

Sup-E-10-02

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ADA COUNTY HIGHWAY DISTRICT,

Petitioner/Appellant,

v.

IDAHO PUBLIC UTILITIES COMMISSION,

Respondent on Appeal,

and

IDAHO POWER COMPANY,

Respondent/Respondent on Appeal.

SUPREME COURT
DOCKET NO. 37294-2010

BRIEF OF RESPONDENT
IDAHO PUBLIC UTILITIES
COMMISSION

APPEAL FROM THE IDAHO PUBLIC UTILITIES COMMISSION
Commissioner Marsha H. Smith, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case was initiated when Idaho Power Company filed an application with the Idaho Public Utilities Commission (“Commission” or “IPUC”) requesting approval of changes to the Company’s line extension tariff. This appeal involves Sections 10 and 11 of the tariff.¹ Other provisions of the line extension tariff address the circumstance of providing electric service where it has not previously been available. Sections 10 and 11 address the relocation of Idaho Power facilities that have already been placed in public roadways. Idaho Power proposed the tariff provisions at issue in this appeal to ensure that its rates include the appropriate costs of relocating facilities in public roadways. This is the core of the Commission’s concern also, that Idaho Power’s customers pay an appropriate share of these relocation costs, but nothing more.

Idaho Power has a statutory obligation to relocate its facilities in public rights-of-way at the request of the pertinent road agency. Both the Commission and the Company know this and respect the authority of the road agency to manage the roads under its jurisdiction.

Section 10 was drafted using Ada County Highway District’s (“ACHD”) Resolution 330 as a template. Resolution 330 divides road improvements into two types: those that are paid for entirely by ACHD and those where ACHD determines that some other individual, firm or entity should pay all or a portion of the costs of road improvement. Under either scenario, Idaho Power relocates its utility facilities at the direction of and in the timeframe requested by the road

¹ For the convenience of the Court, Sections 10 and 11 of Idaho Power’s line extension tariff are set out in Appendix A to this Brief. Sections 10 and 11 are located in the Record at Volume IV, pages 676-679.

agency. It is the recovery of the costs that Idaho Power incurs for those relocations that is the subject of Section 10 and is at issue here.

Section 10 specifies that if the road agency pays for all of the costs of the road improvement, Idaho Power pays all of its costs to relocate its facilities and those costs will, through the Commission's ratesetting process, be recovered in the rates charged to all its customers.

If the road agency has determined that some other individual, firm or entity should pay all or a portion of the costs of the road improvement, then Section 10 provides for payment by that third party of the same portion of the cost of electric facilities relocation. The fairness of this cost allocation for Idaho Power's customers is obvious. If the road agency has determined that the public should not bear some or all of the costs of a road improvement and some other beneficiary has cost responsibility, then it is not fair that the general body of ratepayers shoulder all the costs of relocating electric facilities for the same project.

ACHD does not lose any jurisdiction or decision-making authority because of Idaho Power's tariff. In fact, Section 10 does not even apply to ACHD by its own terms.

B. The Course of Proceedings

Idaho Power filed its application with the IPUC on October 30, 2008. On November 26, 2008, the Commission issued a Notice of Application and Intervention Deadline. Four parties subsequently requested and were granted intervention as parties. Pursuant to IPUC Order No. 30687, the parties met on January 14, 2009 to discuss the processing of the case, and agreed that Modified Procedure was appropriate. The Commission may use Modified Procedure when it

preliminarily finds that the public interest may not require a hearing and that the case may be processed by written submissions (comments) rather than by hearing. IDAPA 31.01.01.201.

Following the submission of written comments, the Commission on July 1, 2009, issued Order No. 30853 approving some of the changes Idaho Power requested to its line extension tariff. Four petitions for reconsideration of the Commission's Order were subsequently filed pursuant to *Idaho Code* § 61-626. The IPUC in Order No. 30883 issued August 19, 2009, granted in part and denied in part the petitions for reconsideration, and scheduled an evidentiary hearing and a hearing for oral argument to further consider the issues presented on reconsideration.

On November 30, 2009, the IPUC issued its final order on reconsideration further clarifying and amending Idaho Power's line extension tariff, but also denying some of the changes requested by ACHD. Order No. 30955; R. Vol. IV, pp. 648-678. ACHD filed an appeal to the Supreme Court from the Commission's final Order No. 30955.

C. Concise Statement of the Facts

Idaho Power has had a line extension tariff in place for many years and it was last changed in 1995. As with many utility company tariffs on file with the IPUC, Idaho Power's tariff primarily serves two purposes. First, it provides notice to customers of the utility what terms will apply to their requests for service. The second purpose is to remove uncertainty for Idaho Power regarding recovery of costs. If Idaho Power pays a share of line extension costs pursuant to the terms of the tariff, the Company can reasonably expect those costs to be included in customer rates when it files its next rate case.

In the IPUC proceeding, ACHD objected to Idaho Power's new Section 10 that addresses the allocation of costs to relocate electric facilities already placed in a roadway. Paragraph (a) of Section 10 states that Idaho Power will pay all relocation costs when the relocation request comes from a road agency making improvements to the road. Appendix A, p. 2; R. Vol. IV, p. 677. The Company can reasonably expect the IPUC will allow Idaho Power to recover these costs in rates paid by its customers.

