3-29-2010

Ada Highway Dist. V. Public Utilities Com'n Clerk's Record v. 3 Dckt. 37294

Vol 3 of 6

IN THE SUPREME COURT OF THE STATE OF IDAHO

THE BUILDING CONTRACTORS ASSOCIATION OF SOUTHWESTERN IDAHO, Appellant,	)	DOCKET NO. 37293-2010
v.	)	
IDAHO PUBLIC UTILITIES COMMISSION and IDAHO POWER COMPANY, Respondents	)	
ADA COUNTY HIGHWAY DISTRICT, Appellant,	)	DOCKET NO. 37294-2010
v.	)	
IDAHO PUBLIC UTILITIES COMMISSION and IDAHO POWER COMPANY, Respondents	)	CONSOLIDATED AGENCY RECORD ON APPEAL

LAW CLERK

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

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Office of the Secretary
Service Date
August 19, 2009

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	CASE NO. IPC-E-08-22 NOTICE OF RECONSIDERATION SCHEDULE INTERLOCUTORY ORDER NO. 30883

On July 1, 2009, the Commission issued Order No. 30853 approving Idaho Power Company's request to modify its Rule H tariff addressing charges for installing new or altering existing distribution lines. The Ada County Highway District, City of Nampa, Association of Canyon County Highway Districts, and Building Contractors Association of Southwestern Idaho all filed timely Petitions for Reconsideration. On July 29, 2009, Idaho Power filed an Answer to the Petitions. After reviewing the Petitions and our final Order, the Commission grants in part and denies in part the Petitions for Reconsideration as set out in greater detail below.

BACKGROUND

Reconsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). The Commission may grant reconsideration by rehearing if it intends to take additional argument. If reconsideration is granted, the Commission must complete its reconsideration within 13 weeks after the deadline for filing petitions for reconsideration. *Idaho Code* § 61-626(2). The Commission must issue its order upon reconsideration within 28 days after the matter is finally submitted. *Id.*, IDAPA 31.01.01.331-.332.

THE DISTRICTS' PETITIONS

Ada County Highway District (ACHD), City of Nampa (Nampa), and the Association of Canyon County Highway Districts (ACCHD) (collectively "the Districts"), allege that the Commission's approval of Section 10 in Rule H exceeds the Commission's authority granted by statute. Section 10 of Rule H generally pertains to the relocation of utility facilities located in public rights-of-way and the allocation of relocation costs. ACHD further maintains

that Section 10 is unconstitutional because it violates Article 8, § 2 and Article 7, § 17 of the Idaho Constitution. ACHD Petition at 11. ACHD also requests that the Commission clarify its Order and revise Section 10 of the proposed tariff. *Id.* at 15. Nampa and ACCHD also insist that the Commission's Order fails to clarify the definitions of "third-party beneficiary" and "local improvement district." Petitions at 2.

The Districts' arguments are similar and specifically focused on Section 10 of Idaho Power's proposed Rule H tariff. Therefore, their Petitions will be addressed together.

First, the Districts maintain that the highway districts possess exclusive jurisdiction over the public rights-of-way under their authority. Thus, they argue that Section 10 of 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 at 7.

Second, the Districts maintain that Section 10 is unconstitutional and an illegal attempt to abrogate or amend the common law rule that utilities placing their facilities along streets and highways (in public rights-of-way) gain no property right and must move their facilities at their own expense upon demand. Finally, the Districts seek clarification as to the definitions for "third-party beneficiaries" and "local improvement districts" ("LID") in Section 10. They generally allege that the definitions of these terms are too vague. ACCHD Petition at 2.

In its Answer to the petitions, Idaho Power acknowledges that the definition of "LID" should be further clarified. Answer at 17. The Company also conceded that the filing of written briefs is a proper means of addressing legal issues. *Id.* at 19.

Commission Decision: The Commission acknowledged the limits of its authority in Order No. 30853 by stating that "Section 10 in no way grants Idaho Power or this Commission authority to impose [relocation] costs on a public road agency." Order No. 30853 at 13. We further clarified that "[j]ust as the Commission cannot compel the highway agency to pay for the relocation of utility facilities in the public right-of-way made at the agency's request, the agency cannot restrict the Commission from establishing reasonable charges for utility services and practices." *Id.* However, given the complexity of the constitutional and jurisdictional arguments posed by the Districts on reconsideration and the Company's acknowledgement that the term

LID should be clarified, the Commission finds it appropriate to grant their petitions regarding the disputed language contained in Section 10. In order to adequately address the issues raised on reconsideration, the Commission first directs that Idaho Power update the language of Section 10, including a clarified definition of "third party beneficiary" and "local improvement district." Idaho Power shall file its updated Rule H, Section 10 with the Commission and the parties no later than August 28, 2009.

After Idaho Power clarifies its proposed Section 10 language, the District parties may file additional briefs (if necessary). Pursuant to Rule 332, we adopt the following schedule for reconsideration of Section 10:

Action	Date
Idaho Power file amended Section 10	August 28, 2009
Districts file briefs	September 11, 2009
Idaho Power response brief	September 21, 2009
Oral argument	To be determined

BCA's PETITION

In its Petition, BCA requests reconsideration of the Commission's findings and conclusions regarding: (1) terminal facilities allowances; (2) per-lot refunds; and (3) vested interest refunds. If reconsideration is not granted, BCA requests that the Commission clarify why it is departing from existing policy regarding investment in distribution facilities. Finally, BCA requests a stay of the Commission's Order No. 30853 pending a final decision on its Petition for Reconsideration.

First, BCA alleges in its Petition for Reconsideration that the Commission's Order "approves an inherently discriminatory rate structure for line extensions by imposing unequal charges on customers receiving the same level and conditions of service." BCA Petition at 1. BCA seeks reconsideration "to establish an appropriate value of current Company embedded costs for distribution facilities, a method to true up those costs over time, and a fair method for line extension costs, allowances and refunds to be paid going forward." *Id.* at 10.

BCA also disputes the Commission's elimination of per-lot refunds and the decision to leave the five-year vested-interest refund period undisturbed. BCA argues that the

Commission provides no reasoning for its decision to maintain a 5-year vested-interest refund period as opposed to adopting the 10-year period suggested by BCA. *Id.* at 2.

Commission Decision: The Petition for Reconsideration filed by BCA is granted in part and denied in part. The Commission finds it appropriate to grant reconsideration on the limited issue of the amount of appropriate allowances. As stated in its final Order, "[t]he Commission recognizes that multiple forces put upward pressure on utility rates." Order No. 30853 at 10. Allowances are intended to reflect an appropriate amount of contribution provided by new customers requesting services in an effort to relieve one area of upward pressure on rates. BCA may address what allowance amount is reasonable based on the cost of new distribution facilities.

Pursuant to Rule 332, we adopt the following schedule for the limited reconsideration of how the allowances in Order No. 30853 were calculated and whether the calculation had a reasonable basis:

Action	**Date**
BCA file direct testimony	September 11, 2009
Responsive testimony filed	September 25, 2009
Technical hearing	To be determined

We deny reconsideration of the five-year vested-interest refund period and the per-lot refunds for several reasons. First, our procedural Rule 331 requires that petitions for reconsideration "set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous or not in conformity with the law." IDAPA 31.01.01.331.01. BCA's petition fails to specifically address why the five-year vested-interest refund period or the elimination of the per-lot refund is unreasonable or erroneous.

Second, as we stated in our prior Order, "BCA's request to extend the refund period to ten years is not supported by documentation or cogent argument." Order No. 30853. In that Order we denied Idaho Power's request to shorten the period to 4 years and declined to extend the period to 10 years. Instead, we maintained the current refund period of five years. The Company's current administrative system is based upon five years. Staff also commented that with the current economic conditions "more refunds will be made in the fifth year now that

building activity has slowed." Staff Comments at 12. Without elaboration, Idaho Power also opposed BCA's recommendation to increase the period to 10 years. Response Comments at 10. Given this record we find that BCA did not provide sufficient or persuasive evidence to support its proposal to move to a 10-year lot refund policy. Consequently, we determined that the status quo of five years should be continued and deny BCA's request to change the vested-interest refund period.

Finally, as we explained in our prior Order, increasing the amount of up-front allowance was in part to balance the elimination of the per-lot refunds. Order No. 30853 at 12. Elimination of the per-lot refund has a direct impact on the general body of ratepayers because the Company's rate base will no longer grow by the refunded amounts. BCA does not address why an up-front reduction in developer contribution through an increased allowance is somehow inferior (and therefore unreasonable) to a subsequent refund policy. Moreover, allowing developers a reduced up-front contribution in lieu of a refund reduces the developers' speculative risk that properties will sell.

As set out above, we grant limited reconsideration on the issue of the initial allowance. BCA will have an opportunity to present evidence of whether the allowance amount is sufficient.

Finally, we deny BCA's Petition for a stay. Idaho Power's Rule H changes will not become effective until November 1, 2009. Given the delayed effective date, we find there is sufficient time to conduct reconsideration and issue our Order on reconsideration prior to the approved effective date.

ORDER

IT IS HEREBY ORDERED that the Petitions for Reconsideration of Ada County Highway District, City of Nampa and Association of Canyon County Highway Districts are granted. Reconsideration shall be accomplished as set out above.

IT IS FURTHER ORDERED that Idaho Power submit an updated Rule H, Section 10, consistent with the directives provided in Commission Order No. 30853 no later than August 28, 2009.

IT IS FURTHER ORDERED that the Building Contractors Association's Petition for Reconsideration is granted in part and denied in part. More specifically, reconsideration is

granted on the issue of allowances and denied on the issues of per-lot refunds and vested-interest refunds.

IT IS FURTHER ORDERED that the Building Contractors Association's Petition for Stay is denied.

IT IS FURTHER ORDERED that the parties conform to the schedules set out above. The Commission will issue an Order scheduling the date(s) for the Districts' oral argument and BCA's technical hearing.

THIS IS AN INTERLOCUTORY ORDER. The Commission has not finally decided all of the matters presented in this case because it has granted reconsideration on at least some of the issues.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 19th day of August 2009.

JIM D. KEMPTON, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

MACK A. REDFORD, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

O:IPC-E-08-22_ks5

IDAHO POWER®
An IDACORP Company

LISA D. NORDSTROM
Senior Counsel

August 28, 2009

VIA HAND DELIVERY
Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. IPC-E-08-22
Rule H Compliance Filing Pursuant to Order Nos. 30853 and 30883

Dear Ms. Jewell:

In its Notice of Reconsideration Schedule and Interlocutory Order No. 30883 issued August 10, 2009, the Commission directed Idaho Power to "update the language of Section 10, including a clarified definition of 'third party beneficiary' and 'local improvement district'" as provided in Order No. 30853 no later than August 28, 2009.

To clarify the terminology of Section 10, Idaho Power added or clarified four defined terms in Section 1: Local Improvement District, Public Road Agency, Third-Party Beneficiary, and Underground Conversion Local Improvement District. The Company then removed the language defining Local Improvement District and Third-Party Beneficiary from Section 10 to avoid confusion. Idaho Power also distinguished between Local Improvement Districts generally and Underground Conversion Local Improvement Districts, the latter of which requires the Company to follow the process set forth in Section 9.

The Company has attached its updated Rule H tariff language pertaining to these issues in both clean and legislative formats. If you have any questions about this filing, please contact me at (208) 388-5825.

Very truly yours,

Lisa D. Nordstrom

Lisa D. Nordstrom

LDN:csb
Enclosures

P.O. Box 70 (83707)
1221 W. Idaho St.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August 2009 I served a true and correct copy of IDAHO POWER COMPANY'S REVISION TO SECTION 10 OF RULE H TARIFF SHEET upon the following named parties by the method indicated below, and addressed to the following:

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Deputy Attorney General
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Lisa D. Nordstrom

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS

This rule applies to requests for electric service under Schedules 1, 4, 5, 7, 9, 19, 24, 45, and 46 that require the installation, alteration, relocation, removal, or attachment of Company-owned distribution facilities. New construction beyond the Point of Delivery for Schedule 9 or Schedule 19 is subject to the provisions for facilities charges under those schedules. This rule does not apply to transmission or substation facilities, or to requests for electric service that are of a speculative nature.

1. Definitions

Additional Applicant is a person or entity whose Application requires the Company to provide new or relocated service from an existing section of distribution facilities with a Vested Interest.

Alteration is any change or proposed change to existing distribution facilities. An alteration may include Relocation, Upgrade, Conversion, and/or removal.

Applicant is a person or entity whose Application requires the Company to provide new or relocated service from distribution facilities that are free and clear of any Vested Interest.

Application is a request by an Applicant or Additional Applicant for new electric service from the Company. The Company, at its discretion, may require the Applicant or Additional Applicant to sign a written application.

Company Betterment is that portion of the Work Order Cost of a Line Installation and/or Alteration that provides a benefit to the Company not required by the Applicant or Additional Applicant. Increases in conductor size and work necessitated by the increase in conductor size are considered a Company Betterment if the Connected Load added by the Applicant or Additional Applicant is less than 100 kilowatts. If, however, in the Company's discretion, it is determined that the additional Connected Load added by the Applicant or Additional Applicant, even though less than 100 kilowatts, is (1) located in a remote location, or (2) a part of a development or project which will add a load greater than 100 kilowatts, the Company will not consider the work necessitated by the load increase to be a Company Betterment.

Connected Load is the total nameplate kW rating of the electric loads connected for commercial, industrial, or irrigation service. Connected Load for residences is considered to be 25 kW for residences with electric space heat and 15 kW for all other residences.

Conversion is a request by a customer to replace overhead facilities with underground facilities.

Cost Quote is a written cost estimate provided by the Company that must be signed and paid by the Applicant or Additional Applicant prior to the start of construction. Cost Quotes are derived from Work Order Cost estimates.

RULE H
NEW SERVICE ATTACHMENTS
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(Continued)

1. **Definitions (Continued)**

Subdivision is the division of a lot, tract, or parcel of land into two or more parts for the purpose of transferring ownership or for the construction of improvements thereon that is lawfully recognized, platted and approved by the appropriate governmental authorities.

Temporary Line Installation is a Line Installation for electric service of 18 calendar months or less in duration.

Temporary Service Attachment is a Service Attachment to a customer-provided temporary pole which typically furnishes electric service for construction.

Terminal Facilities include transformer, meter, overhead service conductor, or underground service cable and conduit (where applicable). These facilities are not eligible for Vested Interest Refunds.

Third-Party Beneficiary is any individual, firm or entity that provides funding for road improvements performed by a Public Road Agency as set forth in Section 10. A Third-Party Beneficiary may include, but is not limited to, real estate developers, Local Improvement Districts or adjacent landowners.

Underground Service Attachment Charge is the non-refundable charge assessed an Applicant or Additional Applicant whenever new underground service is required by a customer attaching to the Company's distribution system.

Underground Conversion Local Improvement District is an entity created by an authorized governing body, as provided by Idaho Code §50-2503, whose purpose is to provide for the study, financing and construction of a distribution Line Installation or Alteration as set forth in Section 9. The governing body shall assess property owners to recover the cost of the distribution Line Installation or Alteration. An Underground Conversion Local Improvement District has discernible property boundaries.

Unusual Conditions are construction conditions not normally encountered, but which the Company may encounter during construction which impose additional, project-specific costs. These conditions may include, but are not limited to: frost, landscape replacement, road compaction, pavement replacement, chip-sealing, rock digging/trenching, boring, nonstandard facilities or construction practices, and other than available voltage requirements.

Costs associated with unusual conditions are separately stated and are subject to refund if not encountered. If unusual conditions are not encountered, the Company will issue the appropriate refund within 90 days of completion of the project.

RULE H
NEW SERVICE ATTACHMENTS
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(Continued)

2. General Provisions (Continued)

c. Rights-of-Way and Easements. The Company will construct, own, operate, and maintain lines only along public streets, roads, and highways that the Company has the legal right to occupy, and on public lands and private property across which rights-of-way or easements satisfactory to the Company will be obtained at the Applicant's or Additional Applicant's expense.

d. Removals. The Company reserves the right to remove any distribution facilities that have not been used for 1-year. Facilities shall be removed only after providing 60 days written notice to the last customer of record and the owner of the property served.

e. Property Specifications. Applicants or Additional Applicants must provide the Company with final property specifications as required and approved by the appropriate governmental authorities. These specifications may include but are not limited to: recorded plat maps, utility easements, final construction grades, property pins and proof of ownership.

f. Undeveloped Subdivisions. When electric service is not provided to the individual spaces or lots within a Subdivision, the Subdivision will be classified as undeveloped.

g. Mobile Home Courts. Owners of mobile home courts will install, own, operate, and maintain all termination poles, pedestals, meter loops, and conductors from the Point of Delivery.

h. Conditions for Start of Construction. Construction of Line Installations and Alterations will not be scheduled until the Applicant or Additional Applicant pays the appropriate charges to the Company.

i. Terms of Payment. All payments listed under this section will be paid to the Company in cash, a minimum of 30 days and no more than 120 days, prior to the start of Company construction, unless mutually agreed otherwise.

j. Interest on Payment. If the Company does not start construction on a Line Installation or Alteration within 30 days after receipt of the construction payment, the Company will compute interest on the payment amount beginning on the 31st day and ending once Company construction actually begins. Interest will be computed at the rate applicable under the Company's Rule L. If this computation results in a value of $10.00 or more, the Company will pay such interest to the Applicant, Additional Applicant, or subdivider. An Applicant, Additional Applicant, or subdivider may request to delay the start of construction beyond 30 days after receipt of payment in which case the Company will not compute or pay interest.

RULE H
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(Continued)

4. Service Attachment Charges (Continued)

Distance charge (per foot)

Company Installed Facilities with:	
1/0 underground cable	$ 7.20
4/0 underground cable	$ 7.80
350 underground cable	$10.00
Customer Provided Trench & Conduit with:	
1/0 underground cable	$ 2.10
4/0 underground cable	$ 2.70
350 underground cable	$ 4.10

ii. All Three Phase and Single Phase Greater than 400 Amps
If a three phase or single phase underground Service Attachment greater than 400 amps is required, the Applicant or Additional Applicant will pay a non-refundable Underground Service Attachment Charge equal to the Work Order Cost.

5. Vested Interest Charges

Additional Applicants connecting to a vested portion of a Line Installation will pay a Vested Interest Charge to be refunded to the Vested Interest Holder. Additional applicants will have two payment options:

Option One - An Additional Applicant may choose to pay an amount determined by this equation:

Vested Interest Charge = A x B x C where;

A = Load Ratio: Additional Applicant's load divided by the sum of Additional Applicant's load and Vested Interest Holder's load.
B = Distance Ratio: Additional Applicant's distance divided by original distance.
C = Vested Interest Holder's unrefunded contribution

Option Two - An Additional Applicant may choose to pay the current Vested Interest, in which case the Additional Applicant will become the Vested Interest Holder and, as such, will become eligible to receive Vested Interest Refunds in accordance with Section 8.a.

If Option One is selected, the Additional Applicant has no Vested Interest and the previous Vested Interest Holder remains the Vested Interest Holder. The Vested Interest Holder's Vested Interest will be reduced by the newest Additional Applicant's payment.

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(Continued)

6. Other Charges (Continued)

ii. Overhead - $182

The Customer-provided pole shall be set in a location that does not require more than 100 feet of #2 aluminum service conductor that can be readily attached to the permanent location by merely relocating it.

The electrical facilities provided by the Customer on the pole shall be properly grounded, electrically safe, meet all clearance requirements, and ready for connection to Company facilities.

The Customer shall obtain all permits required by the applicable state, county, or municipal governments and will provide copies or verification to the Company as required. The above conditions must be satisfied before the service will be attached.

g. Temporary Service Return Trip Charge. If the conditions stated in Section 6.f. of this rule are not satisfied prior to the Customer's request for temporary service, a Temporary Service Return Trip Charge of $41.00 will be assessed each time Company personnel are dispatched to the job site, but are unable to connect the service. The charge will be billed after the conditions have been satisfied and the connection has been made.

h. Unusual Conditions Charge. Applicants, Additional Applicants, and subdividers will pay the Company the additional costs associated with any Unusual Conditions included in the Cost Quote. This payment, or portion thereof, will be refunded to the extent that the Unusual Conditions are not encountered.

In the event that the estimate of the Unusual Conditions included in the Cost Quote is equal to or greater than $10,000, the Applicant, Additional Applicant or subdivider may either pay for the Unusual Conditions or may furnish an Irrevocable Letter of Credit drawn on a local bank or local branch office issued in the name of Idaho Power Company for the amount of the Unusual Conditions. Upon completion of that portion of the project which included an Unusual Conditions estimate, Idaho Power Company will bill the Applicant, Additional Applicant or subdivider for the amount of Unusual Conditions encountered up to the amount established in the Irrevocable Letter of Credit.

The Applicant, Additional Applicant or subdivider will have 15 days from the issuance of the Unusual Conditions billing to make payment. If the Applicant, Additional Applicant or subdivider fails to pay the Unusual Conditions bill within 15 days, Idaho Power will request payment from the bank.