Paragraph (b) of Section 10 addresses the allocation of costs when the relocation benefits both a road agency and a private developer. In those cases, the road agency and developer typically agree on a sharing of costs to improve the road. Paragraph (b) states that Idaho Power will pay the same percentage of costs to move its facilities as the road agency will pay on the project. Likewise, the developer will pay the same percentage of the costs to move Idaho Power's facilities as the developer has agreed to pay the road agency for the road improvements. Appendix A, p. 2; R. Vol. IV, p. 677. For example, if the developer is going to pay 50% of the costs to improve the road, paragraph (b) of Section 10 provides that the developer will also pay 50% of the costs to move Idaho Power's facilities, and the Company will pay 50%. Idaho Power can be reasonably assured that the amount it pays will be included by the Commission in rates paid by its customers.

Paragraph (c) of Section 10 states that when the request to relocate electric facilities is solely for the benefit of a private developer, the private developer will pay all the costs to move the facilities. Appendix A, p. 2; R. Vol. IV, p. 677. In that case, none of the costs will be included in Idaho Power's customer rates.

Finally, paragraph (d) states that if Idaho Power and a road agency have an agreement in place that creates 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." Appendix A, p. 3; R. Vol. IV, p. 678. Idaho Power probably will not pay relocation costs under paragraph (d), but if it does, it can request that those costs be included in customer rates.

ACHD challenged these cost allocation terms of Section 10 as "an improper usurpation of the aforementioned agencies' authority and beyond the jurisdiction of this Commission." Order No. 30853, p. 12; R. Vol. II, p. 324. The IPUC noted that "Idaho Power proposed Section 10 of its Rule H tariff to address the situation that arises when highway improvements and the concurrent requirement to relocate utility facilities is caused by development adjacent to streets and highways." Order No. 30853, p. 13; R. Vol. II, p. 325. The IPUC disagreed with ACHD's allegations and concluded that "the Idaho Constitution and existing case law are not violated because Section 10 in no way grants Idaho Power or this Commission authority to impose such costs on a public road agency." *Id.* Instead, said the Commission, "Section 10 addresses whether Idaho Power customers or a third party should pay for the relocation of utility facilities." *Id.* The IPUC found "that the Section 10 provisions will properly allocate the utility costs of relocation so that Idaho Power customers pay only the appropriate amount of the cost." *Id.* The Commission concluded that Section 10 appropriately established costs that would be passed to Idaho Power's customers.

ACHD filed a Petition for Reconsideration of Order No. 30853, asserting that "Section 10, Rule H is beyond the jurisdictional authority of the IPUC because it seeks to affirmatively

regulate the state's public road agencies, entities of government, third parties, and developers and impose upon them the duty to pay for mandatory utility relocations in an unreasonable, one size fits all approach." ACHD Petition for Reconsideration, p. 7; R. Vol. II, p. 347. ACHD argued it had "exercised its exclusive jurisdiction over utility relocations (including financial liability for utility relocations) with the adoption of ACHD Resolution 330 in September 1986," and claimed that Section 10 "usurps ACHD resolution 330 and ACHD's exclusive jurisdiction." ACHD Petition for Reconsideration, p. 10; R. Vol. II, p. 350. ACHD recognized that provisions of the Idaho Public Utilities Laws "authorize the IPUC to determine whether utility costs associated with mandatory relocations may be included in a utility's rate base;" ACHD argued those laws do not "provide the IPUC with the jurisdiction or authority to affirmatively intervene in the exclusive jurisdiction of the state's highway districts and thereby impose upon public road agencies, entities of government, third parties, and developers the duty to pay for such relocations." ACHD Petition for Reconsideration, p. 8; R. Vol. II, p. 348. ACHD described the Commission's approval of Idaho Power's line extension tariff as "aggressive" and "unprecedented." ACHD Petition for Reconsideration, p. 9; R. Vol. II, p. 349. The Commission granted ACHD reconsideration and convened a hearing for oral argument.

The IPUC issued final Order No. 30955 after considering the arguments raised by ACHD and other petitioners. The Commission noted that there was no disagreement between ACHD and Idaho Power regarding underlying legal standards. For example, ACHD and Idaho Power agree that "road agencies have exclusive jurisdiction to supervise highways and public rights-of-way." Order No. 30955, p. 9; R. Vol. IV, p. 656. The Commission cited case law affirming that

“highway agencies have exclusive jurisdiction over all highways including the power to construct, maintain, and repair public highways as well as to establish design standards and use standards.” *Id.*, citing *Worley Highway District v. Kootenai County*, 104 Idaho 833, 835, 663 P.2d 1135, 1137 (Ct.App. 1983). Finally, the IPUC explicitly affirmed “that highway agencies have the authority to determine when Idaho Power must relocate its distribution facilities and whether any other party is responsible for paying for the road improvement costs.” Order No. 30955, p. 10; R. Vol. IV, p. 657.