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
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(Continued)

7. Line Installation and Service Attachment Allowances (Continued)

b. Allowances for Subdivisions and Multiple Occupancy Projects. Developers of Subdivisions and Multiple Occupancy Projects will receive a $1,780 allowance for each single phase transformer installed within a development and a $3,803 allowance for each three phase transformer installed within a development. Subdividers will be eligible to receive allowances for Line Installations inside residential and non-residential subdivisions.

8. Refunds

a. Vested Interest Refunds. Vested Interest Refunds will be paid by the Company and funded by the Additional Applicant's Vested Interest Charge as calculated in accordance with Section 5. The initial Applicant will be eligible to receive refunds up to 80 percent of their original construction cost. Additional Applicants that become Vested Interest Holders will be eligible to receive refunds up to their total contribution less 20 percent of the original construction cost.

A Vested Interest Holder and the Company may agree to waive the Vested Interest payment requirements of Additional Applicants with loads less than an agreed upon level. Waived Additional Applicants will not be considered Additional Applicants for purposes of Section 8.a.i. (1) below.

i. Vested Interest Refund Limitations

(1). Vested Interest Refunds will be funded by no more than 4 Additional Applicants during the 5-year period following the completion date of the Line Installation for the initial Applicant.

(2). In no circumstance will refunds exceed 100 percent of the refundable portion of any party's cash payment to the Company.

b. Subdivision Refunds.

i. Applicants will be eligible for Vested Interest Refunds for facilities installed inside Subdivisions if the construction was NOT part of the initial Line Installation. Customers requesting additional Line Installations within a Subdivision will be considered new Applicants and become eligible for Vested Interest Refunds.

ii. A subdivider will be eligible for Vested Interest Refunds for payments for Line Installations outside subdivisions.

RULE H
NEW SERVICE ATTACHMENTS
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(Continued)

10. Relocations in Public Road Rights-of-Way (Continued)

The Company's cost of Relocations from or within the public road rights-of-way shall be paid as follows:

a. Road Improvements for General Public Benefit – Where the road improvements requiring the Relocation are funded solely by the Public Road Agency, the Company will bear the cost of the Relocation.

b. Road Improvements for Third-Party Beneficiary – Where the Public Road Agency performs road improvements which are funded by a Third-Party Beneficiary, such Third-Party Beneficiary will pay the Company for the cost of the Relocation.

c. Road Improvements for Joint Benefit – Where the road improvements requiring a Relocation are funded by both the Public Road Agency and a Third-Party Beneficiary, the Company will bear the percentage of the Relocation costs equal to the percentage of the road improvement costs paid by the Public Road Agency, and the Third-Party Beneficiary will pay the Company for the percentage of the Relocation costs equal to the percentage of the road improvement costs paid by the Third-Party Beneficiary.

d. Private Right of Occupancy – Notwithstanding the other provisions of this Section 10, where the Company has a private right of occupancy for its power line facilities within the public road right-of-way, such as an easement or other private right, the cost of the Relocation is borne by the Public Road Agency.

All payments from Third-Party Beneficiaries to the Company under this Section shall be paid in advance of the Company's Relocation work, based on the Company's Work Order Cost.

This Section 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.

11. Existing Agreements

This rule shall not cancel existing agreements, including refund provisions, between the Company and previous Applicants, or Additional Applicants. All Applications will be governed and administered under the rule or schedule in effect at the time the Application was received and dated by the Company.

RULE H
NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS OR ALTERATIONS

This rule applies to requests for electric service under Schedules 1, 4, 5, 7, 9, 19, 24, 45, and 46 that require the installation, alteration, relocation, removal, or attachment of Company-owned distribution facilities. New construction beyond the Point of Delivery for Schedule 9 or Schedule 19 is subject to the provisions for facilities charges under those schedules. This rule does not apply to transmission or substation facilities, or to requests for electric service that are of a speculative nature.

1. Definitions

Additional Applicant is a person or entity whose Application requires the Company to provide new or relocated service from an existing section of distribution facilities with a Vested Interest.

Alteration is any change or proposed change to existing distribution facilities. An alteration may include Relocation, Upgrade, Conversion, and/or removal.

Applicant is a person or entity whose Application requires the Company to provide new or relocated service from distribution facilities that are free and clear of any Vested Interest.

Application is a request by an Applicant or Additional Applicant for new electric service from the Company. The Company, at its discretion, may require the Applicant or Additional Applicant to sign a written application.

Company Betterment is that portion of the Work Order Cost of a Line Installation and/or Alteration that provides a benefit to the Company not required by the Applicant or Additional Applicant. Increases in conductor size and work necessitated by the increase in conductor size are considered a Company Betterment if the Connected Load added by the Applicant or Additional Applicant is less than 100 kilowatts. If, however, in the Company's discretion, it is determined that the additional Connected Load added by the Applicant or Additional Applicant, even though less than 100 kilowatts, is (1) located in a remote location, or (2) a part of a development or project which will add a load greater than 100 kilowatts, the Company will not consider the work necessitated by the load increase to be a Company Betterment.

Connected Load is the total nameplate kW rating of the electric loads connected for commercial, industrial, or irrigation service. Connected Load for residences is considered to be 25 kW for residences with electric space heat and 15 kW for all other residences.

Conversion is a request by a customer to replace overhead facilities with underground facilities.

Cost Quote is a written cost estimate provided by the Company that must be signed and paid by the Applicant or Additional Applicant prior to the start of construction. Cost Quotes are derived from Work Order Cost estimates.

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS
(Continued)

1. Definitions (Continued)

Standard Terminal Facilities are the overhead Terminal Facilities the Company considers to be most commonly installed for overhead single phase and three phase services. Single phase Standard Terminal Facilities include the cost of providing and installing one overhead service conductor and one 25 kVA transformer to serve a 200 amperage meter base. Three phase Standard Terminal Facilities include the cost of providing and installing one overhead service conductor and three 15 kVA transformers to serve a 200 amperage meter base.

Subdivision is the division of a lot, tract, or parcel of land into two or more parts for the purpose of transferring ownership or for the construction of improvements thereon that is lawfully recognized, platted and approved by the appropriate governmental authorities.

Temporary Line Installation is a Line Installation for electric service of 18 calendar months or less in duration.

Temporary Service Attachment is a Service Attachment to a customer-provided temporary pole which typically furnishes electric service for construction.

Terminal Facilities include transformer, meter, overhead service conductor, or underground service cable and conduit (where applicable). These facilities are not eligible for Vested Interest Refunds.

Third-Party Beneficiary is any individual, firm or entity that provides funding for road improvements performed by a Public Road Agency as set forth in Section 10. A Third-Party Beneficiary may include, but is not limited to, real estate developers, Local Improvement Districts or adjacent landowners.

Underground Service Attachment Charge is the non-refundable charge assessed an Applicant or Additional Applicant whenever new underground service is required by a customer attaching to the Company's distribution system.

Underground Conversion Local Improvement District is an entity created by an authorized governing body, as provided by Idaho Code §50-2503, whose purpose is to provide for the study, financing and construction of a distribution Line Installation or Alteration as set forth in Section 9. The governing body shall assess property owners to recover the cost of the distribution Line Installation or Alteration. An Underground Conversion Local Improvement District has discernible property boundaries.

Unusual Conditions are construction conditions not normally encountered, but which the Company may encounter during construction which impose additional, project-specific costs. These conditions may include, but are not limited to: frost, landscape replacement, road compaction, pavement replacement, chip-sealing, rock digging/trenching, boring, nonstandard facilities or construction practices, and other than available voltage requirements.

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS
(Continued)

2. General Provisions (Continued)

c. Rights-of-Way and Easements. The Company will construct, own, operate, and maintain lines only along public streets, roads, and highways that the Company has the legal right to occupy, and on public lands and private property across which rights-of-way or easements satisfactory to the Company will be obtained at the Applicant's or Additional Applicant's expense.

d. Removals. The Company reserves the right to remove any distribution facilities that have not been used for 1-year. Facilities shall be removed only after providing 60 days written notice to the last customer of record and the owner of the property served.

e. Property Specifications. Applicants or Additional Applicants must provide the Company with final property specifications as required and approved by the appropriate governmental authorities. These specifications may include but are not limited to: recorded plat maps, utility easements, final construction grades, property pins and proof of ownership.

f. Undeveloped Subdivisions. When electric service is not provided to the individual spaces or lots within a Subdivision, the Subdivision will be classified as undeveloped.

g. Mobile Home Courts. Owners of mobile home courts will install, own, operate, and maintain all termination poles, pedestals, meter loops, and conductors from the Point of Delivery.

h. Conditions for Start of Construction. Construction of Line Installations and Alterations will not be scheduled until the Applicant or Additional Applicant pays the appropriate charges to the Company.

i. Terms of Payment. All payments listed under this section will be paid to the Company in cash, a minimum of 30 days and no more than 120 days, prior to the start of Company construction, unless mutually agreed otherwise.

j. Interest on Payment. If the Company does not start construction on a Line Installation or Alteration within 30 days after receipt of the construction payment, the Company will compute interest on the payment amount beginning on the 31st day and ending once Company construction actually begins. Interest will be computed at the rate applicable under the Company's Rule L. If this computation results in a value of $10.00 or more, the Company will pay such interest to the Applicant, Additional Applicant, or subdivider. An Applicant, Additional Applicant, or subdivider may request to delay the start of construction beyond 30 days after receipt of payment in which case the Company will not compute or pay interest.

RULE H
NEW SERVICE ATTACHMENTS
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INSTALLATIONS OR
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(Continued)

4. Service Attachment Charges (Continued)

Distance charge (per foot)	
Company Installed Facilities with:	
1/0 underground cable	$ 7.20
4/0 underground cable	$ 7.80
350 underground cable	$10.00
Customer Provided Trench & Conduit with:	
1/0 underground cable	$ 2.10
4/0 underground cable	$ 2.70
350 underground cable	$ 4.10

ii. All Three Phase and Single Phase Greater than 400 Amps
If a three phase or single phase underground Service Attachment greater than 400 amps is required, the Applicant or Additional Applicant will pay a non-refundable Underground Service Attachment Charge equal to the Work Order Cost.

5. Vested Interest Charges

Additional Applicants connecting to a vested portion of a Line Installation will pay a Vested Interest Charge to be refunded to the Vested Interest Holder. Additional applicants will have two payment options:

Option One - An Additional Applicant may choose to pay an amount determined by this equation:

Vested Interest Charge = A x B x C where;

A = Load Ratio: Additional Applicant's load divided by the sum of Additional Applicant's load and Vested Interest Holder's load.
B = Distance Ratio: Additional Applicant's distance divided by original distance.
C = Vested Interest Holder's unrefunded contribution

Option Two - An Additional Applicant may choose to pay the current Vested Interest, in which case the Additional Applicant will become the Vested Interest Holder and, as such, will become eligible to receive Vested Interest Refunds in accordance with Section 8.a.

If Option One is selected, the Additional Applicant has no Vested Interest and the previous Vested Interest Holder remains the Vested Interest Holder. The Vested Interest Holder's Vested Interest will be reduced by the newest Additional Applicant's payment.

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS
(Continued)

6. Other Charges (Continued)

f. Temporary Service Attachment Charge. Applicants or Additional Applicants will pay for Temporary Service Attachments as follows:

i. Underground - $41

The Customer-provided pole must be set within two linear feet of the Company's existing transformer or junction box.

ii. Overhead - $182

The Customer-provided pole shall be set in a location that does not require more than 100 feet of #2 aluminum service conductor that can be readily attached to the permanent location by merely relocating it.

The electrical facilities provided by the Customer on the pole shall be properly grounded, electrically safe, meet all clearance requirements, and ready for connection to Company facilities.

The Customer shall obtain all permits required by the applicable state, county, or municipal governments and will provide copies or verification to the Company as required. The above conditions must be satisfied before the service will be attached.

g. Temporary Service Return Trip Charge. If the conditions stated in Section 6.f. of this rule are not satisfied prior to the Customer's request for temporary service, a Temporary Service Return Trip Charge of $41.00 will be assessed each time Company personnel are dispatched to the job site, but are unable to connect the service. The charge will be billed after the conditions have been satisfied and the connection has been made.

h. Unusual Conditions Charge. Applicants, Additional Applicants, and subdividers will pay the Company the additional costs associated with any Unusual Conditions included in the Cost Quote. This payment, or portion thereof, will be refunded to the extent that the Unusual Conditions are not encountered.

In the event that the estimate of the Unusual Conditions included in the Cost Quote is equal to or greater than $10,000, the Applicant, Additional Applicant or subdivider may either pay for the Unusual Conditions or may furnish an Irrevocable Letter of Credit drawn on a local bank or local branch office issued in the name of Idaho Power Company for the amount of the Unusual Conditions. Upon completion of that portion of the project which included an Unusual Conditions estimate, Idaho Power Company will bill the Applicant, Additional Applicant or subdivider for the amount of Unusual Conditions encountered up to the amount established in the Irrevocable Letter of Credit.

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS
(Continued)

7. Line Installation and Service Attachment Allowances (Continued)

b. Allowances for Subdivisions and Multiple Occupancy Projects
Developers of Subdivisions and Multiple Occupancy Projects will receive a $1,780 allowance for each single phase transformer installed within a development and a $3,803 allowance for each three phase transformer installed within a development. Subdividers will be eligible to receive allowances for Line Installations inside residential and non-residential subdivisions.

8. Refunds

a. Vested Interest Refunds. Vested Interest Refunds will be paid by the Company and funded by the Additional Applicant's Vested Interest Charge as calculated in accordance with Section 5. The initial Applicant will be eligible to receive refunds up to 80 percent of their original construction cost. Additional Applicants that become Vested Interest Holders will be eligible to receive refunds up to their total contribution less 20 percent of the original construction cost.

A Vested Interest Holder and the Company may agree to waive the Vested Interest payment requirements of Additional Applicants with loads less than an agreed upon level. Waived Additional Applicants will not be considered Additional Applicants for purposes of Section 8.a.i. (1) below.

i. Vested Interest Refund Limitations

(1). Vested Interest Refunds will be funded by no more than 4 Additional Applicants during the 5-year period following the completion date of the Line Installation for the initial Applicant.

(2). In no circumstance will refunds exceed 100 percent of the refundable portion of any party's cash payment to the Company.

b. Subdivision Refunds.

i. Applicants will be eligible for Vested Interest Refunds for facilities installed inside Subdivisions if the construction was NOT part of the initial Line Installation. Customers requesting additional Line Installations within a Subdivision will be considered new Applicants and become eligible for Vested Interest Refunds.

ii. A subdivider will be eligible for Vested Interest Refunds for payments for Line Installations outside subdivisions.

RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS
(Continued)

10. Relocations in Public Road Rights-of-Way (Continued)

The Company's cost of Relocations from or within the public road rights-of-way shall be paid as follows:

a. Road Improvements for General Public Benefit – Where the road improvements requiring the Relocation are funded solely by the Public Road Agency, the Company will bear the cost of the Relocation.

b. Road Improvements for Third-Party Beneficiary – Where the Public Road Agency performs road improvements which are funded by a Tthird-Pparty Bbeneficiary, such Tthird-Pparty Bbeneficiary will ~~also~~ pay the Company for the cost of the Relocation.

c. Road Improvements for Joint Benefit – Where the road improvements requiring a Relocation are funded by both the Public Road Agency and a Tthird-Pparty Bbeneficiary, the Company will bear the percentage of the Relocation costs equal to the percentage of the road improvement costs paid by the Public Road Agency, and the Tthird-Pparty Bbeneficiary will pay the Company for the percentage of the Relocation costs equal to the percentage of the road improvement costs paid by the Tthird-Pparty Bbeneficiary.

d. Private Right of Occupancy – Notwithstanding the other provisions of this Section 10, where the Company has a private right of occupancy for its power line facilities within the public road right-of-way, such as an easement or other private right, the cost of the Relocation is borne by the Public Road Agency.

All payments from Tthird-Pparty Bbeneficiaries to the Company under this Ssection shall be paid in advance of the Company's Relocation work, based on the Company's Work Order Cost.

This Section 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.

11. Existing Agreements

This rule shall not cancel existing agreements, including refund provisions, between the Company and previous Applicants, or Additional Applicants. All Applications will be governed and administered under the rule or schedule in effect at the time the Application was received and dated by the Company.

Office of the Secretary
Service Date
September 3, 2009

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	CASE NO. IPC-E-08-22 ORDER NO. 30896

BACKGROUND

On October 30, 2008, Idaho Power Company filed an Application with the Commission seeking authority to modify its Rule H tariff relating to new service attachments and distribution line installations and alterations. Specifically, the Company sought to increase the charges for new service attachments, distribution line installations and alterations.

On December 10, 2008, Building Contractors Association of Southwestern Idaho (BCA) filed a Petition for Intervention. The Commission granted BCA's request on December 19, 2008. Order No. 30707. Subsequently, on July 1, 2009, the Commission issued Order No. 30853 approving Idaho Power Company's request to modify its Rule H tariff addressing charges for installing or altering distribution lines.

PETITION FOR INTERVENOR FUNDING

On July 13, 2009, BCA filed a request for intervenor funding. BCA acknowledges that its Petition is untimely, but submits that it was an "inadvertent and unintentional oversight by its legal counsel with respect to the correct timing for submission of requests for intervenor funding." Petition at 2. BCA further argues that a determination of whether to accept a late-filed request for intervenor funding is within the Commission's discretion. Finally, BCA maintains that neither Idaho Power nor its ratepayers would be prejudiced by the consideration and granting of BCA's Petition. BCA requests recovery of $28,386.35 in fees and expenses.

COMMISSION FINDINGS

Idaho Code § 61-617A and Rules 161-165 of the Commission's Rules of Procedure provide the framework for awards of intervenor funding. Section 61-617A(1) declares that it is the "policy of this state to encourage participation at all stages of all proceedings before the Commission so that all affected customers receive full and fair representation in those proceedings." Accordingly, the Commission may order any regulated utility with intrastate

annual revenues exceeding $3,500,000 to pay all or a portion of the costs of one or more parties for legal fees, witness fees and reproduction costs, not to exceed a total for all intervening parties combined of $40,000.

Commission Rules of Procedure 161 through 165 provide the procedural requirements for applications for intervenor funding. Rule 164 states that "[u]nless otherwise provided by order, an intervenor requesting intervenor funding must apply no later than fourteen (14) days after the last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders, or statements of position, whichever is last."

It is undisputed that BCA's Petition for Intervenor Funding does not comply with the procedural requirements of Rule 164. While *Idaho Code* § 61-617A vests the Commission with the discretion to award attorney's fees and costs, Rule 164 clearly requires that an application be filed "no later than fourteen (14) days after the last evidentiary hearing . . . or deadline for submitting briefs." As conceded by BCA in its Petition, the 14-day deadline expired on May 15, 2009. BCA did not file its request until July 13, 2009. BCA's request for intervenor funding is untimely and is, therefore, denied.

ORDER

IT IS HEREBY ORDERED that Building Contractors Association's Petition for Intervenor Funding is denied as untimely.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 3rd day of September 2009.

JIM D. KEMPTON, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

MACK A. REDFORD, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

O:IPC-E-08-22_ks6_Intervenor Funding

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September 11, 2009

Via HAND DELIVERY

IDAHO PUBLIC UTILITIES COMMISSION
P. O. Box 83720
Boise, ID 83720-0074

RE: Case No. IPC-E-08-22:
In the Matter of the Application of Idaho Power Company for Authority to Modify its Rule H Line Extension Tariff Related to New Service Attachments and Distribution Line Installations
Intervenors: (1) Association of Canyon County Highway Districts; and (2) City of Nampa

Dear Commission:

Enclosures:

1. (original + 7 copies) *Joint Brief on Reconsideration by Nampa and ACCHD.*

Enclosed for filing with the IPUC, please find Intervenors Nampa and ACCHD's *Joint Brief on Reconsideration* in connection with the above referenced matter.

Please contact this office if you have any questions. Thank you.

Sincerely,
WHITE PETERSON
LeAnn Hembree
Legal Assistant to Matthew A. Johnson

Encls.
Cc: counsel of record
Clients
W:\Work\W\Nampa\Idaho Power - Rule H change\Letter to IPUC re filing Joint Brief Reconsider 09-11-09 lh.doc

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City of Nampa
Association of Canyon County Highway Districts

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS	CASE NO. **IPC-E-08-22** **JOINT BRIEF ON RECONSIDERATION**

The CITY OF NAMPA (Nampa) and the ASSOCIATION OF CANYON COUNTY HIGHWAY DISTRICTS (ACCHD) hereby submit the following brief on reconsideration. This brief is submitted in accordance with Interlocutory Order No. 30883, dated August 19, 2009, in the above-captioned matter.

Nampa and ACCHD are separate intervenors in this matter, but share similar concerns in their roles as public road agencies.[1,2] Both parties are represented by the same legal counsel. Additionally the issues raised by each are sufficiently similar such that this brief is submitted jointly in the interests of time and for the convenience of the Commission and parties.

I. PUBLIC ROAD AGENCIES HAVE EXCLUSIVE AUTHORITY OVER HIGHWAYS AND RIGHT OF WAYS.

Exclusive authority over highways within city limits lies with the municipality. Exclusive authority over rights-of-way in highway districts lies with the highway district commissioners. This point was set forth in the original comments of Nampa and ACCHD, as well as the comments and petition for reconsideration of the Ada County Highway District (ACHD).

Municipalities and highway districts, as public road agencies, hold these right-of-way lands in trust for the public. Public road agencies are required to protect the public use. *State ex rel. Rich v. Idaho Power Co.,* 81 Idaho 487, 346 P.2d 596 (1959). As such, municipalities have the exclusive authority to determine that relocation of utility facilities is necessary so as not to incommode public use. This includes the power to require relocation at the utility's cost.

Utility use of public right-of-ways is permissive and subject to the authority of the public road agency. "[The] permissive use of the public thoroughfares is subordinate to the paramount use thereof by the public." *Id.* at 498. The public road agencies' authority over the paramount

[1] As a municipality, Nampa has the power and responsibility to supervise and control city highways under Idaho Code § 50-313 and § 50-314. Nampa also has authority over utility transmission systems on municipal land under Idaho Code § 50-328.

[2] Under Idaho Code § 40-1310, the Canyon County highway districts have "exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system."

public use necessarily includes the authority to determine that a utility relocate at its own cost.

Of course the authority of the public road agencies also allows that these agencies could pay for portions of the relocation cost or negotiate agreements for apportionment of relocation costs. ACHD has pursued such an approach with Idaho Power in ACHD's adoption, ***under ACHD's own authority***, of Resolution 330. Public road agencies may also negotiate utility relocation costs on a case-by-case basis with utilities and developers. Municipalities may approach relocation cost apportionment under the municipality's authority in formulating a franchise agreement. However, these all would fall under the exclusive supervisory authority of public road agencies over utility use of the public right-of-way. Such agreements must be worked out with the public road agencies, not imposed by the IPUC.

II. THE IPUC DOES NOT HAVE JURISIDICTION TO APPROVE SECTION 10 OF RULE H.

IPUC's jurisdiction is limited to that expressly granted by the legislature. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979). The IPUC is not granted authority to determine what may or may not incommode the public use as it pertains to municipal land and highways. It is the function and duty of a municipality to determine whether the public use and safety is protected by such actions as road-widening, sidewalk development, or installation of a turning lane. The Public Utilities Act "does not contain any provision diminishing or transferring any of the powers and duties of the municipality to control and maintain its streets and alleys." *Village of Lapwai v. Alligier*, 78 Idaho 124, 129, 299 P.2d 475, 478 (1956). *Lapwai* found that authority over municipal lands remains with the municipality and that the IPUC has no authority in regard to a municipality requiring utility relocation. *Lapwai* also held that IPUC consent to such relocation is not

required. The IPUC is not given authority to regulate utility relocation or to take on the role of determining when utility system location may, or may not, impair the public use.

Similarly the Public Utilities Act does not give the IPUC the jurisdiction to take utility relocation costs and impose the duty to pay them on public road agencies, government entities, developers, or other third parties alleged to have specially benefitted from the improvements. Idaho Code § 67-205 provides no express or implied authority for utilities to charge third parties for relocations. If the governing public road agency determines that relocation is necessary to support the public use and safety, then the utility must relocate at its own cost.

Furthermore, the third-party beneficiary cost apportionment proposal of Section 10 overlooks that the public benefits from such road improvements, even if paid for in portion by a third party. Idaho Power suggests that "Idaho Power customers in Pocatello do not benefit from roadway improvements for a new shopping center in Nampa" but that such customers bear a portion of the relocation cost. *Idaho Power Company's Answer to Petitions for Reconsideration*, page 16. However, a customer in Pocatello does benefit. That Pocatello customer pays a lower utility rate because Idaho Power is able to make permissive use of public rights-of-way, rather than having to acquire its own private rights-of-way. Additionally, the Pocatello customer benefits when on a future visit to Nampa he or she is not stuck in traffic because that road was widened and a traffic light installed. The Pocatello customer benefits when traveling more safely on a highway through Canyon County because the highway district negotiated with developers for contributions to more quickly make certain improvements that improve traffic flow. There are always some members of the public who may see a more immediate or more frequent benefit, but the public road agencies requests for relocation are always to benefit the public use generally. If Idaho Power has concerns that in certain situations there has been "inappropriate

cost shifting" then Idaho Power needs to work to resolve such with the public road agencies. If absolutely necessary, Idaho Power may decide to pursue a remedy in the courts. However, it is not the role of the IPUC, or within the jurisdiction or expertise of the IPUC, to begin second-guessing the motivation behind public road agency requests for relocation.

III. THE REVISED DEFINITION OF THIRD PARTY BENEFICIARIES IS TOO BROAD.

In the initial comments by both Nampa and ACCHD, concern was raised about the definition of "third party beneficiaries," particularly the inclusion of location improvement districts and other government entities. Idaho Power's clarification on the definition, including that the intent is this apply to all local improvement districts under Idaho Code Title 50, Chapter 17, does not assuage the intervenors' concerns.

Local government entities often cooperate and work together on projects. For instance a municipality and a highway district may coordinate on a municipal water line improvement coupled with a highway district widening project. The highway district widening project would require that an Idaho Power line be relocated. However, under Section 10, the municipality will have contributed to the widening project in conjunction with repaving required by its water line improvement and therefore the municipality would be required to pay Idaho Power relocation costs. This does not make sense.

Alternatively a municipality or highway district may work with a neighborhood to form a local improvement district for the improvement of water and/or sewer facilities or for the improvement of sidewalks, curbs, and gutters. The local improvement district is a financing mechanism available to the local government body so that such improvements may be made sooner than if relying on general funds. The local improvements may have nothing to do with

electric utility lines. However, due to the improvements, reconfiguration of the road and right-of-way may be necessary, thereby requiring relocation of electric utility lines so as not to interfere with the public use and so as to protect the public safety.

Section 10 and its treatment of third party beneficiaries would interfere with the ability of the public road agencies to cooperate with other government entities, with neighborhoods, and with developments. Rather than being in position to negotiate and cooperate between parties, Section 10 imposes a scheme where now these entities are in competition with each other to minimize their contribution to the project and therefore avoid Idaho Power imposing relocation costs. This is another example of how Section 10 as proposed interferes with the exclusive authority of the public road agencies and impedes their ability to negotiate appropriately with all parties.

Rule H should be limited and returned to its original definition of local improvement districts, which contemplates only LIDs under Idaho Code § 50-2503 which are specifically related to electric utility line installation and alteration.

IV. SECTION 10 IS UNCONSTITUTIONAL AND IS CONTRARY TO THE COMMON LAW.

Intervenors, along with ACHD, have presented constitutional and common law concerns with Section 10 of Rule H. See *Comments of Intervenor City of Nampa*, *Comments of Intervenor ACCHD*, and *Comments of ACHD*. See also *Petition for Reconsideration/Clarification by ACHD*. Nampa and ACCHD hereby reaffirm those arguments and urge the IPUC to reconsider and delete Section 10 from Rule H.

V. CONCLUSION

Section 10 of Rule H, as proposed, is in direct conflict with the exclusive jurisdiction of public road agencies over their rights-of-way. Rather than seek to cooperate with the agencies to come to an agreement under their exclusive authority, Section 10 usurps that authority to try and force a one-size-fits-all approach on the agencies. The proposed rule interferes with the ability of public road agencies to pursue necessary road improvements. It places the IPUC in an undesirable position of second-guessing relocation requests. Section 10 also places the IPUC in a position outside its jurisdiction and expertise. The proposed Section 10 is also in violation of the Idaho constitution and in conflict with the common law. For these reasons, Nampa and the ACCHD recommend reconsideration of Order 30853.

DATED this 11TH day of September, 2009.

WHITE PETERSON

By: _____
Davis F. VanderVelde
Matthew A. Johnson
Attorneys for the Association of Canyon County Highway Districts
Attorneys for the City of Nampa

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 11TH day of September, 2009, a true and correct copy of the above and foregoing JOINT BRIEF ON RECONSIDERATION BY NAMPA AND ACCHD was served upon the following by the method indicated below:

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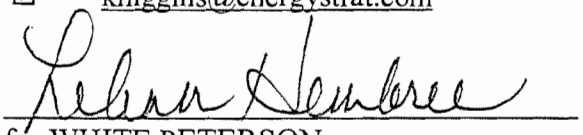

for WHITE PETERSON

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	**CASE NO. IPC-E-08-22**

BUILDING CONTRACTORS ASSOCIATION OF SOUTHWESTERN IDAHO

TESTIMONY ON RECONSIDERATION

OF

DR. RICHARD SLAUGHTER

Q. Please state your name and business address for the record.

A. My name is Richard Slaughter. My business address is 907 Harrison Blvd, Boise, Idaho 83702.

Q. Are you the same Richard Slaughter who has testified previously in this case?

A. I am.

Q. What is the purpose of your testimony?

A. In Interlocutory Order No. 30883 the Commission granted the Building Contractors' request for reconsideration "on the limited issue of the amount of appropriate allowances." Order 30883 at 4. The Commission stated that "Allowances are intended to reflect an appropriate amount of contribution provided by new customers requesting services in an effort to relieve one area of upward pressure on rates. BCA may address what allowance amount is reasonable based on the cost of new distribution facilities." My testimony addresses the allowance issue in that context and within the framework of the existing Commission standard enunciated in Order 26780 in 1995 concerning an appropriate amount of Company investment in distribution facilities (and the concurrent amount of contribution provided by new customers).

Q. What is your understanding of the Order 26780 standard regarding distribution cost recovery as it applies to the contribution provided by new Company customers?

A. In Order 26780 (1995) the Commission concluded that new customers are entitled to the same company investment in distribution enjoyed by existing customers in the same class, and costs required to extend service to new customers in excess of the embedded cost of distribution are to be recovered from the developer or new customer:

> We find that new customers are entitled to have the Company provide a level of investment equal to that made to serve existing customers in the same class. Recovery of those costs in excess of embedded costs must also be provided for and the impact on the rates of existing customers is an important part of our consideration. [Order 26780 at 17].

Q. What is the significance of focusing on the Company's embedded costs for distribution when establishing an appropriate allowance for extending service to new customers?

A. The Company's per customer embedded cost for distribution is equal to the Company's investment in existing distribution plant less depreciation. Embedded cost represents the Company's current "level of investment made to serve existing customers," and depending on how much additional distribution plant has been added since the Company's last rate case, embedded cost approximates the Company's per customer level of investment in distribution plant that it can recover through existing rates. To the extent that the Commission desires to

relieve upward pressure on rates, then limiting the Company's investment in distribution to serve new customers to its current per customer embedded costs for distribution facilities providing the same service to existing customers accomplishes this.

Q. Is there a reasonable estimate of what the Company's per customer embedded cost for distribution facilities is?

A. Both I, in my earlier pre-filed testimony, and Staff in its Comments, have calculated the Company's embedded distribution costs. In the residential customer class, Staff calculated this to be $1,232 per residential customer. That calculation has not been challenged by any party to this case. For purposes of my testimony I have accepted Staff's estimate of the Company's per customer embedded cost.

Q. How, then, does all of this relate to "what allowance amount is reasonable based on the cost of new distribution facilities?"

A. If the Commission's standard for Company investment in distribution continues to be an amount "equal to that made to serve existing customers in the same class," and the Company is entitled to recover from the new customer the costs of new distribution facilities in excess of embedded costs, then the appropriate Company per customer allowance for new distribution should be an amount equal to the

Company's per customer embedded costs to serve existing customers, or $1,232 per new customer.

Q. Are you aware that the Company's new tariff treats an "allowance" as an amount equal to the Company's contribution toward the cost of terminal facilities, which the Company, Staff and the Commission each have determined should be $1,780 per transformer as a "maximum allowance" for residential and non-residential single phase service?

A. Yes.

Q. The $1,780 allowance approved in Order 30853 is over $600 more than the $1,001 embedded cost per customer that you calculated in your Direct Testimony, and over $500 more than the $1,232 embedded cost per customer that Staff calculated from the cost of service studies used in the Company's most recent rate case. Hasn't the Commission actually *increased* the allowance it now would permit for these new residential class customers?

A. I state emphatically that it has not. The $1,001 to $1,232 embedded cost amounts I have testified to above are per customer embedded costs. The $1,780 terminal facilities allowance for new service bears no relationship whatsoever to the Company's current per customer investment to serve existing customers in the same class. A $1,780 allowance could be appropriate and reasonable if it did, but it simply does not.

Q. Please explain.

A. As the Building Contractors have emphasized in their comments, and I have in my testimony, in a residential subdivision terminal facilities can and do serve up to ten customers per installation. Consequently, a single allowance, in whatever amount, that is based solely on the cost of terminal facilities must be apportioned among the total number of new customers who share those terminal facilities. By authorizing only a per transformer allowance of $1,780, the Company investment per new customer can drop to as low as $149 per customer, or nearly $1100 *less* than the Company's current distribution investment for each of its existing customers.

Q. What does this mean in terms of the Company's ability to recover its investment through existing rates?

A. For the 60 lot subdivision example in Exhibit 204 of my Direct Testimony, this results in the Company recovering through rates up to $1,084 more per new customer than it invested in the distribution facilities serving that customer.

Q. So what does that mean for this proceeding?

A. In the context of residential customers, in all but the smallest subdivisions, the allowance approved by the Commission in Order 30833 allows the Company to receive a contribution for distribution facilities from each new customer that

exceeds embedded costs. In a large subdivision the new customer contribution exceeds the Company's embedded cost by approximately $1,050 per customer.

Q. How does this compare with the Company's investment versus its recovery through rates using the current allowances in the Order 26780 tariff?

A. Again using the residential customer class, the Company's current tariff approved by Order 26780 provides a total per customer allowance that is made up of two components: 1) an up-front allowance for terminal facilities; and 2) a per-lot/customer refund allowance as new customers come on line.

Interestingly, as illustrated in Exhibit 202 to my Direct Testimony, which is appended to this testimony as Exhibit 205, the total of these two allowances on a per customer basis under the Order 26780 Rule H tariff are quite close to the approximate $1,100 to $1,200 current per customer embedded cost of distribution. Under the tariff approved in Order 30853, however, even after accounting for a $1,780 terminal facilities allowance, the Company's net per customer investment actually becomes negative.

Q. Please elaborate.

A. Table 1 below shows how developments of different sizes compare with regard to the Company's capital investment for Rule H costs, including 1.5% overhead. The examples are from Staff Comments, Attachment 9, page 2 of 4.

Table 1

Order 30853 Rule H Rate Structure

Subdivision example	1	2	3	4	5
Design Number	61114	67186	60197	24482	27729
No. of Lots	3	10	32	60	101
No. of transformers	2	1	4	5	10
Average embedded cost per customer (Staff comments at 5)	**$ 1,232**	**$ 1,232**	**$ 1,232**	**$ 1,232**	**$ 1,232**
Total Design Cost	$10,572	$15,116	$50,432	$72,528	$144,771
Recovery through existing rates	$3,697	$12,324	$39,438	$73,946	$124,476
Order 30853 developer payment after allowance	$7,012	$13,336	$43,312	$63,628	$126,971
Net Company investment per customer	($46)	($1,054)	($1,010)	($1,084)	($1,056)

Source: Staff Attachment 9, Page 2 of 4; Staff comments at 5.

Company investment per customer is total design cost per lot less developer payment less rate recovery

Q. Please describe the table.

A. The table shows the number of lots and the number of transformers in each development. It also shows the total design/work order cost, the amount recovered through existing rates, and the amount that Order 30853 would require be paid in up front capital by the developer. Finally, it shows the net Company investment per customer in each case.

In example 5 of Table 1, total design cost is $144,771 of which the Company is entitled to recover $124,476 from the new ratepayers through the existing rate

structure, leaving a shortfall of $20,395, presumably to be collected from the developer. Order 30853, however, entitles the Company to collect almost $127,000 from the developer, for a total recovery of $251,447, having expended only $144,771.

Q. How can the Company's net investment be negative if the purpose of Order 30853 is to "relieve upward pressure on rates," and if, as the Commission has observed in Order 30853 (see Testimony at page 11 below), "fees cannot be charged for new plant that cannot be attributed specifically to serving new customers?"

A. The conflict between the Order 26780 standards and the outcome of the new Rule H design approved in Order 30853 cannot be reconciled. As Table 1 clearly shows, the new Rule H design does far more than affect "upward pressure on rates" from new distribution, it actually provides a profit on each installation supplemental to the Company's authorized rate of return on the investment.

Q. What is the case under Rule H from Order 26780?

A. From Staff Attachment 9, page 2 of 4, it is clear that under "Current Rule H" approved by Order 26780, the developer's "Net Cost" plus the $800 per lot refund almost exactly equal the "Work Order Cost per lot," which in turn are almost exactly equal to the average embedded cost of $1,232 computed by Staff. Whether as a result of simple coincidence or of thoughtful consideration, under

the existing Rule H tariff approved in Order 26780, current Company per customer investment in new distribution closely approximates its current embedded cost. It therefore is hard to see how, given today's costs for new distribution facilities, the authorized allowances under the Rule H tariff approved in Order 26780 produce "upward pressure on rates," let alone why any significant change in the tariff is warranted.

Q. So what rationale does exist for changing the tariff and reducing the Company's distribution investment if the sum of its current per customer allowance in the form of terminal facilities allowances and per lot refunds actually approximates its embedded cost for distribution?

A. None that I am aware of.

Q Do you have an opinion as to what the economic result to the Company would be if only a $1,780 terminal facilities allowance is approved and there is no other allowance provided for new distribution?

A. In the residential subdivision examples I have been discussing, the Company will be in an excess earning situation with regard to its distribution plant. The difficulty in accounting for this excess earning after the fact and providing necessary refunds or credits to the appropriate new customers will be significant.

Q. Absent such an after-the-fact accounting, what happens to this "excess earnings?"

A. Absent a timely true up that ultimately distributes these excess revenues back to the new customers who paid them, the practical effect quite likely will be that the amount earned on new distribution plant in excess of embedded costs will be applied to help pay the Company's other costs, including non-recoverable costs, generation and/or transmission costs—new customers will be paying an unequal proportion of these costs when compared with existing customers.

Q. Is that result consistent with prior Commission decisions?

A. No. It would not be consistent with Order 30853 or the two Idaho Supreme Court decisions on this subject referenced in that Order, which preclude disproportionately recovering the costs of new generation and transmission plant from new customers:

> Allowances. The capital cost of installing new generation and transmission plant has always generally been recovered through rates paid by all customers. Indeed, fees cannot be charged for new plant that cannot be attributed specifically to serving new customers. (Idaho State Homebuilders v. Washington Water Power, 107 Idaho 415,690 P.2d 350 (1984); Building Contractors Association v. ¡PUC and Boise Water Corp., 128 Idaho 534, 916 P.2d 1259 (1996).) [Order 30853, at 9-10] Emphasis added.

Q. Aside from the issues you have just described, is the rate structure in Order 30853 an economically efficient result as it applies to residential extensions?

A. No. An economically efficient result would align costs with recovery from developers, so that the highest developer contributions would come from developments that present the highest per customer cost. In the Table 1 example,

the subdivision with three lots, which has two transformers for three customers, receives the highest allowance, over $1,000 higher per lot (customer) than the larger subdivisions with ten customers per transformer. In other words, the rule approved in Order 30853 encourages high cost development. This cannot be desirable.

Q. Based on the foregoing testimony, do you have an opinion concerning how to calculate a reasonable and appropriate allowance for line extensions to serve new customers?

A. However the allowance is configured, to meet the Commission's stated standard an appropriate per new customer allowance must be approximately equal to the Company's per existing customer embedded costs, calculated in this case by Staff at $1232.44.

Q. Do you have a proposed rate structure for residential subdivisions that satisfies this standard?

A. Yes. Much of the regulatory difficulty with Rule H, insofar as residential customers are concerned, stems from attempting to match allowances and refunds with defined "standard service," accounting for transformers, underground vs. overhead, service drops, the size of the pole offset, etc. It would be much simpler for all to understand and administer, if the tariff simply were to charge a subdivision developer the full work order cost for the installation, and then credit

that charge with the capital value embedded in rate base. In other words, the appropriate allowance would achieve a Company investment for any new service extension request equal to its per customer embedded cost multiplied by the total number of new customers to be served. The developer or new customer contribution towards the new distribution facilities then would be equal to total design cost minus the Company's per customer embedded cost allowance (i.e., those facilities costs in excess of the amount the Company will receive as a return from the new customer through rates).