The Commission in Order No. 30955 approved Section 10 in Idaho Power’s line extension tariff, and described its ratemaking purpose: “[O]nce the highway agency determines that a private party (e.g., a developer) must shoulder all or a portion of the road improvement costs, then it is the Commission that establishes the costs for utility relocation pursuant to *Idaho Code* §§ 61-502, 503, and 507.” Order No. 30955, p. 10; R. Vol. IV, p. 657. The IPUC acknowledged that its “ability to set relocation costs arises only after the highway agency determines that it or another party is responsible for road improvement costs.” *Id.* (emphasis added). The Commission concluded that if ACHD requires “that a third party pay for the road improvement costs of Idaho Power’s facilities within a public right-of-way or where the road agency requires Idaho Power to move its facility located in its easements, Section 10 and other sections of Rule H fall within the Commission’s ratemaking functions.” Order No. 30955, p. 12; R. Vol. IV, p. 659.

The IPUC required Idaho Power to make several changes to its tariff based upon the oral argument and briefs. In particular, Idaho Power was directed to change Section 10 out of a

concern it could affect the Company's cooperation with road agencies' projects. Idaho Power had included a term to require that it be paid in advance when third parties are paying the Company for relocating its facilities in public rights-of-way. ACHD argued that "requiring all relocations in the public right-of-way to be paid in advance will unduly interfere with the project's timetable." Order No. 30955, p. 19; R. Vol. IV, p. 666. The Commission agreed with ACHD "that requiring advance payments may hinder the timely completion of improvements and relocations within the public rights-of-way." *Id.* The IPUC accordingly required the advance payment term be dropped from Idaho Power's tariff.

The IPUC in Order No. 30955 also approved two other paragraphs to the tariff that are part of ACHD's appeal. The 2009 session of the Idaho Legislature added a new provision to Title 40, Highways and Bridges, of the Idaho Code, effective July 1, 2009. 2009 Sess. Laws, ch. 142 § 1. New Section 40-210 requires roadway agencies, after giving specific notice, to

meet with the utility for the purpose of allowing the utility to review plans, understand the goals, objectives and funding sources for the proposed project, provide and discuss recommendations to the public highway agency that would reasonably eliminate or minimize utility relocation costs, limit the disruption of utility services, eliminate or reduce the need for present or future utility facility relocation, and provide reasonable schedules to enable coordination for the highway project construction and such utility facility relocation as may be necessary.

Idaho Code § 40-210(2) (emphasis added). The section also requires that "all parties 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." *Id.* (emphasis added). Given enactment of *Idaho Code* §

40-210, the Commission directed Idaho Power to add Section 11 to the line extension tariff. Appendix A, p. 3; R. Vol. IV, p. 678. Section 11 states Idaho Power's obligation to meet with road agencies after receiving notice that a public road project may require the relocation of Idaho Power's facilities. By participating in project design and development meetings, Idaho Power will be in a better position to minimize utility relocation costs, and accomplish the objectives of *Idaho Code* § 40-210. The Commission in Order No. 30955 approved that amendment to the tariff. Order No. 30955, p. 13; R. Vol. IV, p. 660.

The other change Idaho Power made to the tariff now challenged by ACHD on appeal is a "Savings Clause" added to Section 10. As an appeasement to ACHD, Idaho Power proposed to add a sentence to make clear that Section 10 does not apply where a road agency has adopted similar "legally binding" guidelines, as ACHD had done with Resolution 330. Appendix A, p. 3; R. Vol. IV, p. 678. The IPUC approved this change to the tariff, finding that "the 'Savings Clause' of Section 10 does not operate to invalidate or void a road agency's legally enacted guidelines for the allocation of utility relocation costs." Order No. 30955, p. 20; R. Vol. IV, p. 667.

ACHD filed its Notice of Appeal from IPUC Order No. 30955 on January 8, 2010. As it did before the Commission, ACHD argues on appeal that "Section 10 of Rule H attempts to usurp the exclusive jurisdiction granted to Public Road Agencies over public rights-of-way." ACHD Brief, p. 19. ACHD claims that by approving Idaho Power's tariff, "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 electricity utility relocations by assigning financial liability for such relocations.” *Id.*

ACHD on appeal also objects to the Savings Clause added to Section 10, now referring to it as a “Preemption Clause.” ACHD Brief, p. 27. ACHD claims the Savings Clause purports to confer concurrent jurisdiction on the IPUC to regulate utility relocations. ACHD Brief, p. 24.

Finally, ACHD on appeal argues that Section 11 added to the tariff is improper because, by approving it, “the IPUC purports to have jurisdiction to enforce the provisions of *Idaho Code* § 40-210,” and that the Commission “is attempting to take upon itself the authority to police whether Public Road Agencies are complying with their statutory duty to minimize relocation costs.” ACHD Brief, p. 28.

II. ISSUES PRESENTED ON APPEAL

The IPUC contends the issues presented on appeal listed by ACHD in its brief are insufficient or incomplete, and so will state the issues on appeal consistent with Idaho Appellate Rule 35, as follows:

1. Does the IPUC’s approval of Sections 10 and 11 of Idaho Power’s line extension tariff impermissibly intrude in ACHD’s jurisdiction over public rights-of-way?
2. Should ACHD’s appeal be dismissed because there currently is no case or controversy over Idaho Power’s Line Extension Tariff that exists for resolution by the Supreme Court?