Q. Are there side effects to such a structure?

A. Yes. This structure would cause embedded rate base to decline slowly over time, unless the allowance is somehow adjusted for inflation. While such an outcome may be desirable from the Company's standpoint or from a political standpoint, it would over time cause rates to be less truly reflective of energy costs than they are now. To the extent that allowances fall further behind costs, the Rule would shift generation and transmission cost to the new customer. To avoid this outcome, the embedded cost allowance should be indexed to the lesser of a general energy or construction cost index or the increase in installation work order costs. Either approach will work and either cost method can easily be updated annually by the Company and Staff.

Q. Can you illustrate your proposal?

A. Yes. Table 2 shows the effect of a simplified Rule H rate structure, wherein the developer pays up front the entire work order or Total Design cost, less the amount expected to be recovered from the new customers through existing rate base. This latter amount can be calculated by Commission staff each year, in conjunction with a filing by the Company of current work order costs. Developer payments would always be $0 or greater. In the examples in the table, subdivision #4 is from 2002, so the costs shown may be understated in today's dollars.

Table 2

Simplified Rule H Rate Structure

Subdivision example	1	2	3	4	5
Design Number	61114	67186	60197	24482	27729
No. of Lots	3	10	32	60	101
Average embedded cost per customer (Staff comments at 5)	**$ 1,232**	**$ 1,232**	**$ 1,232**	**$ 1,232**	**$ 1,232**
Total Design Cost	$10,572	$15,116	$50,432	$72,528	$144,771
Recovery through existing rates	$3,697	$12,324	$39,438	$73,946	$124,476
Developer payment (>= $0)	$6,875	$2,792	$10,994	$0	$20,295
Developer payment per lot	$2,292	$279	$344	$0	$201
Net Company investment per customer	$0	$0	$0	($24)	$0

Q. Does this structure have advantages?

A. Subject to the qualifications above, it achieves several objectives: 1) it does not contribute additional cost to rate base, which achieves the Company's and

Commission's stated objectives. Residential growth serves only to maintain rates at their current levels insofar as Rule H costs are concerned; 2) it satisfies the Supreme Court standard in *Water Power* and *Boise Water* by avoiding the need for continual after-the-fact accounting for excess earnings on distribution plant and/or the potential shift of generation and transmission costs to new customers through the line extension tariff; 3) it greatly simplifies the presentation and calculation of Rule H costs for residential development; and 4) it is economically efficient, because it recovers the highest development payment from the highest cost installations.

Q. Does this conclude your testimony?

A. Yes.

BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

CASE NO. IPC-3-08-22

BUILDING CONTRACTORS ASSOCIATION OF SOUTHWEST IDAHO

EXHIBIT 205

Exhibit 205: Comparison of Existing and Proposed Rule H Cost Distribution

		Existing Rule H				Proposed Rule H			
No. of Lots	**Project Cost**	**Terminal Facilities Allowance**	**Maximum Refund**	**Total Customer**	**Total Company**	**Terminal Facilities Allowance**	**Maximum Refund**	**Total Customer**	**Total Company**
3	$10,897	$3,493	$2,400	$5,004	$5,893	$3,560	$0	$7,337	$3,560
10	$19,929	$3,397	$8,000	$8,532	$11,397	$1,780	$0	$18,149	$1,780
32	$50,432	$11,496	$25,600	$13,336	$37,096	$7,120	$0	$43,312	$7,120

Source: Idaho Power Company's Response to BCA production request, Page 5

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2009, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	**CASE NO. IPC-E-08-22** **ADA COUNTY HIGHWAY DISTRICT'S BRIEF ON RECONSIDERATION AND CLARIFICATION**

The ADA COUNTY HIGHWAY DISTRICT (hereinafter "ACHD") hereby submits the following ADA COUNTY HIGHWAY DISTRICT'S BRIEF ON RECONSIDERATION AND CLARIFICATION in the above-captioned matter pursuant to the Idaho Public Utilities Commission's (hereinafter "IPUC") *Order No. 30883*, issued August 19, 2009, Idaho Code § 61-626, and IPUC Rule 332.

I.

INTRODUCTION

On July 1, 2009, the IPUC issued *Order No. 30853* in the above-captioned matter granting Idaho Power's Application to modify Rule H. On July 22, 2009, ACHD filed its PETITION FOR RECONSIDERATION/CLARIFICATION BY ADA COUNTY HIGHWAY

DISTRICT requesting reconsideration and clarification of the IPUC's approval of Rule H Section 10 relating to utility relocations. On that date, the Association of Canyon County Highway Districts and the City of Nampa also filed petitions for reconsideration of the IPUC's approval of Rule H Section 10. Additionally, the Building Contractors Association filed a petition for reconsideration of other portions of Rule H. On August 19, 2009, the IPUC issued *Order No. 30883* granting reconsideration and also directed Idaho Power to clarify the definition of "third party beneficiary" and "local improvement district". As directed by the IPUC, Idaho Power on August 28, 2009, filed modifications to Rule H Section 10. Idaho Power's August 28, 2009 filing also made modifications to Rule H Section 1 "Definitions" and, in particular, modified the definition of "Local Improvement District" and added definitions of "Public Road Agency" and "Third-Party Beneficiary", (collectively, these modifications to Rule H Section 1 are referred to below as "applicable portions of Rule H Section 1").

ACHD has considered IPUC *Order No. 30853*, IPUC *Order No. 30883*, and the modified Rule H Section 10 and applicable portions of Rule H Section 1 and renews its objections as stated in its PETITION FOR RECONSIDERATION/CLARIFICATION BY ADA COUNTY HIGHWAY DISTRICT as well as its original comments submitted March 3, 2009. As will be demonstrated below, Rule H Section 10 and applicable portions of Rule H section 1, as modified by Idaho Power, are unauthorized usurpations of the clear and exclusive jurisdiction of Idaho's highway districts and public road agencies by the IPUC. To the extent that Rule H Section 10 and applicable portions of Rule H Section 1 are 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. Rule H Section 10 and applicable portions of Rule H

Section 1 are also unconstitutional and legally unauthorized abrogations or amendments of the common law rule that utilities pay the cost of relocation of their facilities within the public rights-of-way.

ACHD hereby requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1 from Rule H.

II.

ARGUMENT

A. As Modified by Idaho Power, Rule H Section 10 and Applicable Portions of Rule H Section 1 are an Illegal Encroachment Into ACHD's Exclusive Jurisdiction

On August 28, 2009, pursuant to *Order No. 30883,* Idaho Power filed a modified Rule H, which included changes to Rule H Section 10 and Rule H Section 1. As modified, Rule H Section 10 and applicable portions of Rule H Section 1 are an illegal encroachment into ACHD's exclusive jurisdiction.

Pursuant to Idaho law, highway districts have ***exclusive*** general supervision and jurisdiction over all highways and public rights-of-way within their highway system and full power to establish design standards and to establish use standards.

Idaho Code § 40-1310(1) & (8) provide as follows:

> 40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS.
> (1) The commissioners of a highway district have ***exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system, with full power to construct, maintain, repair, acquire, purchase and improve all highways within their highway system***, whether directly or by their own agents and employees or by contract. Except as otherwise provided in this chapter in respect to the highways within their highway system, a highway district shall have all of the powers and duties that would by law be vested in the commissioners of the county and in the district directors of highways if the highway district had not been organized. Where any highway within the

limits of the highway district has been designated as a state highway, then the board shall have exclusive supervision, jurisdiction and control over the designation, location, maintenance, repair and reconstruction of it. The highway district shall have power to manage and conduct the business and affairs of the district; establish and post speed and other regulatory signs; make and execute all necessary contracts; have an office and employ and appoint agents, attorneys, officers and employees as may be required, and prescribe their duties and fix their compensation. Highway district commissioners and their agents and employees have the right to enter upon any lands to make a survey, and may locate the necessary works on the line of any highways on any land which may be deemed best for the location.
(Emphasis added.)

(8) The highway district board of commissioners shall have the ***exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction, with full power to*** establish design standards, ***establish use standards***, pass resolutions and establish regulations in accordance with the provisions of title 49, Idaho Code, and control access to said public highways, public streets and public rights-of-way. (Emphasis added.)

Pursuant to Idaho Code § 40-1312, this grant of power to the highway districts is to be liberally construed and all necessary powers are to be implied.

40-1312. GRANT OF POWERS TO BE LIBERALLY CONSTRUED. The grant of powers provided in this chapter to highway districts and to their officers and agents, shall 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. The enumeration of certain powers that would be implied without enumeration shall not be construed as a denial or exclusion of other ***implied powers*** necessary for the free and efficient exercise of powers expressly granted. (Emphasis added.)

In *Worley Highway District v. Kootenai County*, 104 Idaho 833, 663 P.2d 1135 (Idaho App.,1983), the Idaho Court of Appeals considered powers and authorities granted to highway districts under the predecessors to Idaho Code § 40-1310 and Idaho Code § 40-1312 and stated as follows:

It is clear to us that [Idaho Code § 40-1310] together with [Idaho Code § 40-1312] gives highway commissioners broad powers to administer highways within their districts. Their domain includes not only the "exclusive general supervision and jurisdiction over all highways," but also "full power to construct, maintain, repair,

> and improve all highways within the district." ***This language makes the legislature's intent clear that in the area of construction, maintenance, and day-to-day operation of highways, the prerogative of the highway commissioners is exclusive.*** (Emphasis added.) *Worley Highway District v. Kootenai County*, 104 Idaho at 835.

Additionally, Idaho Code § 40-1406 provides in pertinent part:

> 40-1406. POWERS AND DUTIES OF HIGHWAY COMMISSIONERS -- ONE HIGHWAY DISTRICT IN COUNTY -- HIGHWAY POWERS OF CITIES IN COUNTY ABOLISHED -- LAWS IN CONFLICT SUPERSEDED. The highway commissioners of a county-wide highway district shall exercise ***all of the powers and duties provided in chapter 13 of this title***, and are empowered to make highway ad valorem tax levies as provided by chapter 8, of this title.
>
> * * *
>
> Wherever ***any provisions*** of the existing laws of the state of Idaho are ***in conflict*** with the provisions of this chapter, the provisions of ***this chapter shall control and supersede*** all such laws. (Emphasis added.)

Therefore, to the extent that ***any*** law of the state of Idaho is in conflict with the highway districts' exclusive jurisdictional authority over the public rights-of-way as granted in Code §§ 40-1310(1), 40-1310(8), 40-1312, and 40-1406, such laws are superseded by these provisions of Idaho law.

In *Village of Lapwai v. Alligier*, 78 Idaho 124, 299 P.2d 475 (1956), the Idaho Supreme Court said, "[i]n the exercise of its powers and duties with respect to its streets and alleys, the municipality [highway district] acts as agent of the state. In discharging a mandatory duty imposed by the state, the municipality performs a governmental function [cites omitted] within the police power conferred by the state." *Village of Lapwai v. Alligier,* 78 Idaho at 128.

The highway district's exclusive control and jurisdiction over the public rights-of-way includes the unqualified ability to demand that electric utility facilities within the public rights-of-way relocate per Idaho Code § 62-705. Pursuant to Idaho Code § 62-705, utility use of public

lands is permissive and remains subject to the authority of a city, county or highway district. It is noteworthy that Idaho Code § 62-705 does not provide express or implied authority for utilities to charge for relocations. Local governing entities, such as highway districts and public road agencies, hold such land in trust for the public and must protect the public use. *State v. Idaho Power Company*, 81 Idaho 487, 346 P.2d 596 (1959). Highway districts have the exclusive authority to determine whether and when relocation of utility facilities within the public right-of-way is necessary so as to not incommode the public use. In *State v. Idaho Power Company*, the Idaho Supreme Court stated:

> The permissive use of public highways, which the legislature by I.C. §§ 62-701 and 62-705 accords to utilities, is in recognition of the time honored rule existing in this state, that streets and highways belong to the public and are ***held by the governmental bodies and political subdivisions of the state in trust*** for the use by the public, and that only a permissive right to use, and no permanent property right can be gained by those using them. . . . This is but a recognition of the fundamental proposition that [Idaho Power's and Mountain States Telephone's] ***permissive use of the public thoroughfares is subordinate to the paramount use thereof by the public***. (Emphasis added.) 81 Idaho at 498, 515.

See also, *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 32, 607 P.2d 1084 (1980).

Under the common law rule, "utilities bear the expense of relocating their facilities in public rights of way when necessary to make way for proper governmental use of the streets." *Mountain States Telephone and Telegraph Co.,* 101 Idaho at 32. As noted by the Idaho Supreme Court in *State v. Idaho Power Company*, "[l]ong before the adoption of our Constitution, the people adopted the common law as the rule of decision in all cases not otherwise provided by law. . . . Under the common law, a utility, placing its facilities along streets and highways, gains no property right and upon demand must move its facilities at its

expense." 81 Idaho at 501. The highway district's exclusive authority and jurisdiction over the public right-of-way necessarily includes the exclusive power to determine who pays for the utility relocation. This is consistent with, and supported by Idaho Code §40-1312 which, as noted above, is an affirmative statement by the Idaho legislature that the power to the highway districts is to be liberally construed with all necessary powers to be implied.

Acting in its role as agent of the state per *Village of Lapwai v. Alligier*, and performing its governmental function with police power conferred by the state, ACHD exercised its exclusive jurisdiction over utility relocations (including financial liability for utility relocations) with the adoption of Resolution 330 in September 1986 (a copy of which is attached as Exhibit "A" to the Affidavit of Susan Slaughter which is attached hereto as Attachment "1"). Resolution 330 reflects the work of representatives of ACHD, the Boise City Department of Public Works and various utility organizations and establishes guidelines for utility and sewer relocations within the public rights-of-way under the jurisdiction of ACHD. Resolution 330 addresses utility and sewer relocations in a comprehensive fashion including assignment of financial responsibility, and establishment of operational procedures, in three different scenarios: 1) utility and sewer relocations are required because improvements in the public right-of-way are sponsored or funded by ACHD; 2) utility and sewer relocations are required because improvements in the public right-of-way are partially funded by ACHD and partially funded by another party; and 3) utility and sewer relocations are required because improvements in the public right-of-way do not involve the participation or funding of ACHD.

Accordingly, ACHD requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1 from Rule H.

B. As Modified by Idaho Power, Rule H Section 10 and Applicable Portions of Rule H Section 1 are Beyond the Jurisdiction of the IPUC.

The jurisdiction of the IPUC is limited to that expressly granted by the legislature. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875 (1979). In *Alpert v. Boise Water Corporation*, 118 Idaho 136, 795 P.2d 298 (1990), the Idaho Supreme Court cited *Washington Water Power Co. v. Kootenai Environmental Alliance* and other Idaho precedent reaching back to 1963 stating:

> The Idaho Public Utilities Commission exercises limited jurisdiction and has ***no authority other than that expressly granted to it by the legislature***. [cite to *Washington Water Power Co.]*. The Idaho Public Utilities Commission has ***no authority*** other than that given to it by the legislature. It exercises a limited jurisdiction and ***nothing is presumed*** in favor of its jurisdiction. *United States v. Utah Power & Light Co.*, 98 Idaho 665, 570 P.2d 1353 (1977); *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692 Idaho 692, 571 P.2d 753 (1977); *Arrow Transp. Co. v. Idaho Public Utils. Comm'n.*, 85 Idaho 307, 379 P.2d 422 (1962). As a general rule, administrative authorities are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the statutes reposing power in them and ***they cannot confer it upon themselves***, although may determine whether they have it. If the provisions of the statutes are not met and compliance it not had with the statutes, no jurisdiction exists. (Emphasis added.) *Alpert v. Boise Water Corporation*, 118 Idaho at 140

Additionally, in *Utah Power & Light Co. v. Idaho Public Utilities Commission*, 107 Idaho 47, 685 P.2d 276 (1984) the Idaho Supreme Court said, "[t]he Idaho Public Utilities Commission has no authority other than that given to it by the legislature. It exercises a limited jurisdiction and nothing is presumed in favor of its jurisdiction." *Utah Power & Light Co. v. Idaho Public Utilities Commission*, 107 Idaho at 52.

The IPUC is not granted authority to determine what may or may not incommode the public use as it pertains to public rights-of-way. In *Village of Lapwai v. Alligier*, 78 Idaho 124, 299 P.2d 475 (1956), the Idaho Supreme Court established clear lines of authority over the public rights-of-way and the relocation of utility facilities within public rights-of-way, stating:

> ". . . ***the [Public Utilities Law] does not contain any provision diminishing or transferring any of the powers and duties of the municipality to control and maintain its streets and alleys.*** Moreover, the legislature, in providing for the use of streets and alleys by utilities, expressly required the consent of the municipal authorities, and authorized the municipal authorities to impose reasonable regulations upon such use. The legislature recognizing the duty it imposes upon the municipality to control and maintain its streets and alleys, ***has preserved to the municipality the power*** to deny their use to a utility, or to impose reasonable regulations thereon, when necessary to the use of such streets and alleys by the public in the usual manner. . . we conclude that the ***village was not required to procure the consent of the [public utilities] commission*** as a condition to discontinuance of appellants' service and their ouster from its streets and alleys." (Emphasis added) *Village of Lapwai v. Alligier,* 299 P.2d at 478.

Rule H Section 10 and applicable portions of Rule H Section 1 are beyond the jurisdictional authority of the IPUC because they seek to affirmatively regulate the state's highway districts, 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. The state's highway districts, public road agencies, entities of government, third parties and developers are not "public utilities" as defined in Idaho Code § 61-129. Idaho Code § 61-101 provides, "[t]his act shall be known as "The Public Utilities Law" and shall apply to the public utilities and public services herein described and the commission herein referred to."

In *Order No. 30853* at page 13, the IPUC asserts jurisdiction via Idaho Code §§ 61-502 and 61-503. It is erroneous for the IPUC to find that these provisions of the Idaho Code, which

relate to rates and charges for services, products or commodities, provide the IPUC the jurisdiction and authority it has exercised in this matter. Mandatory relocation of utility facilities from the public rights-of-way is not a service, product or commodity. It is only by an unreasonable and irrational stretch of logic that the IPUC characterizes a mandatory relocation of utility facilities located in the public right-of-way permissively and subordinately to the public, to be "services". Certainly, per *Washington Water Power Co. v. Kootenai Environmental Alliance,* Idaho Code §§ 61-502 and 61-503 authorize the IPUC to determine whether utility costs associated with mandatory relocations may be included in a utility's rate base, but this is the limit of the IPUC's jurisdiction and authority in this matter. Idaho Code §§ 61-502 and 61-503 in no way, express or implied, provide the IPUC with the jurisdiction or authority to affirmatively intervene in the exclusive jurisdiction of the state's highway districts and public road agencies and thereby impose upon highway districts, public road agencies, entities of government, third parties, and developers the duty to pay for such relocations.

The IPUC's jurisdiction and authority to determine whether utility charges, services or practices are unjust, unreasonable, discriminatory or preferential does not expressly or impliedly provide the IPUC with the jurisdiction or authority to impose upon public road agencies, entities of government, third parties, and developers the duty to pay for such relocations and thereby affirmatively intervene in the exclusive jurisdiction of the state's highway districts.

Moreover, the IPUC's jurisdiction and authority to determine whether utility charges, services or practices are unjust, unreasonable, discriminatory or preferential does not expressly or impliedly provide the IPUC with the jurisdiction or authority to dictate the operation of public road agencies and thereby affirmatively intervene in the exclusive jurisdiction of the state's

highway districts. Rule H Section 10 and applicable portions of Rule H Section 1 dictate the operation of public road agencies in at least two ways. First, they effectively dictate the substance of any guidelines that public road agencies might develop for the allocation of utility relocation costs. Second, they will artificially and inappropriately inject the allocation of utility relocation costs into any development agreement between highway districts and third parties.

It is noteworthy that Idaho Code § 62-705 does not provide express or implied authority for utilities to charge for relocations and no such authority is granted to the IPUC in Idaho Code § 62-705. That the people have reserved the common law right to require the utilities to relocate facilities permissively located within the public right-of-way cannot mean to give utilities or the IPUC the authority to decide who pays for the relocation. Clearly, with the adoption of Section 10 Rule H, the IPUC has overstepped its jurisdictional bounds.

Rule H Section 10 and applicable portions of Rule H Section 1 are an unprecedented illegal usurpation of the highway districts' ***exclusive*** general supervision and jurisdiction over all highways and public rights-of-way. Through the adoption of Rule H Section 10 and applicable portions of Rule H Section 1, the IPUC will effectively dictate the policies and procedures of highway districts and local road agencies regarding electric utility relocations, impact the operation of highway districts and local road agencies in their negotiations and relations with third parties and developers concerning road improvement projects, and regulate and control electric utility relocations by assigning financial liability for such relocations. Such is strictly in the power and authority of the highway districts and should be left in the hands of the highway districts, working in a coordinated effort with local government officials and utility companies to develop an approach that is mutually beneficial.

Additionally, with the following provision, Rule H Section 10 attempts to regulate how quickly a public utility is required to make the relocation: "All payments from Third Party Beneficiaries to the Company under this Section shall be paid in advance of the Company's Relocation work, based on the Company's Word Order Cost." Thus, the IPUC is taking away from the highway districts and public road agencies the exclusive right, authority and jurisdiction to require the public utility to relocate its facilities on the highway district's schedule. ACHD has experienced problems in the past getting public utilities to relocate utility lines in a timely manner. See, Affidavit of Dorrell Hansen, attached hereto as Attachment "2". Rule H Section 10 explicitly takes ACHD's exclusive authority to control the timing of the relocation of utilities and transfers it to the IPUC and the utilities. Rule H Section 10 will jeopardize the timing and schedule of road project development and construction and the public's use of the right-of-way. See, Affidavit of Dorrell Hansen, attached hereto as Attachment "2".

ACHD is unaware of any similar move by the IPUC since its formation nearly 100 years ago. ACHD questions this aggressive and unprecedented move now, at this time.

ACHD requests that the IPUC overturn its clearly erroneous finding that "Section 10 does not explicitly or implicitly usurp the public road agencies' authority to manage and control their rights-of-way" (*Order No. 30853,* page 12) and that it reverse its earlier decision and strike Rule H Section 10 and the applicable portions of Rule H Section 1 from Rule H.

In *Order No. 30853* at page 9, the IPUC notes Idaho Power's acknowledgement that public road agencies such as ACHD have "sole and complete [exclusive] jurisdiction to determine when relocation is required to avoid incommoding the public" and that "in regard to the costs of utility facility relocations to determine utility rates and charges, the Commission has

exclusive jurisdiction", but that somehow, with regard to utility relocations, the public road agencies and the IPUC will "exercise jurisdiction concurrently". Unfortunately, it appears in *Order No. 30853* at page 13 that the IPUC has accepted Idaho Power's unfounded and incongruous position that two entities, each with exclusive jurisdiction, can exercise jurisdiction concurrently.

As previously stated, acting in its role as agent of the state per *Village of Lapwai v. Alligier*, and performing its governmental function with police power conferred by the state, ACHD exercised its exclusive jurisdiction over utility relocations (including financial liability for utility relocations) with the adoption of ACHD Resolution 330 in September 1986. Rule H Section 10 usurps ACHD Resolution 330 and ACHD's exclusive jurisdiction as outlined above. Additionally, Rule H Section 10 is in conflict with ACHD Resolution 330. As stated by the Idaho Supreme Court in *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950), "[t]he state and a municipal corporation may have concurrent jurisdiction over the same subject matter and in which event the municipality may make regulations on the subject notwithstanding the exercise of state regulations thereon, ***provided the regulations or law are not in conflict***." (Emphasis added.) *State v. Poynter*, 70 Idaho at 441. Additionally, it must be noted that in modifying Rule H Section 10 to provide that Rule H Section 10 will not apply if a public road agency has adopted "legally binding guidelines" with "substantially similar" terms, Idaho Power has highlighted the point that there can be no concurrent jurisdiction where regulations of a local entity and a state entity are in conflict. Thus, pursuant to *State v. Poynter* concurrent jurisdiction as proposed by Idaho Power and accepted by the IPUC cannot exist with regard to utility relocations from the public rights-of-way.

In adopting Rule H Section 10 and applicable portions of Rule H Section 1, the IPUC erroneously assumes that the public (rate payers) does not benefit from road projects funded by entities of government including but not limited to local improvement districts, as well as those funded by third parties, and developers; in fact, the opposite is quite true. The public (rate payers) benefits tremendously from road projects funded by entities of government including but not limited to local improvement districts, as well as those funded by third parties, and developers; this is evidenced by the fact that upon completion, such road projects are commonly accepted for the public by highway districts for ownership and maintenance as public right-of-way per Idaho Code § 40-1310. Additionally, the legislature has given highway districts the authority to organize local improvement districts as a funding mechanism for certain improvements. See Idaho Code § 40-1322.

Improvements, whether funded by an entity of government, including but not limited to local improvement districts, as well as those funded by third parties or developers, do provide certain local benefits, but the improvements also ultimately provide benefits to the general public. For example, a new subdivision may receive certain benefits from a new turn-out lane, but the general public benefits as well as the turn-out lane provides relief for the general flow of traffic. Highway districts and public road agencies have been exclusively authorized to evaluate such benefits, determine funding responsibilities and establish funding mechanisms where appropriate, and determine whether relocation of utility facilities is necessary so as to not incommode the public. It is beyond the jurisdiction of the IPUC to determine what does or does not constitute a general public benefit versus a third party benefit versus a shared benefit. Moreover, such a determination is well beyond the expertise and role of the IPUC. The IPUC

does not have the jurisdiction to act as arbiter in any dispute over public benefit, third party benefit, or shared benefit and to do so under Rule H Section 10 and applicable portions of Rule H Section 1 usurps the exclusive authority and jurisdiction of highway districts and public road agencies to govern the public use and safety of the public rights-of-way.

Moreover, the Idaho Supreme Court has clearly stated that the permissive use of the public right-of-way is a benefit which utilities and their rate payers enjoy and they and their rate payers should bear the burden of relocation from the public right-of-way when requested:

> A further answer to the argument that relocation costs should be paid by highway users is, that [Idaho Power's and Mountain States Telephone's] permissive use of the highways is for the benefit of the utilities and their subscribers and relocation costs should therefore be paid by them as an incident of such benefit; . . . *State v. Idaho Power Company*, 81 Idaho at 505.

Neither Idaho Power nor the IPUC can simply ignore the compelling policy issues expounded by the Idaho Supreme Court in the foregoing quotation from *State v. Idaho Power Company.*

ACHD requests that the IPUC overturn its clearly erroneous finding that Idaho Code §§ 61-502 and 61-503 expressly or impliedly provide the IPUC with the concurrent jurisdiction or authority to affirmatively intervene in the exclusive jurisdiction of the state's highway districts and public road agencies.

ACHD also questions the wisdom of singling out electric utilities for treatment. In *Order No. 30853,* at page 13, the IPUC praises the concept of maintaining "consistency between the agencies", yet, with the adoption of Section 10 of Rule H, the IPUC has singled out electric utilities. This creates a lack of consistency between and among the public utilities in Idaho.

Accordingly, ACHD requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1.

C. As Modified by Idaho Power, Rule H Section 10 and Applicable Portions of Rule H Section 1 are Unconstitutional

In *State v. Idaho Power Company*, the Idaho Supreme Court struck down as unconstitutional, Idaho Code § 40-120(27) which imposed upon the Idaho Board of Highway Directors (predecessor to the Idaho Department of Transportation) an affirmative obligation to pay for utility relocations associated with state highway projects. The Idaho Supreme Court ruled that Idaho Code § 40-120(27) violated both Article 8 § 2 and Article 7 § 17 of the Idaho Constitution. *State v. Idaho Power Company*, 81 Idaho at 515.

Article 8 § 2 of the Idaho Constitution prohibits the state from giving, loaning, or aiding in any manner the credit of the state to any individual, association, municipality or corporation. Article 7 § 17 of the Idaho Constitution mandates that proceeds from any tax on gasoline shall be used exclusively for the construction, repair, maintenance and traffic supervision of the public highways of Idaho and that no part of such funds shall by transfer of funds or otherwise, be diverted to any other purposes whatsoever. Article 8 § 4 of the Idaho Constitution is the local government analogue to Article 8 § 2 and prohibits counties, cities, and other political subdivisions from loaning pledging the credit or faith, directly or indirectly, in any manner, to or in aid of any individual, association, municipality or corporation.

In *Order No. 30853,* at page 13, and again in *Order No. 30883*, at page 2 the IPUC makes the clearly erroneous findings: "Section 10 in no way grants Idaho Power or this Commission authority to impose such costs on a public road agency". ACHD directs the IPUC to Subsection d of Section 10 which states: ". . . where the Company has a private right of occupancy for its power line facilities within the public road right-of-way, such as an easement or other private right, the costs of the relocation is borne by the Public Road Agency." Applying *State v. Idaho*

Power Company, it is clear that Subsection d of Section 10 clearly imposes a duty upon the state and public road agencies such as cities, counties or highway districts to pay for utility relocations associated with road projects, and therefore violates Article 8 § 2 and Article 7 § 17 of the Idaho Constitution (state) Article 8 § 4 of the Idaho Constitution (highway districts and other public road agencies) because it establishes a requirement upon the state and such entities of local government to pay for utility relocations.

The holdings of *State v. Idaho Power Company* apply to other entities of local government by virtue of Article 8 § 4 of the Idaho Constitution, including but not limited to, local improvement districts. Inclusion of any entity of local government, including but not limited to local improvement districts, in the definition of third party beneficiary as provided in the new Rule H Section 1, is a clear violation of Article 8 § 4 of the Idaho Constitution because it establishes a requirement upon such entities of local government to pay for utility relocations.

Idaho Power's revisions to Rule H Section 10 and Rule H Section 1, with the modification of "Local Improvement District" and addition of the definitions of "Public Road Agency" and "Third-Party Beneficiary", served only to rearrange these terms as expressed in the previous iteration of Rule H Section 10 as adopted by the IPUC in *Order No. 30853*. As originally adopted, Rule H Section 10 essentially defined the terms "Public Road Agency" and "Third-Party Beneficiaries", with use of text and parentheses. The previous version of Rule H Section 10 explicitly included a reference to "local improvement districts" in attempting to define the term "Third Party Beneficiaries". The previous version of Rule H Section 10 explicitly set out the definition of "Local Improvement District" as including "any local improvement district created under the statutory procedures set forth in Idaho Code Title 50,

Chapter 17." Thus, as revised, Rule H Section 10 and the applicable portions of Rule H Section 1 continues to include and be applicable to local improvement districts which may be created by any entity of local government such as a city, highway district or public road agency and therefore continues to violate the Idaho Constitution.

IPUC has erroneously found that Rule H Section 10 does not violate the Idaho Constitution. (*Order No. 30853,* page 13 and *Order No. 30883*, at page 2). ACHD requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1.

D. As Modified by Idaho Power, Rule H Section 10 and Applicable Portions of Rule H Section 1 is an illegal attempt to abrogate or amend the Common Law Rule

In *State v. Idaho Power Company*, the Idaho Supreme Court discussed the common law rule as follows: "[l]ong before the adoption of our Constitution, the people adopted the common law as the rule of decision in all cases not otherwise provided by law. . . . ***Under the common law, a utility, placing its facilities along streets and highways, gains no property right and upon demand must move its facilities at its expense***." (Emphasis added) 81 Idaho at 501. As noted above, in *State v. Idaho Power Company*, the Idaho Supreme Court struck down as unconstitutional, Idaho Code § 40-120(27) which established upon the Idaho Board of Highway Directors (predecessor to the Idaho Department of Transportation) an affirmative obligation to pay for utility relocations associated with state highway projects. In addition to finding Idaho Code § 40-120(27) to be a violation of Article 8 § 2 and Article 7 § 17 of the Idaho Constitution as discussed in the preceding section *II C*, the Idaho Supreme Court also indicated that Idaho Code § 40-120(27) was an unconstitutional abrogation of the common law rule.

> We are aware of the basic rule that, inasmuch as our Constitution is a limitation and not a grant of power, the legislature has plenary power in all matters except those prohibited by the Constitution. [cite omitted] Expressions of this rule, as it relates to the power of the legislature to change the common law obligation of utilities to pay the cost of relocation of their facilities, recognize that the legislature is powerless in the premises if there is a constitutional limitation upon the exercise of such power. ***And [Idaho Power's and Mountain States Telephone's] assertion that the legislature may abrogate the common law rule must be so circumscribed.*** The constitutional limitation upon the exercise of such legislative power is expressed [cites omitted] as follows: 'The common-law obligation of a utility to relocate its own structures * * * in connection with a grade crossing * * * program continues until the *Constitution* and statute *expressly provide otherwise*.' (Emphasis added.) (Emphasis supplied.) *State v. Idaho Power Company*, 81 Idaho at 503-504.

If Idaho Code § 40-120(27), a ***statute*** attempting to abrogate or modify the common law rule was contrary to the Idaho Constitution's limitation on power, then without question, Section 10, Rule H, an ***administrative rule*** of the IPUC is certainly contrary to the Idaho Constitution's limitation on power. Clearly, Rule H Section 10 and the applicable portions of Rule H Section 1 are violations of the Idaho Constitution's limitation on power to abrogate or amend the common law rule that utilities pay the cost of relocation of their facilities from the public rights-of-way.

Supporting the conclusion that the common law rule applies any time a utility is requested to relocate its facilities from the public rights-of-way, is *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho 30, 607 P.2d 1084 (1980), in which the Idaho Supreme Court found that the common law rule prohibited the utilities from obtaining reimbursement of their relocation costs from an urban renewal agency. Citing to *State v. Idaho Power Company*, the Idaho Supreme Court said:

> The rule at common law that utilities must relocate at their own expense is not an absolute, however, but is subject to legislative provision to the contrary, and also subject to any constitutional prohibition or requirement. [cite to *State v. Idaho Power Company*] We must thus decide whether the legislature has provided that the B.R.A must pay the costs of relocation. While I.C. §§ 50-2007(h) and 50-

2018(j)(3) permit payment of such costs, they do not appear to be mandatory. ***In the absence of clear legislative direction we decline to abolish the common law rule and establish a rule requiring relocation costs to be paid to permissive users such as utilities.*** (Emphasis added.) *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency*, 101 Idaho at 34-35.

It cannot be argued that there is a difference between urban renewal agencies and local improvement districts such that would justify a different treatment under *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency* for local improvement districts. Indeed, both urban renewal agencies and local improvement districts are created by entities of local government and each are granted the power to install, construct, and reconstruct streets and similar public facilities and each have the power to acquire property by purchase and condemnation.

As demonstrated above in Section *II.* B., Idaho Code §§ 61-502, 61-503, and 62-705 in no way, express or implied, 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 within the public rights-of-way. Moreover, Idaho Code §§ 61-502, 61-503, and 62-705 are completely absent of ***any*** legislative direction or intent that utilities should be entitled to recover their costs of relocation within the public rights-of-way. In the absence of "clear legislative direction" no such intent can be presumed or authority assumed by the IPUC.

ACHD requests that the IPUC strike Rule H Section 10 and applicable portions of Rule H Section 1 in light of the clear constitutional limitation on power to abrogate the common law rule as expressed by the Idaho Supreme Court in *State v. Idaho Power Company* and in light of a complete lack of legislative direction or authority regarding reimbursement of utility relocation

costs in Idaho Code §§ 61-502, 61-503, and 62-705 per *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency.*

Rule H Section 10 and applicable portions of Rule H Section 1 continue to include an overly broad and potentially troublesome definition of "third party beneficiary" which would include a highway district and it's duly created and established local improvement district. As discussed above, road improvements benefit the general public as a whole, whether undertaken as a highway district planned and coordinated project or by another entity improving its own facilities.

As noted in the preceding section, the principles of *State v. Idaho Power Company* and *Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency* apply equally to all other entities of local government including, but not limited to, local improvement districts established by highway districts under Idaho Code § 40-1322. The inclusion of ***any*** entity of local government, including but not limited to local improvement districts created by highway districts and public road agencies, in the definition of third party beneficiary is yet another violation of Article 8 § 4 of the Idaho Constitution and the common law rule that utilities pay the cost of relocation of their facilities within the public rights-of-way.

ACHD requests that the IPUC overturn its erroneous finding that Section 10 may include ***any*** local improvement districts. (*Order No. 30853,* page 13). ACHD requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1.

III.

CONCLUSION

As demonstrated above, Rule H Section 10 and applicable portions of Rule H section 1 as modified by Idaho Power are unauthorized usurpations of the clear and exclusive jurisdiction of Idaho's highway districts and public road agencies by the IPUC. To the extent that Rule H Section 10 and applicable portions of Rule H Section 1 are 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. Rule H Section 10 and applicable portions of Rule H Section 1 are also 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. ACHD hereby requests that the IPUC issue an Order reversing its earlier decisions and striking Rule H Section 10 and applicable portions of Rule H Section 1.

Respectfully submitted this 11th day of September, 2009.

Scott D. Spears

SCOTT D. SPEARS, Attorney for the Petitioner,
Ada County Highway District

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of September, 2009, I caused to be delivered by hand or by e-mail and U.S. Mail (postage pre-paid) in the manner indicated, a true and correct copy of the foregoing ADA COUNTY HIGHWAY DISTRICT'S BRIEF ON RECONSIDERATION AND CLARIFICATION upon the following parties:

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	**CASE NO. IPC-3-08-22** **AFFIDAVIT OF SUSAN K. SLAUGHTER IN SUPPORT OF ADA COUNTY HIGHWAY DISTRICT'S BRIEF ON RECONSIDERATION AND CLARIFICATION**

SUSAN K. SLAUGHTER, being first duly sworn on oath, deposes and says as follows:

1. I am presently the Executive Assistant to the Director, and Secretary/Clerk of the Board of the Ada County Highway District ("ACHD"). I have been employed with ACHD since 1993.

2. I make this affidavit based on my direct personal knowledge of the matters set forth below. I also make this affidavit based upon my capacity as the custodian of ACHD's official and permanent records in accordance with Idaho Code 40-1336.

3. Attached hereto as Exhibit "A" is a true and correct copy of the Ada County Highway District Resolution 330, which was adopted September 25, 1986. ACHD Resolution

ATTACHMENT 1

330 sets forth ACHD's current rules and standards for regulating the relocation of public utilities within public rights-of-way under the jurisdiction of the Ada County Highway District.

DATED this 11th day of September, 2009.

SUSAN K. SLAUGHTER
Ada County Highway District

SUBSCRIBED and SWORN to before me this 11th day of September, 2009.

RUTH G. MILLER NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise
My Commission Expires: 4/12/11

RESOLUTION NO. 330

BY THE ADA COUNTY HIGHWAY DISTRICT COMMISSIONERS:
CHARLES L. WINDER, GLENN J. RHODES, KEITH A. LOVELESS

A RESOLUTION REPEALING RESOLUTION NO. 232 AND ESTABLISHING A REVISED POLICY WITH RESPECT TO THE RELOCATION OF PUBLIC UTILITY AND SEWER FACILITIES WITHIN THOSE PUBLIC RIGHTS-OF-WAY UNDER THE JURISDICTION OF ADA COUNTY HIGHWAY DISTRICT.

WHEREAS, it is deemed to be in the best interests of Ada County Highway District and the various public utility and sewer entities who locate, relocate, install and/or reinstall facilities within the public rights-of-way to establish a revised policy with respect to the relocation of such facilities; and

WHEREAS, representatives of the District, Boise City Department of Public Works and various utility organizations met on December 18, 1985 to establish the guidelines for utility and sewer relocations within those public rights-of-way under the jurisdiction of Ada County Highway District;

NOW, THEREFORE, BE IT RESOLVED AND ORDAINED BY THE ADA COUNTY HIGHWAY DISTRICT BOARD OF COMMISSIONERS that the following policies shall be applicable with respect to the relocation of public utility and sewer facilities within the public rights-of-way under the jurisdiction of Ada County Highway District:

SECTION 1. UTILITY OR SEWER RELOCATIONS REQUIRED AS A RESULT OF RIGHT-OF-WAY IMPROVEMENTS FUNDED BY ADA COUNTY HIGHWAY DISTRICT.

This section is applicable to those instances where utility or relocations are required because improvements sponsored or funded by Ada County Highway District (District) are being undertaken within the public rights-of-way.

A. Relocation Cost Responsibility - The responsibility for costs associated with the relocation of utility or sewer facilities shall be assigned as follows:

(1) Should the District require that any facility of a utility or sewer company be relocated from its existing location to a new location within the public right-of-way, all relocation costs shall be the responsibility of the utility or sewer company.

EXHIBIT A

(2) If a utility or sewer company has facilities located on private property, with a right of occupancy other than its right to locate in a public right-of-way, and the District requires that any facility so located be relocated, the actual costs for such relocation shall be the responsibility of the District. Such costs shall be exclusive of profit allowances.

B. Operational Procedure:

(1) Preliminary Notification: The District will provide written notification of potential utility or sewer relocation requirements at the conceptual stage of project development. Any plans provided at this stage shall be noted as preliminary. Where practical, the District shall provide such notification one year in advance of the commencement of right-of-way improvement work. The notification specified herein shall be delivered to affected utility and/or sewer companies with a copy to the the Utility Coordinating Council (U.C.C.). The District shall provide the U.C.C. with a tentative schedule of its work for the ensuing fiscal year at the time of budget approval by the District's Board of Commissioners.

(2) Preliminary Review: As soon as reasonably possible and no later than forty-five calendar days after receipt of the notification indicating the need for utility or sewer relocations, the affected utility and/or sewer companies shall provide the District with a preliminary engineering plan. That plan shall include the time frame requirements for material acquisition and relocation work and special construction considerations that may affect scheduling.

(3) Revisions: If revisions are made in the District's preliminary plan which alter the initial utility or sewer relocation requirements, the District will provide the affected utility and/or sewer companies with revised plans. The affected companies shall, as soon as reasonably possible and no later than thirty calendar days after the delivery of the revised plans, provide to the District any revisions in the company's preliminary engineering plan or schedule.