III. ARGUMENT

A. The Commission Regularly Pursued its Authority in Approving Idaho Power's Tariff

The Supreme Court's review of Commission orders "shall not be extended further than to determine whether the commission has regularly pursued its authority." *Idaho Code* § 61-629. The Court's review often includes deference to IPUC findings and conclusions. The Court will sustain factual determinations made by the Commission "unless it appears that the clear weight of the evidence is against its conclusion or that the evidence is strong and persuasive that the Commission abused its discretion." *Utah-Idaho Sugar Company v. Intermountain Gas Co.*, 100 Idaho 368, 376, 597 P.2d 1058 (1979). The Court will sustain Commission rulings on the meaning of technical terms in a rate tariff "where the decision is based upon a reasonable interpretation of the instrument." *Id.* The Court in the *Utah-Idaho Sugar* case affirmed that part of the Commission's order that denied the sugar company a credit toward gas consumption because it was based on "a reasonable reading of the tariff." *Id.*

The IPUC approved Idaho Power's line extension tariff because the purpose and effect of the tariff falls within the Commission's ratemaking authority, and does not interfere in any way with ACHD's jurisdiction over road projects. The IPUC specifically acknowledged that its role regarding Idaho Power's relocation costs "arises only after the highway agency determines that it or another party is responsible for road improvement costs." Thus, Section 10 assists the Commission with its *ratemaking* responsibilities. Order No. 30955, pp. 10, 12; R. Vol. IV, pp. 657, 659.

ACHD's claims about the effect of Sections 10 and 11 ascribe much greater purpose and effect to the tariff than is normally granted a utility tariff approved by the Commission. ACHD's difference of opinion about the effect of the tariff, particularly Section 10, is neatly summarized in a dialogue between Commissioner Smith and ACHD's attorney during the hearing on reconsideration:

COMMISSIONER SMITH: Well, okay, I'm still back on [the Savings Clause of] this section, so all it says is that if you've done something like this, this section [10] doesn't apply. If you've done something that's different, then I guess the issue arises whether this section applies or not.

MR. SPEARS: Madam Chair, yes. It effectively instructs highway districts, such as Ada County Highway District which has adopted a resolution that our resolution must –

COMMISSIONER SMITH: No, no, no, you can't—

MR. SPEARS: For it to be effective, I'm sorry, it must be substantially similar to Rule H, Section 10.

COMMISSIONER SMITH: Well, the way I would see it that you could adopt your resolution 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 [Section 10] 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.

MR. SPEARS: Well, Madam Chair, with all due respect, I think that you have just made and demonstrated our concern regarding jurisdiction.

COMMISSIONER SMITH: But whether Rule H [Section 10] applies or not is for the Commission to determine. You've already made your resolution and done your thing with regard to the roads.

MR. SPEARS: But this provision of Rule H, Section 10 states that if our legally binding guidelines are not similar, then they're invalid.

COMMISSIONER SMITH: No, it does not. The word "invalid" is not here in any sense. It can't operate that way.

MR. SPEARS: Effectively it does.

COMMISSIONER SMITH: The tariff is only applicable to the utility and the people who are taking services under the conditions where the rules apply. It cannot invalidate your resolution.

MR. SPEARS: Madam Chair, I guess that we reach a friendly disagreement on what the effect of this provision is. We view it as a direct encroachment upon our exclusive jurisdiction.

COMMISSIONER SMITH: And I would think that you should view it as an accommodation of your existing practices so that they don't get in the way of what's already in place.

Tr. Vol. I, p. 60, 1.4 - p. 62, 1.2 (emphasis added).

The Commission approved Idaho Power's tariff, understanding it is applicable only to the utility and the customers who are taking services under the conditions where the rules apply, and that there is no way Idaho Power's tariff can invalidate an ACHD resolution. There is no dispute in this case that ACHD has exclusive jurisdiction over roadway improvements, that ACHD can require Idaho Power to relocate its facilities in public rights-of-way in its district, and that ACHD determines whether Idaho Power or some other party will bear the costs to relocate. Nor is there any dispute that the IPUC has authority to determine the extent to which relocation costs will be included in Idaho Power's rate base to be recovered in customer rates. The Commission regularly pursued that authority by approving Idaho Power's line extension tariff. The Commission's Order is entitled to a presumption of correctness and ACHD has the burden of

demonstrating the Commission's Order is arbitrary. *Industrial Customers of Idaho Power v. Idaho PUC*, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000).

B. Idaho Power's Tariff by its Terms and in Application Serves a Ratemaking Purpose for the IPUC, and it does not Conflict with ACHD Resolution 330

Section 10 of Idaho Power's line extension tariff assigns or allocates costs the Company incurs when relocating its facilities, thus implicating the Commission's oversight of cost recovery and customer rates for Idaho Power. ACHD's Resolution 330 serves a different purpose altogether. ACHD noted that "Resolution 330 is much broader than just governing who pays for utility relocations." ACHD Brief, p. 5. ACHD commits large portions of its brief to addressing differences in the tariff and its resolution. Because much of ACHD's argument is inaccurate, the IPUC is compelled to address it.