(4) Final Notification: The District will provide the Utility Coordinating Council with final notification of its intent to proceed with right-of-way improvements and include the anticipated date work will commence thereon. This notification shall indicate that the work to be performed will either be accomplished pursuant to the preliminary plan or will be accomplished pursuant to a revised plan.

(5) Relocation Activity: Unless otherwise agreed upon, all utility or sewer relocations shall be completed prior to the anticipated date of commencement of work on the right-of-way improvements by the District.

A project construction control line will be established in the field by the District. The location of this control line will be established after review with the utility and/or sewer companies involved.

(6) Roadway Restoration: Whenever possible, District, utility and/or sewer company construction personnel shall coordinate their activities in an attempt to eliminate duplication of roadway restoration work.

SECTION 2. UTILITY OR SEWER RELOCATIONS REQUIRED AS A RESULT OF RIGHT-OF-WAY IMPROVEMENTS PARTIALLY FUNDED BY ADA COUNTY HIGHWAY DISTRICT

This section is applicable to those instances where utility or sewer relocations are required because of improvements being undertaken within the public rights-of-way which are partially funded by the District and partially funded by another individual, firm or entity.

A. Relocation Cost Responsibility: The responsibility for costs associated with the relocation of utility or sewer facilities shall be assigned as follows:

(1) Where the District requires that any facility of a utility and/or sewer company be relocated from its existing location to a new location within the public right-of-way, the utility and/or sewer company shall be responsible for that portion of the relocation costs that equals the percentage of the District's participation in the right-of-way improvement costs. The remaining utility and/or sewer relocation costs shall be the responsibility of the individual, firm or entity that provides funds for the balance of the right-of-way improvement costs.

(2) If a utility or sewer company has facilities located on private property, with a right-of-way occupancy other than its right to locate in a public right-of-way, and the District requires any facility so located to be relocated, the actual costs for such relocation shall be the responsibility of the District and the individual, firm or entity providing funds to accomplish the improvements within the public right-of-way. Such costs shall be exclusive of profit allowances.

B. Operational Procedure:

(1) Plan Review: The District will schedule a plan review conference to which representatives of all funding participants and affected utility and/or sewer companies will be asked to attend. Within thirty calendar days after the date of the plan review conference, the utility and/or sewer company shall provide the District with a project review statement outlining the utility or sewer relocation work required, the estimated cost thereof and the time required therefor. This statement should include the date on which field relocation work could commence and any other special construction considerations that may affect scheduling.

(2) Revisions: If revisions are made in the preliminary plans which alter the initial utility or sewer relocation requirements, the District will provide the affected companies with revised plans. The affected companies shall, as soon as reasonably possible and no later than thirty calendar days after delivery of the revised plans by the District, provide the District with any revisions to the initial project review statement.

(3) Final Notification: The District will provide the Utility Coordinating Council with final notification of its intent to proceed with right-of-way improvements and include the anticipated date that work will commence thereon. This notification shall indicate that the work to be performed will either be accomplished pursuant to the preliminary plan or will be accomplished pursuant to a revised plan.

(4) Relocation Activity: Unless otherwise agreed upon, all utility or sewer relocations shall be completed prior to the anticipated date of commencement of work on the right-of-way improvements.

(5) Roadway Restoration: Whenever possible, District, utility and/or sewer company construction personnel shall coordinate their activities in an attempt to eliminate duplication of roadway restoration work.

SECTION 3. UTILITY OR SEWER RELOCATIONS REQUIRED AS A RESULT OF RIGHT-OF-WAY IMPROVEMENTS NOT FUNDED BY ADA COUNTY HIGHWAY DISTRICT

This section is applicable to those instances where utility or sewer relocations are required because of improvements being undertaken within the public rights-of-way and do not involve participation or funding by Ada County Highway District (District).

A. Relocation Cost Responsibility - The responsibility for costs associated with the relocation of utility facilities shall be assigned as follows:

(1) When utility or sewer relocations are required as a result of improvements being made by a developer within the public rights-of-way which were scheduled to have otherwise been made by the District within three years of the date said improvements are actually commenced, then the responsibility for the costs of utility relocations shall be in conformance with Section 1 of this Resolution.

(2) When utility or sewer relocations are required as a result of improvements being made by a developer within the public rights-of-way which were not scheduled to have otherwise been made by the District within three years of the date said improvements are actually commenced, then the responsibility for the costs of utility or sewer relocations shall be that of the developer.

(3) Roadway Restoration: Whenever possible, District, utility and/or sewer company construction personnel shall coordinate their activities in an attempt to eliminate duplication of roadway restoration work.

B. Operational Procedure:

(1) Plan Review: The developer shall provide the District and all affected utility and/or sewer companies with preliminary project plans and schedule a plan review conference to be held at the District offices. At the plan review conference each company shall have the right to appeal, adjust and/or negotiate with the District and developer on its own behalf. The utility and/or sewer companies may operate as a technical committee in comprehensive plan review with the District. Each utility and/or sewer company shall provide the developer and the District with a letter of review indicating the magnitude of and time required for relocation of its facilities. Said letter of review is to be provided within thirty calendar days after the date of the plan review conference.

(2) Revisions: If revisions are made in the preliminary plans which modify the utility or sewer relocation requirements, the companies shall be provided with such revised plans and have thirty calendar days after receipt thereof to review and comment thereon.

(3) Final Notification: The developer will provide the District, utility and/or sewer companies with final notification of its intent to proceed with the right-of-way improvements and include the anticipated date work will commence thereon. This notification shall indicate that the work to be performed will either be accomplished pursuant to the preliminary plan or will be accomplished pursuant to a revised plan.

(4) Relocation Activity: Unless otherwise agreed upon, all utility or sewer relocations shall be completed within the times established during the plan review process.

C. Signalized Intersections - Should any utility or sewer relocation activity be in close proximity of an intersection included in the District's Traffic Planning Policy for signalization or intersection turning movements, the developer, the utility and/or sewer company shall meet with the District to determine the responsible cost allocation for signalization or turning movement modifications.

D. Trust Fund Deposits - In those cases where a developer elects or is required to make a deposit to the District's Road Trust Fund Account to provide for future improvements within the public rights-of-way in lieu of the immediate construction thereof, the developer will be required to include in the deposit an amount equal to 110% of the utility and/or sewer company's estimated cost to accomplish the required utility and/or sewer relocation work.

Deposits, administration and disbursements of monies for future utility or sewer improvements or relocations within the public rights-of-way shall be governed by the provisions of the District's then current Resolution regarding the Public Rights-of-Way Trust Fund.

SECTION 4. UTILITY OR SEWER FACILITY UPGRADES WITHIN THE PUBLIC RIGHTS-OF-WAY

When any utility or sewer company upgrades or modifies those facilities located within the public rights-of-way for its own purposes, all costs of the work associated therewith shall be the sole responsibility of the utility company undertaking such activity.

SECTION 5. REPEAL OF RESOLUTION NO. 232

Resolution No. 232, adopted by the Board of Commissioners of Ada County Highway District on August 18, 1983, is hereby repealed.

ADOPTED this 25th day of September, 1986 by the Board of Commissioners, Ada County Highway District.

Charles L. Winder, President

(SEAL)

Glenn J. Rhodes, Vice-President

ATTEST:

Tom L. MacGregor, Director

Keith A. Loveless, Secretary

Scott D. Spears, ISB # 4180
Ada County Highway District
3775 Adams Street
Garden City, Idaho 83714
Office: (208) 387-6113
Fax: (208) 345-7650
sspears@achd.ada.id.us

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	**CASE NO. IPC-3-08-22** **AFFIDAVIT OF DORRELL R. HANSEN IN SUPPORT OF ADA COUNTY HIGHWAY DISTRICT'S BRIEF ON RECONSIDERATION AND CLARIFICATION**

DORRELL R. HANSEN, P.E., being first duly sworn on oath, deposes and says as follows:

1. I am presently the Project Manager/Supervisor, Capital Projects Department, of the Ada County Highway District ("ACHD"). I have been employed with ACHD since 1993.

2. I make this affidavit based on my direct personal knowledge of the matters set forth below.

3. All documents attached as exhibits in this affidavit are true and correct copies of the documents.

4. I am a registered Professional Engineer of the State of Idaho, and I have a Masters Degree in Civil Engineering.

ATTACHMENT 2

5. ACHD is a single, county-wide highway district. It was formed by vote of the citizens of Ada County in 1972. ACHD has all of the powers of highway districts in general set forth in Title 40, Chapter 13 of the Idaho Code, and all of the powers of single, county-wide highway districts under Title 40, Chapter 14 of the Idaho Code. *See* Idaho Code § 14-1406.

6. Under the Idaho Code, ACHD has exclusive jurisdiction, authority, and control over all roads in Ada County and all roads in the cities in Ada County, except for Interstate 84, Interstate 184 and state highways under the jurisdiction and control of the Idaho Transportation Department. *See* Idaho Code Title 40, Chapters 13 and 14.

7. Upon the formation of ACHD, the road departments of Ada County, the City of Boise, Garden City, the City of Meridian, and the other incorporated cities within Ada County were disbanded, and the road systems were all transferred to ACHD. *See* Idaho Code §§ 40-1210(1), 40-1406.

8. Pursuant to Idaho Code 62-705, utilities have the right to locate in the public rights-of-way, however, the right of the utilities to use the public rights-of-way cannot be regarded as a permanent property right. Generally, when a road project impacts a utility in the public right-of-way, the utility is responsible for relocations and adjustments in a manner and at such places as to not to inconvenience public use.

9. The following is a list of the positions I have held with ACHD and the years I held each position:

Project Manager/Supervisor, Capital Projects Department	2006-Present
Assistant Manager, Engineering Department	2000-2006
Supervisor, Drainage/Utilities Division	1997-2000

Staff Civil Engineer, Drainage/Utility Division 1993-1997

10. I have extensive personal knowledge of road development. The relocation of utilities is a critical important element of project development, which can significantly impact a project schedule and costs.

11. Early in my tenure with ACHD, I created and supervised the Utilities Division at ACHD and headed that division until 2006. Given my background and experience, I continued to have substantial involvement in utility relocation issues for ACHD.

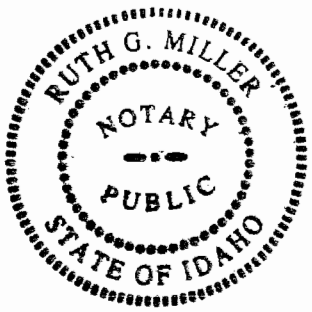
12. I have extensive knowledge of ACHD's interactions with utilities in Ada County, including Idaho Power, on issues involving utility relocations in the public rights-of-way on road projects. The Utility Division was created in an effort to coordinate the relocation of utilities on road projects. Historically, ACHD has had extensive problems in getting some utilities to relocate in a timely manner. The lack of coordination of utilities for road projects has caused delay and contractor claims for road projects.

13. I have reviewed the Idaho Public Utilities Commission Rule 10, which transfers ACHD's authority to control the timing of the relocation of utilities to Idaho Power. Rule 10 will severly impact ACHD's statutory responsibility to develop road projects and the public's use of the right-of-way.

DATED this 11 day of September, 2009.

DORRELL R. HANSEN, P.E.
Ada County Highway District

SUBSCRIBED and SWORN to before me this 11th day of September, 2009.



Notary Public for Idaho
Residing at: Boise
My Commission Expires: 4/12/11

Michael C. Creamer, ISB #4030
Conley E. Ward, ISB # 1683
GIVENS PURSLEY LLP
601 W. Bannock St.
Post Office Box 2720
Boise, Idaho 83701-2720
Telephone: 208-388-1200
Facsimile: 208-388-1300
10495-1_659715_1.DOC

Attorneys for Intervenor Building Contractors
Association of Southwestern Idaho

RECEIVED
2009 SEP 14 PM 4:15
IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS

CASE NO. IPC-E-08-22

AMENDED CERTIFICATE OF SERVICE

Building Contractors Association of Southwestern Idaho ("Building Contractors"), by and through its attorneys of record, Givens Pursley LLP, hereby submits its Amended Certificate of Service of the Testimony on Reconsideration of Dr. Richard Slaughter.

The undersigned hereby certifies that on the 11th day of September, 2009, a true and correct copy of the Testimony on Reconsideration of Dr. Richard Slaughter was served upon the following individual(s) by the means indicated:

Original + 9 Copies Filed:

Jean D. Jewell, Secretary Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, Idaho 83720-0074	☐ ☐ ☒ ☐ ☐	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail

Service Copies:

Lisa D. Nordstrom Barton L. Kline Idaho Power Company PO Box 70 Boise, ID 83707-0070 lnordstrom@idahopower.com bkline@idahopower.com cc: cbearry@idahopower.com	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail
Scott Sparks Gregory W. Said Idaho Power Company PO Box 70 Boise, ID 83707-0070 ssparks@idahopower.com gsaid@idahopower.com	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail
Kristine A. Sasser Deputy Attorney General Idaho Public Utilities Commission 472 W. Washington PO Box 83720 Boise, ID 83720-0074 kris.sasser@puc.idaho.gov	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail

Matthew A. Johnson Davis F. VanderVelde White, Peterson, Gigray, Rossman, Nye & Nichols, P.A. 5700 E. Franklin Rd., Ste. 200 Nampa, ID 83687 mjohnson@whitepeterson.com dvandervelde@whitepeterson.com *Attorneys for The City of Nampa and The Association of Canyon County Highway Districts*	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail
Michael Kurtz Kurt J. Boehm Boehm, Kurtz & Lowry 36 E. Seventh St., Ste. 1510 Cincinnati, OH 45202 mkurtz@BKLlawfirm.com Kboehm@BKLlawfirm.com *Attorneys for The Kroeger Co.*	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail
Kevin Higgins Energy Strategies, LLC Parkside Towers 215 S. State St., Ste. 200 Salt Lake City, UT 84111 khiggins@energystrat.com *Representing The Kroeger Co.*	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail
Scott D. Spears Ada County Highway District 3775 Adams Street Garden City, ID 83714 sspears@achd.ada.id.us	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail

Respectfully submitted this 14th day of September, 2009.

GIVENS PURSLEY LLP

By: _____ FOR
Michael C. Creamer
Attorneys for Intervenor Building Contractors Association of Southwestern Idaho

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2009, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

Original + 7 Copies Filed:

Jean D. Jewell, Secretary Idaho Public Utilities Commission 472 West Washington Street P.O. Box 83720 Boise, Idaho 83720-0074	☐ ☐ ☒ ☐ ☐	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail

Service Copies:

Lisa D. Nordstrom Barton L. Kline Idaho Power Company PO Box 70 Boise, ID 83707-0070 lnordstrom@idahopower.com bkline@idahopower.com cc: cbearry@idahopower.com	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail
Scott Sparks Gregory W. Said Idaho Power Company PO Box 70 Boise, ID 83707-0070 ssparks@idahopower.com gsaid@idahopower.com	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail
Kristine A. Sasser Deputy Attorney General Idaho Public Utilities Commission 472 W. Washington PO Box 83720 Boise, ID 83720-0074 kris.sasser@puc.idaho.gov	☒ ☐ ☐ ☐ ☒	U.S. Mail, postage prepaid Express Mail Hand Delivery Facsimile Electronic Mail

Matthew A. Johnson Davis F. VanderVelde White, Peterson, Gigray, Rossman, Nye & Nichols, P.A. 5700 E. Franklin Rd., Ste. 200 Nampa, ID 83687 mjohnson@whitepeterson.com dvandervelde@whitepeterson.com *Attorneys for The City of Nampa and The Association of Canyon County Highway Districts*	☒ U.S. Mail, postage prepaid ☐ Express Mail ☐ Hand Delivery ☐ Facsimile ☒ Electronic Mail
Michael Kurtz Kurt J. Boehm Boehm, Kurtz & Lowry 36 E. Seventh St., Ste. 1510 Cincinnati, OH 45202 mkurtz@BKLlawfirm.com Kboehm@BKLlawfirm.com *Attorneys for The Kroeger Co.*	☒ U.S. Mail, postage prepaid ☐ Express Mail ☐ Hand Delivery ☐ Facsimile ☒ Electronic Mail
Kevin Higgins Energy Strategies, LLC Parkside Towers 215 S. State St., Ste. 200 Salt Lake City, UT 84111 khiggins@energystrat.com *Representing The Kroeger Co.*	☒ U.S. Mail, postage prepaid ☐ Express Mail ☐ Hand Delivery ☐ Facsimile ☒ Electronic Mail
Scott D. Spears Ada County Highway District 3775 Adams Street Garden City, ID 83714 sspears@achd.ada.id.us	☒ U.S. Mail, postage prepaid ☐ Express Mail ☐ Hand Delivery ☐ Facsimile ☒ Electronic Mail

FOR

Michael C. Creamer

Office of the Secretary
Service Date
September 16, 2009

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	CASE NO. IPC-E-08-22 NOTICE OF HEARING FOR ORAL ARGUMENT NOTICE OF TECHNICAL HEARING ORDER NO. 30900

On July 1, 2009, the Commission issued Order No. 30853 approving Idaho Power Company's request to modify its Rule H tariff addressing charges for installing or altering distribution lines. The Ada County Highway District, City of Nampa, Association of Canyon County Highway Districts (collectively "the Districts"), and Building Contractors Association (BCA) all filed timely Petitions for Reconsideration. On July 29, 2009, Idaho Power filed an answer to the Petitions.

On August 19, 2009, the Commission issued Interlocutory Order No. 30883 granting in part and denying in part the Petitions and establishing a schedule for the reconsideration of limited issues with dates for oral argument and technical hearing to be determined. By this Order, the Commission establishes a schedule for the Districts' oral argument and BCA's technical hearing.

NOTICE OF HEARING FOR ORAL ARGUMENT

YOU ARE HEREBY NOTIFIED that, given the complexity of the constitutional and jurisdictional arguments posed by the Districts on reconsideration and the Company's acknowledgement that the phrase "local improvement district" should be clarified, the Commission found it appropriate to grant reconsideration on the disputed language contained in Section 10.

YOU ARE FURTHER NOTIFIED that the Commission will convene a hearing for the Districts to **orally argue** the disputed language contained in Section 10 of Rule H on **TUESDAY, OCTOBER 13, 2009, AT 1:00 P.M. IN THE COMMISSION HEARING ROOM, 472 WEST WASHINGTON STREET, BOISE, IDAHO**.

NOTICE OF TECHNICAL HEARING

YOU ARE FURTHER NOTIFIED that the Petition for Reconsideration filed by BCA was granted in part and denied in part. The Commission found it appropriate to grant reconsideration on the limited issue of the amount of appropriate allowances. BCA was directed to address what allowance amount is reasonable based on the cost of new distribution facilities.

YOU ARE FURTHER NOTIFIED that the Commission will conduct a **technical hearing** for BCA in this matter on **TUESDAY, OCTOBER 20, 2009, COMMENCING AT 9:00 A.M. AT THE COMMISSION'S HEARING ROOM, 472 WEST WASHINGTON, BOISE, IDAHO**.

YOU ARE FURTHER NOTIFIED that all hearings and oral arguments in this matter will be held in facilities meeting the accessibility requirements of the Americans with Disabilities Act (ADA). Persons needing the help of a sign language interpreter or other assistance in order to participate in or to understand testimony and argument at a public hearing may ask the Commission to provide a sign language interpreter or other assistance at the hearing. The request for assistance must be received at least five (5) working days before the hearing by contacting the Commission Secretary at:

IDAHO PUBLIC UTILITIES COMMISSION
PO BOX 83720
BOISE, IDAHO 83720-0074
(208) 334-0338 (Telephone)
(208) 334-3762 (FAX)
E-Mail: secretary@puc.idaho.gov

YOU ARE FURTHER NOTIFIED that all proceedings in this case will be held pursuant to the Commission's jurisdiction under Title 61 of the Idaho Code and that the Commission may enter any final Order consistent with its authority under Title 61.

YOU ARE FURTHER NOTIFIED that all proceedings in this matter will be conducted pursuant to the Commission's Rules of Procedure, IDAPA 31.01.01.000, *et seq.*

ORDER

IT IS HEREBY ORDERED that the Districts' oral argument regarding the disputed language in Section 10 of Rule H take place on October 13, 2009, at 1:00 p.m. in the Commission Hearing Room.

IT IS FURTHER ORDERED that BCA's technical hearing take place regarding the limited issue of the amount of appropriate allowances on October 20, 2009, at 9:00 a.m. in the Commission Hearing Room.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 16th day of September 2009.

JIM D. KEMPTON, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

MACK A. REDFORD, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

O:IPC-E-08-22_ks7_Oral_Technical Hearings

IDAHO POWER®
An IDACORP Company

LISA D. NORDSTROM
Senior Counsel
lnordstrom@idahopower.com

September 21, 2009

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. IPC-E-08-22
Rule H

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies of Idaho Power Company's Motion to Strike Portions of the Affidavit of Dorrell R. Hansen in the above matter.

Very truly yours,

Lisa D. Nordstrom

Lisa D. Nordstrom

LDN:csb
Enclosures

P.O. Box 70 (83707)
1221 W. Idaho St.
Boise, ID 83702

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Attorneys for Idaho Power Company

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	)	CASE NO. IPC-E-08-22
	)	IDAHO POWER COMPANY'S MOTION TO STRIKE PORTIONS OF THE AFFIDAVIT OF DORRELL R. HANSEN

COMES NOW, Idaho Power Company ("Idaho Power"), in accordance with the Idaho Public Utilities Commission's Rules of Procedure ("RP") 56, 261, and 265, as well as Rules 401, 402, 602, 701, and 702 of the Idaho Rules of Evidence ("IRE"), hereby objects and moves the Commission for an Order striking certain paragraphs from the Affidavit of Dorrell R. Hansen submitted in support of Ada County Highway District's ("ACHD") Brief on Reconsideration and Clarification. Idaho Power moves the Commission to strike, in their entirety, paragraphs 3, 6, and 8 and to strike portions of paragraphs 12 and 13 from the Affidavit of Dorrell R. Hansen.

I. INTRODUCTION

Idaho Power makes this evidentiary objection and moves the Commission to strike portions of the Affidavit of Dorrell R. Hansen on the grounds that certain portions of Mr. Hansen's testimony contain inadmissible evidence that lack proper foundation, lack of personal knowledge, lack relevance, and containing conclusory or speculative statements. Specifically, paragraph 3 lacks of relevance and paragraphs 6 and 8 are legal conclusions based upon inadmissible opinion testimony. Additionally, paragraphs 12 and 13 contain conclusory and speculative statements that lack foundation. These paragraphs must be stricken because they fail to comply with minimum evidentiary standards.

II. ARGUMENT

A. Standard of Admissibility.

RP 261 provides that the Idaho Rules of Evidence are generally followed by the Commission. "Rules as to the admissibility of evidence used in the district courts of Idaho in non-jury civil cases are generally followed, but evidence (including hearsay) not admissible in non-jury civil cases may be admitted to determine facts not reasonably susceptible of proof under the Idaho Rules of Evidence." RP 261. As such, the Commission "may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or inadmissible on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho." RP 261. While recognizing that the Commission is not bound by the Idaho Rules of Evidence, such Rules will be utilized to establish each proposition to strike paragraphs from the Affidavit of Dorrell R. Hansen.

B. **Inadmissible Portions of the Affidavit of Dorrell R. Hansen.**

RP 51 allows for affidavits to be filed in support of any pleading, including applications, petitions, complaints, motions, answers, and consent agreements. However, the evidence set forth therein should satisfy the rules for admissibility for it to be considered. The following paragraphs, or portions of paragraphs, of the Affidavit of Dorrell R. Hansen are inadmissible evidence to be stricken from the Affidavit of Dorrell R. Hansen and excluded accordingly.

1. **Paragraph 3 Must be Stricken in Its Entirety.**

In paragraph 3 of his Affidavit, Mr. Hansen testifies, "All documents attached as exhibits in this affidavit are true and correct copies of the documents." (Hansen Aff. at 1). As filed with the Commission and served upon Idaho Power, Mr. Hansen's Affidavit neither attaches nor identifies with particularity any exhibits. Therefore, paragraph 3 lacks of relevant evidence and is not admissible. IRE 401 and 402. Striking this paragraph will avoid any future confusion regarding what evidence has been considered by the Commission in this matter.

2. **Paragraphs 6 and 8 Must be Stricken in Their Entirety**

In paragraphs 6 and 8 of his Affidavit, Mr. Hansen testifies:

> 6. Under the Idaho Code, ACHD has exclusive jurisdiction, authority, and control over all roads in Ada County and all roads in the cities in Ada County, except for Interstate 84, Interstate 184 and state highways under the jurisdiction and control of the Idaho Transportation Department. *See* Idaho Code Title 40, Chapters 13 and 14.

(Hansen Aff. at 2).

> 8. Pursuant to Idaho Code 62-705, utilities have the right to locate in the public rights-of-way, however, the right of the utilities to use the public rights-of-way cannot be regarded as a permanent property right. Generally, when a road project impacts a utility in the public right-of-way, the utility is responsible for relocations and adjustments in a manner and at such places as to not to inconvenience public use.

(Hansen Aff. at 2). Each of these paragraphs describes the application of Idaho law by ACHD and further contains citation to the corresponding Idaho Code sections as support. A witness may only testify on matters of which he has personal knowledge. IRE 602. No foundation has been laid establishing Mr. Hansen as a witness qualified to interpret the Idaho Code or opine on the legal issues before the Commission.

The Affidavit is ambiguous as to whether Mr. Hansen is attempting to testify as a lay witness or as an expert witness. If Mr. Hansen's Affidavit is intended as testimony of a lay witness, it is not based on actual knowledge, nor is it rationally based on his perception as a witness, nor is it helpful to a clear understanding of his testimony or the determination of a fact in issue. IRE 701. Therefore, each of these paragraphs consists wholly of legal conclusions given by a lay witness. "A lay witness is never permitted to give his opinion on a question of law." *Hawkins v. Chandler*, 88 Idaho 20, 26, 396 P.2d 123, 126 (1964).

Even if Mr. Hansen's Affidavit is intended as testimony of an expert witness, no foundation has been laid establishing Mr. Hansen's qualifications to interpret Idaho law. These paragraphs are improper opinion testimony and must be struck.

3. Paragraphs 12 and 13 Must be Partially Stricken.

In paragraphs 12 and 13 of his Affidavit, Mr. Hansen testifies:

> 12. I have extensive knowledge of ACHD's interactions with utilities in Ada County, including Idaho Power, on issues involving utility relocations in the public rights-of-way on road projects. The Utility Division was created in an effort to coordinate the relocation of utilities on road projects. *Historically, ACHD has had extensive problems in getting some utilities to relocate in a timely manner. The lack of coordination of utilities for road projects has caused delay and contractor claims for road projects.*

(Hansen Aff. at 3 (emphasis added)).

> 13. I have reviewed the Idaho Public Utilities Commission Rule 10, which transfers ACHD's authority to control the timing of the relocation of utilities to Idaho Power. *Rule 10 will severly [sic] impact ACHD's statutory responsibility to develop road projects and the public's use of the right-of-way.*

(Hansen Aff. at 3 (emphasis added)). Neither paragraph 12 nor 13 assist the Commission, the trier of fact, because neither meets the basic criteria for admissibility. Each paragraph lacks of any foundation establishing the basic information that might make them relevant, including, who or what utilities ACHD has had problems with, when such problems occurred, and the circumstances of the situation(s) from which such problems arose. There is utterly no explanation as to why "Rule 10 will severly [sic] impact ACHD's statutory responsibility to develop road projects . . . ." Without this basic information, how can the Commission determine either the credibility or the relevance of the purported testimony?

"Statements that are conclusory or speculative do not satisfy either the requirement of admissibility or competency [for a supporting affidavit]." *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 917, 188 P.3d 854, 859 (2008)

(applying evidentiary requirements of Idaho R. Civ. Pro. 56(e)). The italicized portion of paragraph 12 creates the implication that ACHD's problems have been with Idaho Power; however, no facts are presented that validate such implications. The italicized portion of paragraph 12 is a conclusory and speculative statement that wholly lacks of foundation. Further, paragraph 13 contains speculative and conclusory statements of what could happen, not statements of what has actually happened. The italicized portions of paragraphs 12 and 13 are inadmissible evidence and should be struck accordingly.

III. CONCLUSION

For the foregoing reasons, Idaho Power respectfully requests that the Commission grant, in its entirety, this Motion to Strike.

DATED at Boise, Idaho, this 21st day of September 2009.

Lisa D. Nordstrom

LISA D. NORDSTROM
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21ST day of September 2009 I served a true and correct copy of IDAHO POWER COMPANY'S MOTION TO STRIKE PORTIONS OF THE AFFIDAVIT OF DORRELL R. HANSEN upon the following named parties by the method indicated below, and addressed to the following:

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September 21, 2009

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. IPC-E-08-22
Rule H

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies of Idaho Power Company's Reply Brief on Reconsideration in the above matter.

Very truly yours,

Lisa D. Nordstrom

Lisa D. Nordstrom

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Enclosures

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	)	CASE NO. IPC-E-08-22
	)	IDAHO POWER COMPANY'S REPLY BRIEF ON RECONSIDERATION

Idaho Power Company (hereinafter "Idaho Power" or "Company") hereby submits its Reply Brief on Reconsideration pursuant to the Commission's Interlocutory Order No. 30883, issued August 19, 2009, and Idaho Code § 61-626 and RP 322.

In Interlocutory Order No. 30883, the Commission directed the Ada County Highway District ("ACHD"), City of Nampa ("Nampa"), and the Association of Canyon County Highway Districts ("ACCHD") (hereinafter collectively "the Public Road Agencies" or "PRAs") to file Briefs concerning the legal arguments the Public Road Agencies have raised in this proceeding. Idaho Power was also given the opportunity to respond to the Public Road Agencies Briefs. Idaho Power's response is as follows:

I. Those Who Cause Costs to be Incurred Should Pay Those Costs.

In reading a legal brief, it is difficult not to become immersed in the details of the various statutes and court decisions discussed in the brief. However, in reviewing the briefs in this case, it is particularly important not to lose sight of the forest because of the trees. Idaho Power initiated this proceeding to implement changes to its Rule H in furtherance of one of the fundamental principles of electric utility regulation; that to the extent practicable, utility costs should be paid by those entities that cause the utility to incur the costs. This principle is often referred to as "cost-causation" and is one of the bedrocks of utility regulation. Idaho Power's Rule H is a good example of how the Commission exercises its jurisdiction to address a "cost-causation" by requiring those entities that cause Idaho Power to incur additional costs to pay those additional costs. If the "cost-causers" do not pay, the electric rates for the utilities' other customers will be higher than they would otherwise be. If that result is allowed, Idaho Power's rates are neither "just and reasonable" as required by Idaho Code § 61-503 nor non-discriminatory and non-preferential as required by Idaho Code § 61-515.

This principle is not an alien one for PRAs. In the past, they have expressed the need to assess and recover impact fees from entities that require the PRAs to construct road improvements. The PRAs, like Idaho Power, have frequently emphasized the need to have "growth pay its way." The situation is identical when considering recovery of the costs of mandatory utility relocations. Growth should pay its way.

Section 10 is new to Rule H. Idaho Power decided to add Section 10 and the associated definitions contained in Section 1 of Rule H for two reasons. First, Section 10 is intended, to the extent permitted by law, to accomplish exactly what Rule H is

intended to accomplish, that is to recover costs from those entities that cause the costs to be incurred.

Second, Idaho Power felt it was necessary to add Section 10 to Rule H because of increasing concerns relating to public road agencies inappropriately facilitating shifts of relocation expenses to Idaho Power and its customers. Idaho Power witness David R. Lowry presented direct testimony describing this recent trend toward shifting relocation expenses. (Lowry DI, pp. 5-8.) ACHD has acknowledged the cost-shifting problem in the past. ACHD's Resolution 330, upon which Idaho Power's Section 10 or Rule H is patterned, is a workable, reasonable approach to the problem. Because there are so many PRAs in the Company's service area, the Company concluded that the most practical way to establish a uniform approach across its entire service area was to include Section 10 in Rule H.

II. Idaho Power Does Not Dispute Public Road Agencies' Authority to Manage Their Rights-of-Way and Require Relocations.

The PRAs' Briefs can each be separated into two major parts. The first part of each of the PRAs' Briefs consists of a recitation of the statutes and case law that describe the jurisdiction of PRAs over their respective rights-of-way and their ability to require utilities to relocate utility facilities previously placed in public rights-of-way. The cases and statutes cited are the same ones the PRAs identified in their prior comments in this proceeding. The cases and statutes they cite are straightforward and speak for themselves. In general, Idaho Power does not dispute the general propositions presented by the PRAs in this first part of their Brief that:

1. PRAs have exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system and full power to

establish design standards and establish use standards. (ACHD Brief, p. 3; Joint Brief, p. 2.)

2. Idaho Power only has a permissive right to use the public rights-of-way for its facilities and if a PRA directs Idaho Power to relocate its facilities to a new location in the public right-of-way because those facilities "incommode the public," such order does not constitute a taking of Idaho Power's property. (ACHD, pp. 5-6; Joint Brief, p. 2.)

Idaho Power respectfully disagrees with the balance of the PRAs' arguments presented in their Briefs.

III. Section 10 of Rule H Does Not Encroach on the PRAs' Legal Authority or Operations.

While PRAs assert repeatedly in their Briefs that Section 10 of Rule H would be a material abridgement of the PRAs' authority and would therefore compromise their ability to manage highways and roads, they do not provide any examples of a fundamental management function of the PRA that will be adversely affected by Section 10 of Rule H. In the case of the ACHD, it is difficult to see how it could point out any material problems because Idaho Power and ACHD have operated under Resolution 330, which is very similar to Section 10 of Rule H, for more than twenty years.

As proposed, Section 10 of Rule H allows the three PRAs to continue to: (1) fully exercise their authority to determine that Idaho Power must relocate its facilities in public rights-of-way to accommodate road improvements and (2) determine the percentage, if any, a road improvement will benefit a third party and collect that percentage from the third party. Under Section 10 of Rule H, Idaho Power will use the same percentage the PRA initially used to allocate the costs of the road improvement to

then allocate the cost of relocation of Idaho Power facilities to the same third parties that contributed to the costs of the road improvement.

In its Reply Comments, Idaho Power presented a flowchart which shows how the PRA and the Commission would each exercise its jurisdiction in implementing Section 10 of Rule H. Attachment No. 7 illustrates how Section 10 of Rule H would in no way encroach on the jurisdiction or operations of the PRAs. For the Commission's convenience, a copy of Attachment No. 7 is attached to this Reply Brief.

IV. The Commission Has Exclusive Jurisdiction Over Utility Facility Relocation Expense.

The second parts of each of the PRAs' two briefs are directed to the Commission's purported lack of jurisdiction to approve Section 10 or Rule H. Both PRAs assert that the Commission does not have legal authority to require anyone to reimburse the Company for costs the Company incurs to relocate utility facilities in a public right-of-way. They claim no Commission jurisdiction exists, even when a relocation is required to provide a direct benefit to the private property of a non-PRA, such as a real estate developer or land owners whose property is adjacent to a public road. The Joint Brief of Nampa and ACCHD unequivocally states the PRAs' position:

> Similarly, the Public Utilities Act does not give the IPUC the jurisdiction to take utility relocation costs and impose the duty to pay them on public road agencies, government entities, developers, or other third parties alleged to have specifically benefited from the improvements. Idaho Code § 67-205 provides no express or implied authority for utilities to charge third parties for relocations. If the governing public road agency determines that relocation is necessary to support the public use and safety, the utility must relocate at its own cost.

(Joint Brief, p. 4.)

In making this broad assertion, Nampa and ACCHD fail to acknowledge that Idaho Power constructs relocations of its facilities for its customers every day. Those relocations are governed by Rule H. Rule H has been in effect, in one form or another, for at least thirty years.

No one seriously argues, and the PRAs do not so argue, that the Commission does not have the authority to regulate how Idaho Power charges for relocating its utility facilities when a customer requests that they be moved. Rule H requires that the beneficiaries of a relocation of utility facilities must pay the cost of relocating those facilities. For example, if a real estate developer needs to have Idaho Power facilities relocated to accommodate the entrance to a new subdivision, Rule H governs that relocation and establishes how those costs will be recovered from the developer. If a PRA asked Idaho Power to relocate its facilities not in the public right-of-way in order to accommodate construction of a new building for the PRA, Rule H would apply and would require that the PRA bear the cost of that relocation. PRAs do not assert that the Commission has no jurisdiction over utility facility relocations in those situations.

It is only when utility facilities are located in public road rights-of-way that PRAs assert that the Commission is divested of jurisdiction over utility facility relocations. In that one instance, they argue an exception to the general rule is legally mandated. Idaho Power respectfully submits that PRAs' position is neither reasonable nor legally correct.

V. The Commission's Authority to Regulate How Idaho Power Charges Its Customers for Relocations Comes Directly from the Idaho Code.

In their briefs, the PRAs correctly note that the jurisdiction of the Commission is limited to the authority given to it by the Legislature. They cite the *Kootenai*

Environmental Alliance case and others as support for that proposition. The PRAs rely on the broad discussions of the limits of the Commission's jurisdiction in *Kootenai* to assert that the Commission does not have the requisite authority to approve Section 10 of Rule H. Idaho Power respectfully submits that the PRAs' assertions in that regard are incorrect. In order to understand how the Commission derives its jurisdiction to approve Section of Rule H, it is necessary to consider several provisions of the Idaho Code.

In exercising its jurisdiction, the Idaho Supreme Court has noted that the Commission is allowed all power necessary to effectuate its purpose. Idaho Code § 61-501 provides as follows:

> **61-501. Investment of Authority.** The public utilities commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act.

Idaho Code § 61-503 provides as follows:

> **61-503. Power to investigate and fix rates and regulations.** The commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices or schedule or schedules in lieu thereof.

Idaho Code § 61-315 provides as follows:

> **61-315. Discrimination and preference prohibited.** No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any corporation or person or subject any

> corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. The commission shall have the power to determine any question of fact arising under this section.

Idaho Code § 61-507 provides as follows:

> **61-507. Determination of rules and regulations.** The commission shall prescribe rules and regulations for the performance of any service or the furnishings of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

Idaho Code § 61-301 provides as follows:

> **61-301. Charges just and reasonable.** All charges made, demanded or received by any public utility, or by any two (2) or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.

Idaho Code § 61-302 provides as follows:

> **61-302. Maintenance of adequate service.** Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employees and the public, and as shall be in all respects adequate, efficient, just and reasonable.

With that general statutory foundation laid, Idaho Power can address the specific argument of the PRAs.

Throughout their Briefs, the PRAs repeatedly argue that the Public Utility Law does not refer to "relocation of utility facilities located in public rights-of-way." They

argue that without a specific reference in the statutes to the Commission's jurisdiction to "impose upon public road agencies, entities of government, third parties, and developers the duty to pay for such relocations . . ." (ACHD Brief, p. 10), the Commission is without jurisdiction to approve Section 10 of Rule H. Such a view is inconsistent with the Idaho Supreme Court's interpretation of the scope of the Commission's jurisdiction under the above-cited statutes and the Commission's obligation to act in the public interest.

In an Idaho Power rate case in 1978, the Commission approved a new rate design for irrigation customers in which the Commission cited concepts of energy conservation, optimum use of energy, and resource allocation as some of the support for its decision. Grindstone Butte Mutual Canal Company and a number of other irrigation and soil drainage customers appealed the Commission's decision. The appellants contended that the Commission acted outside its constitutional and statutory limitations by giving consideration to a number of concepts that are not specifically identified in the Public Utility Law. In *Grindstone Butte Etc. v. Idaho Power*, 102 Idaho, 175, 627 P.2d 804 (1981), the Court upheld the Commission's rate design decision and in its Opinion explained that the Commission operates in the public interest and can take into consideration relevant criteria in setting utility rates and charges.

> Appellants contend that the Commission acted outside its constitutional and statutory limitations by giving consideration to the concepts of conservation, optimum use and resource allocation. We do not agree. While the Idaho Public Utilities Commission is a body with statutorily defined jurisdiction, it is also true that the Commission operates in the public interest to insure that every public utility operates as shall promote the safety, health, comfort of the public and as shall be in all respects adequate, efficient, just and reasonable. I.C. §§ 61-301 & 61-302. The power to fix rates

> is for the public welfare. *Agricultural Products v. Utah Power & Light Co., supra.* The Commission has the authority to investigate and determine whether a rate is unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law. I.C. §§ 61-502 & 61-503. 'Every power expressly granted, or fairly to be implied from the language used, where necessary to enable the Commission to exercise the powers expressly granted should be afforded.' *Washington Water Power Co. v. Kootenai Environmental Alliance,* 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). *Citing United States v. Utah Power & Light Co.,* 98 Idaho 665, 667, 570 P.2d 1353, 1355 (1977), *quoting* 64 Am. Jur.2d, Public Utilities, § 232 (1972). Absent a legislative pronouncement to the contrary, we find it within the Commission's jurisdictional province to consider in its rate making capacity all relevant criteria including energy conservation and concomitant concepts of optimum use and resource allocation. In the proceedings below, we find no error in these considerations as made by the Commission in what it perceived as a need to develop new rate designs which would be responsive to current economic realities. It is in the public interest to make such considerations in decisions which impact upon the consumption of energy, especially in light of the advancing 'political, economic and environmental costs imposed on society.' *Bunker Hill Co. v. Washington Water Power* Co., 98 Idaho 249, 253, 561 P.2d 391, 395 (1977). (*Grindstone Butte Etc.*, 102 Idaho 175, 181 (1981).