Idaho Power fashioned its cost allocation terms in Section 10 to mirror ACHD's Resolution 330, as ACHD recognizes by several statements in its brief: "the proposed addition of Section 10 to Rule H was largely patterned after Resolution 330," and, "In fact, as the IPUC has acknowledged, the division of relocation costs under Rule H is the same as it is under Resolution 330." ACHD Brief, pp. 6, 22. Even if Idaho Power's tariff and ACHD's Resolution 330 were to both apply on a project, Idaho Power's cost allocation terms do not conflict with the cost allocation terms of ACHD's Resolution 330.

The language of Section 10 supports the Commission's view that it affects cost recovery for Idaho Power, and thus the Commission's ratemaking authority. The heading for the section is "*Relocation Costs* in Public Road Rights-of-Way." (Italics added.) The lead paragraph

plainly states that Idaho Power will relocate its facilities in a roadway “at the request of a Public Road Agency,” followed by specific provisions for recovery of the Company’s *cost of relocations* in different scenarios. Appendix A, p. 2; R. Vol. IV, p. 677. First, where the relocation is requested by a public road agency to make roadway improvements or other public improvements, Idaho Power will bear the cost of the relocation. *Id.* This, incidentally, is the common law rule ACHD argues is violated by Section 10. (“Under the common law rule, Idaho Power must pay the costs to relocate its facilities at the demand of the Public Road Agencies.”) ACHD Brief, p. 30. This tariff provision mirrors ACHD’s resolution.

The next paragraph of Section 10 addresses the allocation of costs to relocate Idaho Power’s facilities when the relocation benefits both a road agency and a private developer. Appendix A, p. 2; R. Vol. IV, p. 677. Paragraph (b) mirrors a provision in Resolution 330: “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.’” ACHD Brief, p. 5.

Paragraph (c) of Section 10 states that when the request to relocate electric facilities is solely for the benefit of a private developer, the private developer will pay all the costs to move the facilities. Appendix A, p. 2; R. Vol. IV, p. 677; Order No. 30955, p. 11; R. Vol. IV, p. 658.

This provision also mirrors what is in Resolution 330: "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.'" ACHD Brief, p. 4.

There is only one difference between the cost allocation terms of Section 10 and Resolution 330, identified by ACHD as follows: although "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," 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.'" ACHD Brief, pp. 6-7. In that event, Section 1 of the resolution controls and ACHD will look to the utility company to pay the costs.

This only difference between the tariff and Resolution 330 cannot affect ACHD's road projects. Idaho Power understands that its tariff cannot overrule ACHD's resolution. Idaho Power testified in its comments that, where ACHD "plans on making improvements for the general public benefit within three years from the day the improvements begin, or from their budgeted period, Idaho Power will fund the cost of such relocation," as Resolution 330 requires. Idaho Power Lowry Direct Testimony, p. 4; R. Vol. I, p. 82. Under Idaho Power's tariff provision the Company should seek reimbursement from the developer so that these costs are not recovered in customer rates, but this has no impact on ACHD's control of the road improvement. Whether Idaho Power obtains reimbursement could become an issue in the Company's next rate

case if it seeks to include those costs for recovery in rates. If Idaho Power has an opportunity but fails to collect from the developer, the Commission might determine the relocation costs should not be included in rates, absent sound justification by the Company for failing to obtain reimbursement. This ratemaking process and outcome can have no effect on ACHD's jurisdiction over roadway improvements.

At page 20 of its brief, ACHD provides examples of how Idaho Power's tariff and Resolution 330 conflict. None of the possible conflicts identified by ACHD are based on a reasonable reading of Idaho Power's tariff or the Commission's Order No. 30955. ACHD begins by stating: "It is easy to see how operating under two sets of regulations will reduce efficiency and otherwise complicate relocation on public rights-of-way." ACHD Brief, p. 20. ACHD's first example is: "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." *Id.* Allocation of Idaho Power's costs under its tariff is not applicable to other utilities, does not affect scheduling or preparation of engineering plans, and can have no effect on ACHD's scheduling of road projects.

ACHD's second example is: "Resolution 330 requires utility and/or sewer companies to 'coordinate their activities in an attempt to eliminate duplication of roadway restoration work.'" *Id.* Nothing in Idaho Power's tariff attempts to direct coordinating or other activities by other utility companies, and cannot conflict with Resolution 330's direction that utility and sewer companies coordinate their activities. Appendix A, pp. 2-3; R. Vol. IV, pp. 677-678.

ACHD's final example of how Section 10 of the tariff and Resolution 330 could conflict is: "In the event of disputes, ACHD is the ultimate decision-maker and can resolve disputes involving each affected utility company." ACHD Brief, p. 20. ACHD posits that "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." *Id.* This example is based on a false assertion made earlier in ACHD's brief. At page 7 of its brief, ACHD states that "Section 10 of Rule H would vest IPUC with authority over the resolution of any disputes related to utility relocation." There is no provision in Section 10 or elsewhere in Idaho Power's tariff that provides for dispute resolution by the IPUC. Appendix A, pp. 2-3; R. Vol. IV, pp. 677-678. This possible conflict between Idaho Power's tariff and Resolution 330 is fabricated, and will be addressed later in this brief.

1. Section 10 Embodies and thus is Consistent with the Common Law Rule

In the final section of its argument on appeal, ACHD states that "Under the common law rule, Idaho Power must pay the costs to relocate its facilities at the demand of the Public Road Agency," and "Idaho Power cannot circumvent the common law rule through its Rule H Tariff." ACHD Brief, p. 30. Neither the IPUC nor Idaho Power contest these statements, as the common law principle is embodied in paragraph (a), Section 10 of the line extension tariff. Indeed, the Commission's Order is in agreement with the common law rule. Order No. 30955, pp. 9-13; R. Vol. IV, pp. 656-660.

ACHD does not explain how Section 10, which states the common law principle as the primary cost allocation scenario, nonetheless violates the principle and must be set aside.

Perhaps ACHD has in mind the possibility discussed above, where Idaho Power may seek reimbursement for relocation costs from a developer after ACHD has assigned a portion of the road improvement costs to the developer. The common law rule is not abrogated by Idaho Power's recovery of costs from a developer, or by the IPUC's approval of the Company's tariff to allow for reimbursement of costs paid by Idaho Power so that these costs are not passed on to the Company's customers.

2. Neither the "Savings Clause" of Section 10 nor the New Section 11 Interferes with ACHD's Jurisdiction over Road Improvements

a. Savings Clause. ACHD asserts that the "Savings Clause" Idaho Power added to Section 10 during reconsideration of IPUC Order No. 30853 is "the most clear usurpation of the Public Road Agencies' exclusive jurisdiction over public rights-of-way." ACHD Brief, p. 23. The Savings Clause states that the Section 10 cost allocation terms "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 relocation costs between the utility and Third-Party Beneficiaries that are substantially similar to the rules set out in Section 10 of Rule H." Appendix A, p. 3; R. Vol. IV, p. 677. ACHD recognizes that Section 10 was patterned after its Resolution 330, and that the cost allocation provisions of both are the same. ACHD nonetheless argues at this point in its brief that there are differences and the effect of the Savings Clause could render its Resolution 330 "null and void." ACHD Brief, p. 25. The IPUC approved the addition of the Savings Clause after concluding it "does not operate to invalidate or

void a road agency's legally enacted guidelines for the allocation of utility relocation costs." Order No. 30955, p. 20; R. Vol. IV, p. 667.

It cannot be seriously argued that Section 10 and Resolution 330 are not substantially similar, notwithstanding ACHD's effort to distinguish them for the purposes of its argument. ACHD notes that Section 10 "lacks many of the detailed provisions contained in Resolution 330 regarding notice, coordination meetings, and deadlines for submitting engineering plans and cooperation requirements." ACHD Brief, p. 24. This statement clearly shows how ACHD misunderstands the purpose of the line extension tariff. The tariff does not contain these provisions because its purpose is not to regulate utility relocations in roadways, its purpose is to allocate the costs Idaho Power incurs to relocate its facilities, with a concomitant effect on the Company's customer rates.

The effect of the Savings Clause is to eliminate any possible conflict between Idaho Power's tariff and ACHD's Resolution 330. Because Section 10 and Resolution 330 are substantially similar in their cost allocation provisions, that ends any dispute between ACHD and Idaho Power or the IPUC. As the Commission explained in its Order, 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. Order No. 30955, p. 20; R. Vol. IV, p. 667.

ACHD misstates the impact of the Savings Clause were it to come into play: "Public Road Agencies are wholly deprived of jurisdiction if the regulations they pass are superseded unless they are the same as Rule H." ACHD Brief, p. 24. This statement is based on a false

premise. The Savings Clause states whether Idaho Power's Section 10 is in effect or not, it has no impact on ACHD's jurisdiction. The Clause affects the allocation of relocation costs for recovery by Idaho Power, and neither by its terms or application could it deprive ACHD of jurisdiction.

If Section 10 were effective where a road agency either had no cost allocation rules or had cost allocation rules substantially different from Section 10, the result would be the same. The Commission would expect Idaho Power to account for its costs on a project as Section 10 directs. If the Company did not obtain reimbursement, for example, under circumstances where Section 10 would provide for it, the burden would fall on Idaho Power to explain why those costs should nonetheless be included in customer rates. The Savings Clause could affect Idaho Power's recovery of relocation costs through customer rates, but it cannot "wholly deprive" or even minimally impact ACHD's jurisdiction over its road projects. Nothing in the Savings Clause or Section 10 suggests the IPUC can attempt to question a road agency's cost allocation rules, whether similar to Section 10 or not.

b. Section 11. ACHD's arguments about Section 11 also are groundless. After oral argument on reconsideration, the Commission added Section 11 to the line extension tariff. It reaffirms the Company's statutory obligation to work with road agencies and others to minimize utility relocation costs as directed by *Idaho Code* § 40-210. Section 11 simply states that "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.” Appendix A, p. 3; R. Vol. IV p. 678.

ACHD characterizes Section 11 as an attempt by the IPUC “to take upon itself the authority to police whether Public Road Agencies are complying with their statutory duty to minimize relocation costs.” ACHD Brief, p. 28. ACHD claims 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.’” ACHD Brief, p. 10.

ACHD’s claims about the meaning and purpose of Section 11 are incorrect. This is a statement of commitment by Idaho Power to follow its statutory duty to attend planning meetings and has no effect on ACHD. Section 11 parallels the language of *Idaho Code* § 40-210. It cannot reasonably be construed as an attempt by the IPUC “to take upon itself the authority to police whether Public Road Agencies are complying with their statutory duty to minimize relocation costs.” ACHD Brief, p. 28. Lest there be any question otherwise, the final sentence clarifies that “This provision shall not limit the authority of the Public Road Agency over the public road right-of-way.” Appendix A, p. 3; R. Vol. IV, p. 678.

ACHD’s argument that “the IPUC has no jurisdiction to enforce *Idaho Code* § 40-210 or otherwise regulate the actions of Public Road Agencies” misconstrues the language of Section 11. ACHD Brief, p. 29. Section 11 merely requires Idaho Power to participate in project design and development meetings after receiving notice of such meetings from the road agency.

Whether Section 11 existed or not, the IPUC might inquire into Idaho Power's compliance with *Idaho Code* § 40-210, especially if any non-compliance might impact its costs and thus customer rates. See *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 881, 591 P.2d 122 (1979) (The IPUC is authorized to investigate a public utility's "practices" which may or do affect the rates charged or the services sought or rendered which are within the Commission's ratemaking functions). ACHD's speculation about hypothetical circumstances where the Commission might inquire into public road agencies' compliance with *Idaho Code* § 40-210 is completely baseless. The Legislature may care if ACHD is complying with the letter and spirit of *Idaho Code* § 40-210; the Commission's concern is whether utilities are.

C. ACHD's Appeal Should be Dismissed Because there is no Actual Case or Controversy Between ACHD and the IPUC

ACHD argued to the Commission that Idaho Power's amendments to its line extension tariff "are unauthorized usurpations of the clear and exclusive jurisdiction of Idaho's highway districts and public road agencies by the IPUC." ACHD Brief on Reconsideration, p. 22; R. Vol. III, p. 480. ACHD asserted that the tariff, to the extent it is applicable "to the state or any entity of local government, including but not limited to public road agencies and local improvement districts, it is a violation of the Idaho Constitution." *Id.* Finally ACHD claimed the tariff is "an unconstitutional and legally unauthorized abrogation or amendment of the common law rule that utilities pay the cost of relocation of their facilities within the public rights-of-way." *Id.* ACHD requested the IPUC issue an order "striking Rule H Section 10 and applicable portions of Rule H Section 1." *Id.*

ACHD's allegations and request for relief were made in a case where Idaho Power was seeking approval of its tariff amendments. ACHD requested broad declaratory relief on behalf of all road agencies and any state or local entity that might be involved in road projects, even before the tariff went into effect. ACHD now requests the same relief from the Supreme Court. The relief ACHD requests in essence is in the nature of a declaratory judgment.

The Supreme Court has held that "as a general rule, a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988 (1984) (citations omitted). The Court in that case adopted the following guideline for analyzing the "controversy" issue from the United States Supreme Court:

A 'controversy' in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be 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.

Harris v. Cassia County, 106 Idaho 513, 516, 681 P.2d 988, 991, quoting *Aetna Life insurance Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). See also *Miles v. Idaho Power Co.*, 116 Idaho 635, 642, 778 P.2d 757, 764 (1989) (A declaratory judgment action must raise issues that are definite and concrete, and must involve a real and substantial controversy as opposed to an advisory opinion based upon hypothetical facts).

Because Section 10 and Resolution 330 are substantially similar, Section 10 by its terms is not in effect for ACHD's projects. Idaho Power's line extension tariff does not apply to

ACHD and there can be no conflict between the tariff and ACHD's Resolution 330. ACHD's speculation about what might happen if it were to change its Resolution 330 is simply presenting hypothetical and abstract possibilities. ACHD Brief, p. 25.

Even if Idaho Power's tariff were to apply when ACHD directs road improvement projects in Idaho Power's service area, its application would have no effect on the way ACHD conducts its business. ACHD would continue to assign relocation costs to Idaho Power under Resolution 330; the IPUC would continue to assign Idaho Power's costs for ratemaking purposes consistent with the Company's line extension tariff. Instead of presenting a real and substantial controversy admitting of specific relief, ACHD seeks an opinion advising what the law would be given a hypothetical state of facts. ACHD's allegations regarding the effect of the tariff is opinion unsupported by fact or legal analysis. ACHD presents little more than "a friendly disagreement on what the effect of [Section 10] is." Tr. Vol. I, p. 61, ll. 20-22.

There is evidence ACHD is less than candid and stretches to find a conflict between Section 10 and its own Resolution 330, and to support groundless allegations that the IPUC "has attempted to usurp the Public Road Agencies' exclusive jurisdiction over public rights-of-way." ACHD Brief, p. 31. A prime example is ACHD's reference to a non-existent dispute resolution provision in Idaho Power's tariff. ACHD states at page 7 of its brief that "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." Following this sentence, ACHD provides the citation "See R. Vol. III, p. 535." ACHD Brief, p. 7. The document at page 535, volume III of the Record is a relocation flow-chart that

Idaho Power attached to reply comments it filed during the initial comment period. Nothing in the attachment identifies a provision in Section 10 that vests the IPUC with authority to resolve disputes related to utility relocation. There is no dispute resolution term in any part of the line extension tariff, and no discussion by the IPUC of a dispute resolution provision in either Order No. 30853 or Order No. 30955.

After making the unequivocal assertion that Section 10 vests the IPUC with authority to resolve disputes, ACHD throughout its brief mentions problems that may arise from the non-existent dispute resolution provision. At page 20, ACHD reiterates that “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.” ACHD Brief, p. 20.

ACHD identifies a potential problem from this alleged conflict:

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.

ACHD Brief, p. 20.

ACHD later asserts, without reservation or citation to the record, that “Rule H purports to give IPUC jurisdiction of disputes, while Resolution 330 leaves dispute resolution in the jurisdiction of ACHD.” ACHD Brief, pp. 24-25. Finally, ACHD highlights a potential problem of the phantom dispute resolution provision at page 28: “Under this [Section 11] 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.” ACHD Brief, p. 28 (*italics added*). ACHD’s discussion of a non-existent dispute resolution term in Idaho Power’s tariff goes beyond an advocate’s hyperbole.

Another example that ACHD is less than forthright is its mischaracterizations of Commission decisions or motives. At page 9 of its brief, ACHD notes the IPUC removed the provision of Section 10 requiring that Idaho Power’s relocation costs be paid in advance when a private developer is paying costs. ACHD states: “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.” ACHD Brief, p. 9. In striking the advance payment term, the Commission specifically agreed with ACHD’s argument that “requiring advance payments may hinder the timely completion of improvements and relocations within the public rights-of-way.” Order No. 30955, p. 19; R. Vol. IV, p. 666. Whether this is sufficient acknowledgement that “Public Road Agencies can demand relocation on terms-determined by the Public Road Agencies,” it is clear the IPUC removed the one provision in Section 10 it believed might result in Idaho Power hindering ACHD’s control of road projects.

Additional examples of ACHD’s unfair argument are its inaccurate statements about the Commission’s Orders and the effect of Idaho Power’s tariff. ACHD asserts that “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.” ACHD Brief, p. 1. At another point, ACHD claims that “the IPUC erroneously concluded that it has authority to regulate utility relocation under *Idaho Code* §§ 61-502 and 61-503.” ACHD Brief, p. 21. At page 25 of its brief, ACHD states “The IPUC’s conclusion that Rule H [Savings Clause] preempts any regulations adopted by Public Road Agencies that are not “substantially similar” is backwards.” ACHD Brief, p. 25. These statements are inaccurate and misleading.

The Commission approved Idaho Power’s tariff because it determined it “in no way usurps the authority of ACHD or any other highway district or political subdivision.” Order No. 30955, p. 11; R. Vol. IV, p. 658. It is simply false to say the IPUC concluded “that it has authority to regulate utility relocation under *Idaho Code* §§ 61-502 and 61-503.” The IPUC specifically affirmed “that highway agencies have the authority to determine when Idaho Power must relocate its distribution facilities and whether any other party is responsible for paying for the road improvement costs.” Order No. 30955, p. 10; R. Vol. IV, p. 657. The Commission approved the Savings Clause because it “does *not* operate to invalidate or void a road agency’s legally enacted guidelines for the allocation of utility relocation costs.” Order No. 30955, p. 20 (*italics added*); R. Vol. IV, p. 667.

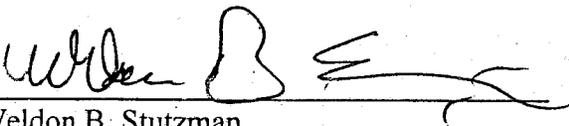
IV. CONCLUSION

The only point of contention in this case is the effect of Idaho Power’s line extension tariff, Sections 10 and 11. Because Section 10 by its terms does not apply to ACHD’s road projects, ACHD raises its argument in a hypothetical debate. The specific language of the tariff limits it to allocation of Idaho Power’s relocation costs, and the Commission clearly stated its

understanding that the tariff affects only the IPUC's ratemaking function and cannot invalidate ACHD's road improvement resolution. Idaho Power proposed the tariff provisions to ensure that its customer rates include the appropriate costs of relocating facilities in public roadways. ACHD nonetheless insists the tariff usurps its authority over regulation of road improvements and that it is an attempt by the IPUC to regulate public rights-of-way. However, it cannot provide specifics on how Idaho Power's tariff will interfere in ACHD's road projects because it does not. ACHD may harbor its own view of the reach of Idaho Power's tariff, but it must be supported by something besides broad allegations based on a complete misunderstanding of the ratesetting process to constitute a proper appeal.

The Commission requests that ACHD's appeal be dismissed and that the Commission be awarded costs on appeal.

DATED at Boise, Idaho this 16th day of July 2010.


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O:ACHD Brief_ws

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 16TH DAY OF JULY 2010, SERVED THE FOREGOING **RESPONDENT BRIEF OF THE IDAHO PUBLIC UTILITIES COMMISSION**, IN SUPREME COURT DOCKET NO. 37294-2010, BY MAILING TWO COPIES THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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SECRETARY

APPENDIX A
SECTIONS 10 AND 11

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.