It is beyond question that it is within the Commission's statutory authority and obligation to protect the public interest by establishing utility practices, like Rule H, that help ensure that entities that cause a utility to increase its costs are required to pay rates and charges that recover those costs and do not shift such costs to the utilities' other customers.

Even though the terms "mandatory relocation of utility facilities from the public right-of-way" or "payment for relocations" are not set out in the statutes that establish the Commission's jurisdiction, the Commission has a right to rely on its undisputed authority to require developers and other customers to pay for utility line extensions and

line relocations. The Commission also has a right to rely its obligation to act in the public interest as authority to allocate the costs of mandatory utility relocations to those non-PRA entities that receive a private benefit from expansion or modification of the public right-of-way.

In their Briefs, PRAs cast Order No. 30853 as an effort on the part of the Commission to "regulate" PRAs, local improvement districts, land owners adjacent to public roads, and real estate developers. ACHD argues in its Brief that "the state's highway districts, public road agencies, entities of government, third parties, and developers are not 'public utilities' as defined in Idaho Code § 61-129." (ACHD, p. 9.) ACHD's argument goes too far. Rule H does not subject any of these parties to utility-type regulation. But it does make it clear that these parties are subject to the Commission's authority to authorize Idaho Power to establish rules and regulations and set rates and charges so that the Company can recover the cost of relocating its *facilities just like it could if the utility facilities were not in public rights-of-way.* By requiring the developers and others to provide reimbursement, Section 10 will reduce upward pressure on retail rates and avoid discrimination and preference as required by Idaho Code § 61-315.

ACHD, the City of Nampa, and ACCHD take umbrage at Idaho Power's observation that an Idaho Power customer in Pocatello does not see the benefit from roadway improvements constructed to accommodate a new shopping center in Nampa. All of the PRAs go to great lengths to explain how, while it may not look like projects such as those described above would confer a benefit on an Idaho Power customer in Pocatello, in fact, all public road improvements, including those made to develop new

entrances to shopping centers or to put in sidewalks in Nampa, provide a benefit to Idaho Power's customers across the state and therefore it is reasonable to expect the Company to pay relocation costs in those instances. (Joint Brief, p. 4; ACHD Brief, p. 14.)

These arguments simply gloss over the fact that if the developers and third-party beneficiaries do not pay the costs Idaho Power incurs to relocate its facilities, those costs are transferred to all of Idaho Power's customers and place upward pressure on rates. Idaho Power does not believe it is unreasonable to expect that those non-PRA entities that cause Idaho Power to incur costs, bear those costs. Customers in Jerome or McCall should not be forced to subsidize economic development in Nampa or Boise cloaked in the guise of public safety or convenience.

VI. Avoidance of "Contribution Competition" is Not a Reasonable Basis for Rejection of Section 10.

ACHD argues that if the Commission approves Section 10 of Rule H, this will "artificially and inappropriately inject the allocation of utility relocation costs into any development agreement between highway districts and third parties." (ACHD Brief, p. 11.) Nampa and ACCHD make the same claim in more detail in their Joint Brief.

> Section 10 and its treatment of third party beneficiaries would interfere with the ability of the public road agencies to cooperate with other government entities, with neighborhoods, and with developments. Rather than being in a position to negotiate and cooperate between parties, Section 10 imposes a scheme where now these entities are in competition with each other to minimize their contribution to the project and therefore avoid Idaho Power imposing relocation costs. This is another example of how Section 10 as proposed interferes with the exclusive authority of public road agencies and impedes their ability to negotiate appropriately with all parties.

(Joint Brief, p. 6.)

This argument by the PRAs is troubling. It indicates that in their dealings with local developers, local improvement districts ("LIDs"), etc., one of the PRAs' principal concerns would be making sure that payments to Idaho Power for utility relocations are minimized to the extent needed to achieve an agreement rather than allocating costs according to public/private benefit. Idaho Power is concerned that a desire to encourage local economic development might be coloring how local road improvements are being characterized at the expense of Idaho Power's customers outside of the PRAs.

It should be noted that ACHD's Resolution 330 would seemingly cause the same problem. Idaho Power appreciates ACHD's ability to manage this issue over the past twenty years that Resolution 330 has been in effect.

VII. Section 10 of Rule H Should be Applied to LIDs.

In their briefs, both PRAs argue that local improvement districts or LIDs must be excluded from the application of Section 10 of Rule H. They argue that because LIDs are created by government units, i.e., a city, highway district, or public road agency, they must be excluded from the application of Section 10 of Rule H. Idaho Power respectfully disagrees. First, a LID is not a public road agency that is charged with operating and maintaining public roads. An LID is simply a vehicle by which taxation can occur but not be included in the general budget of a public road agency. The only function the LID performs is to collect money. Idaho Power does not believe it is unreasonable to expect a LID to include in the amount of money it will fund an amount to cover the cost of utility facility relocation. In his testimony in this proceeding, Idaho

Power witness David Lowry discusses the problems that can occur when local improvement districts are formed to install sidewalks or other improvements which require the relocation of Company facilities. He explains that if the LID has no obligation to include the cost of utility relocation as a part of the cost of the work to be done, the LID will collect funding from nearby property owners only for the cost of the improvements and the cost of relocating city utilities but not for the cost of relocating other utilities in the right-of-way. (Lowry DI, p. 6, l. 17 through p. 7, l. 12.) Mr. Lowry also included as Exhibit No. 1 to his testimony correspondence describing how the lack of requirement for a LID to include costs of relocation of Idaho Power's facilities in its funding requirement resulted in adverse impacts to an Idaho Department of Transportation highway project and ultimately prevented the Company from recovering its relocation costs.

In light of problems the Company has experienced with LIDs and the fact that it would be very easy for LIDs to include cost of utility relocations in their initial funding, Idaho Power urges the Commission to retain LIDs among the entities subject to Section 10 of Rule H.

VIII. ACHD Misunderstands Subsection (D) of Section 10 of Rule H.

On page 16 of its Brief, ACHD concludes that the Commission made an erroneous finding when the Commission held:

> 'Section 10 in no way grants Idaho Power or this Commission authority to impose such costs on a public road agency.' ACHD directs the IPUC to Subsection d of Section 10 which states: '. . . where the Company has a private right of occupancy for its power line facilities within the public right-of-way, such an easement or other private right, the costs of the relocation is borne by the Public Road Agency.'

ACHD interprets Subsection (d) as requiring that PRAs pay for utility relocations associated with road projects. ACHD asserts that this is a violation of the Idaho Constitution. ACHD wrongly interprets Subsection (d) of Section 10. Subsection (d) applies specifically to those very limited situations where a utility is occupying a privately owned right-of-way that crosses a public right-of-way. Idaho Power witness Lowry addressed how that can happen on page 5 of his prefiled testimony (Lowry, p. 5, ll. 1-12.) Probably the most common instance of how this occurs is when a PRA decides to expand the width of a public road and in so doing, expands its public right-of-way to include land where utility facilities are located on a private easement that the utility purchased prior to the road expansion. In that situation, Idaho Power has the same status as any private property owner that has its property acquired by a PRA. Failure to compensate the utility would constitute an unlawful taking under both Art. I § 14 of the Idaho Constitution and the Fifth Amendment of the United States Constitution. ACHD's argument that Subsection (d) of Rule H is inconsistent with the Idaho Constitution is further rebutted by the fact that ACHD's own Resolution 330 acknowledges that in situations involving private utility easements, relocation costs will be the responsibility of ACHD. *See* Resolution 330, Exhibit A to Affidavit of Susan K. Slaughter, Section 1.A.(2).

> If a utility or sewer company has facilities located on private property, with a right of occupancy other than its right to locate in a public right-of-way, and the District requires that any facility so located be relocated, the actual costs for such relocation shall be the responsibility of the District. Such costs shall be exclusive of profit allowances.

IX. Idaho Power Will Work With PRAs to Avoid Scheduling Conflicts.

In its brief, ACHD expresses concern that Section 10 of Rule H could impact a PRAs' schedule for performing road improvements (ACHD Brief, p. 12.) In particular, ACHD expresses concern about the portion of Section 10 that requires payments from third-party beneficiaries to cover relocation costs be made prior to the Company performing relocation work. Idaho Power acknowledges that scheduling of construction, for both Idaho Power and the PRAs, can be complicated and there are economic impacts associated with scheduling. Fortunately, Idaho Power and ACHD have a long history of cooperation in scheduling construction in accordance with the provisions of Resolution 330. Idaho Power believes that it has maintained a good working relationship with ACHD and will continue, as it has over the past twenty years, to work with ACHD and other PRAs in scheduling utility relocations to coordinate with highway construction projects initiated by the PRAs. Idaho Power believes it does a good job of working with all PRAs in scheduling and completing utility relocations in response to PRA-initiated construction projects. The inclusion of Section 10 in Rule H will not change that commitment to cooperation and coordination.

X. Conclusion.

Idaho Power acknowledges the common law rule that the utility's use of the public road right-of-way is subordinate to the paramount use of the public road right-of-way if that use "incommodes the public." Nor does Idaho Power contest the Public Road Agencies' authority to determine that the relocation of utility facilities is necessary, or to require that the relocation be paid by the utility if no private easement exists. Section 10 does not encroach on the Public Road Agencies' authority in this regard; it

establishes how Idaho Power will allocate those costs among its customers and third-party beneficiaries *after* the Public Road Agencies' have made their initial determination. However, once paid the amounts owed by the utility, the PRAs have no authority to determine how the utility will seek *subsequent reimbursement* from third parties benefitting from the facilities relocation. This is solely the domain of the Commission, which is invested with the authority to do all things necessary to carry out the spirit and intent of the Public Utilities Law to ensure that customer rates are "just and reasonable." Consequently, Idaho Power respectfully requests the Commission issue an Order affirming its findings in Order No. 30853 and denying the Petitions for Reconsideration filed by the Public Road Agencies.

DATED at Boise, Idaho, this 21st day of September 2009.

Lisa D. Nordstrom

LISA D. NORDSTROM
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September 2009 I served a true and correct copy of IDAHO POWER COMPANY'S REPLY BRIEF ON RECONSIDERATION upon the following named parties by the method indicated below, and addressed to the following:

Commission Staff
Kristine A. Sasser
Deputy Attorney General
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Lisa D. Nordstrom

Lisa D. Nordstrom

BEFORE THE

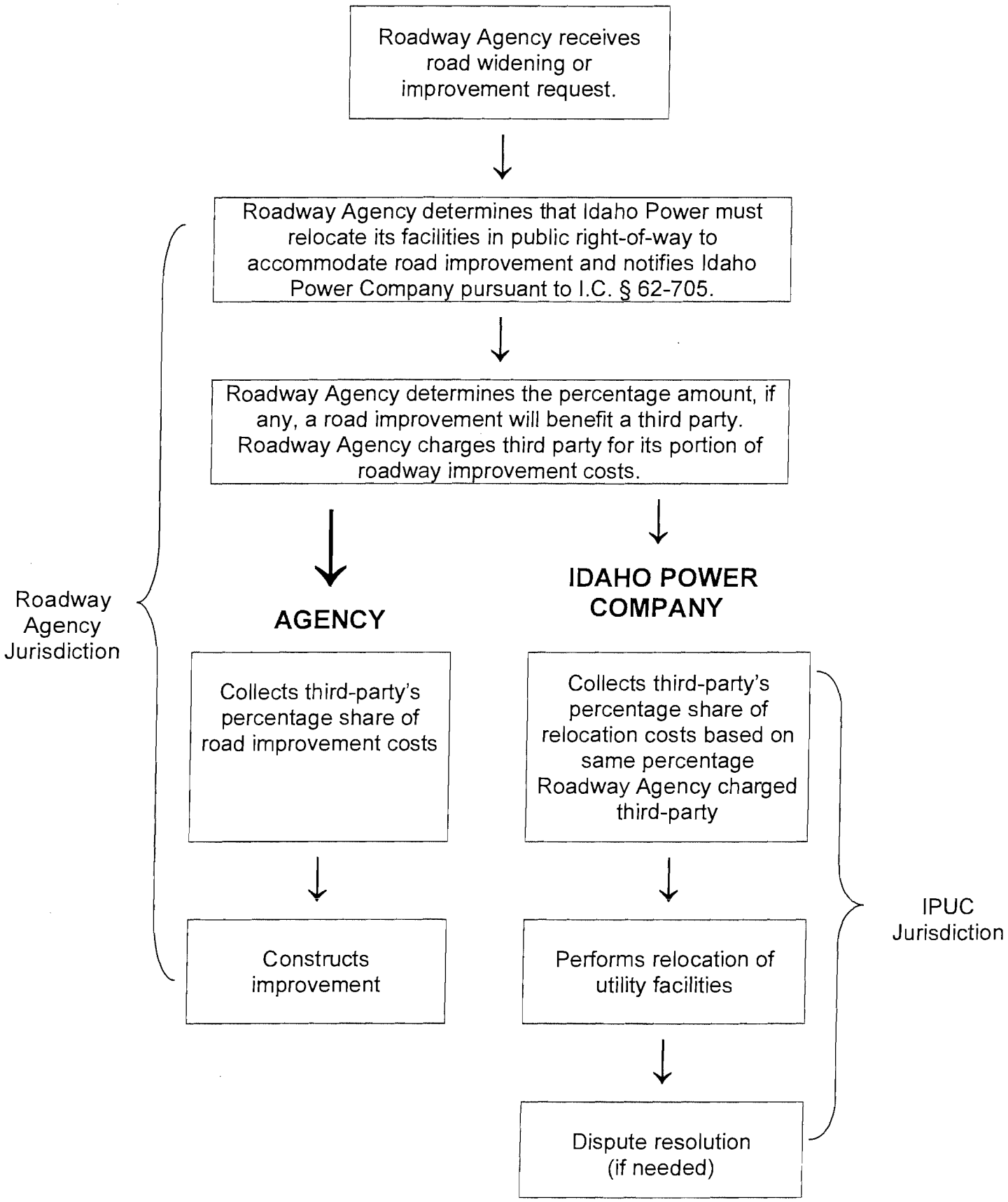
IDAHO PUBLIC UTILITIES COMMISSION

CASE NO. IPC-E-08-22

IDAHO POWER COMPANY

ATTACHMENT NO. 7

RELOCATIONS FLOWCHART



Attachment No. 7
Case No. IPC-E-08-22
Idaho Power Reply Comments
Page 1 of 1

IDAHO POWER®
An IDACORP Company

LISA D. NORDSTROM
Senior Counsel

September 25, 2009

VIA HAND DELIVERY

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
P.O. Box 83720
Boise, Idaho 83720-0074

Re: Case No. IPC-E-08-22
Rule H

Dear Ms. Jewell:

Enclosed please find for filing an original and eight (8) copies of the Response Testimony of Gregory W. Said on Reconsideration. One copy of the enclosed testimony has been designated as the "Reporter's Copy." In addition, a disk containing a Word version of Mr. Said's testimony has been provided for the Reporter and has been marked accordingly.

In addition, an original and eight (8) copies of the Certificate of Service to the parties is enclosed herein for filing.

Very truly yours,

Lisa D. Nordstrom

Lisa D. Nordstrom

LDN:csb
Enclosures

P.O. Box 70 (83707)
1221 W. Idaho St.
Boise, ID 83702

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September 2009 I served a true and correct copy of IDAHO POWER COMPANY'S RESPONSE TESTIMONY OF GREGORY W. SAID ON RECONSIDERATION upon the following named parties by the method indicated below, and addressed to the following:

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Lisa D. Nordstrom

Lisa D. Nordstrom

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	)	CASE NO. IPC-E-08-22

IDAHO POWER COMPANY

RESPONSE TESTIMONY

OF

GREGORY W. SAID

ON RECONSIDERATION

Q. Please state your name and business address.

A. My name is Gregory W. Said and my business address is 1221 West Idaho Street, Boise, Idaho.

Q. Are you the same Gregory W. Said that previously provided direct testimony in this case?

A. Yes, I am.

Q. Please describe the events leading up to your preparation of responsive testimony in this case.

A. On July 1, 2009, the Idaho Public Utilities Commission ("IPUC") issued Order No. 30853 detailing its findings as to the appropriate changes to be made with regard to Idaho Power Company's ("Idaho Power" or the "Company") provisions for constructing new service attachments, distribution line installations, or alterations. Those provisions are contained in the Company's Rule H.

Subsequent to the filing of petitions for reconsideration of the July 1 Order, the IPUC, on August 19, 2009, issued Order No. 30883 granting the Petitions for Reconsideration of Ada County Highway District, City of Nampa, and Association of Canyon Highway Districts regarding jurisdictional authority issues relating to the Order. A briefing schedule was set to address those issues.

Order No. 30883 also granted in part and denied in part the Petition for Reconsideration filed by the Building Contractors Association of Southwestern Idaho ("BCA"). Specifically, reconsideration was granted, but limited to the issue of the amount of initial allowances. The Order instructed the BCA to address "what allowance amount is reasonable based upon the cost of new distribution facilities."

On September 11, 2009, Dr. Richard A. Slaughter on behalf of the BCA submitted his testimony on reconsideration. I am presenting the Company's response to the BCA testimony.

Q. Please describe the Commission's determination of the appropriate allowances to be provided to new residential customers outside of a residential subdivision as per Order No. 30853.

A. The Commission, in Order No. 30853, determined that new residential customers outside a residential subdivision should receive an allowance of up to $1,780. The $1,780 amount was based upon the current installation cost of Standard Terminal Facilities for single phase service to residential customers. The components of this amount were described by Mr. Sparks in his direct testimony and workpapers in this case. Standard

Terminal Facilities costs include the costs associated with providing and installing one overhead service conductor and one 25 kVa transformer to serve a 200 amperage meter base. Based upon this allowance, customers that required non-typical, larger than standard transformation or customers that wanted underground service would be required to pay as a contribution in aid of construction ("CIAC") those work order costs that exceeded the Standard Terminal Facilities cost of $1,780. Customers are responsible for the costs of new primary conductor constructed between the existing distribution facilities and the customers' terminal facilities, as well as any secondary conductor constructed between the transformers and junction boxes.

The effect of the allowance is typically that for new residential customers requesting overhead service from existing facilities adjacent to their new home, there is no cost to the customer. However, if the customer wants underground service, or if the customer is building a large home that requires larger than standard transformation, or if the customer is some distance from existing facilities, that customer is responsible for the additional costs of providing service.

Q. Please describe the Commission's determination of the appropriate allowances provided to

developers of residential properties *inside* residential subdivisions as per Order No. 30853.

A. Similar to its decision as to the appropriate allowance for residential customers outside of residential subdivisions, the Commission determined that allowances within subdivisions should be based upon the same Standard Terminal Facilities costs that were used for residential customers outside of subdivisions. Therefore, the Commission set the allowance at $1,780 *per installed transformer* within subdivisions.

The effect of the allowance inside a subdivision requiring six transformers is that the Company funds the first $10,680 (6 * $1,780) of a developer's work order costs. Work order costs for residential subdivisions typically include: (1) primary conductor necessary to reach new transformers, (2) the transformers, and (3) secondary conductor to junction boxes. Meters and services are not typically installed as part of subdivision work orders. Later, when homes are constructed and new owners request service, Idaho Power installs meters and service conductor but those individual owners are only financially responsible for the overhead/underground differential for services (similar to customers outside subdivisions) and,

in the case of large lot subdivisions, any additional secondary line extensions.

Q. What is Dr. Slaughter's recommendation for an allowance?

A. Dr. Slaughter's recommendation, as I understand it, is to provide an upfront allowance to developers (not customers) of residential subdivisions equal to $1,232 *per lot* within the subdivision.

He equates the number of lots within a residential subdivision to the number of customers that will potentially be served, implying that no development risk exists. He devotes a significant portion of his testimony comparing an embedded cost number of $1,232 *per customer* to the Commission-ordered allowance within residential subdivisions of $1,780 *per installed transformer*. I will detail in my testimony why this is not a valid comparison.

As the Company has stated in reply comments, there is a difference between lots and customers. Lots represent a possibility of future customers that will receive service from the Company, but are by no means a guarantee of future customers.

Q. What is the financial effect of Dr. Slaughter's recommendation?

A. Dr. Slaughter's recommended mechanism treats developers of residential subdivisions more favorably than individual customers seeking connections outside of subdivisions. It tends to provide allowances in subdivisions that exceed the costs of Standard Terminal Facilities with the excess allowances offsetting the costs of primary conductor and secondary conductor. Such treatment is inconsistent with the treatment of residential customers outside of subdivisions who do not receive an allowance greater than the cost of Standard Terminal Facilities.

Furthermore, as I will discuss later in my testimony, Dr. Slaughter's allowance recommendation inappropriately includes a component for substations which are excluded from the provisions of Rule H.

In my opinion, it would be illogical for the Commission to conclude that the Company should make a greater investment on behalf of a speculative development within a subdivision than the investment the Company makes for an actual new residential customer outside a residential subdivision.

Q. As the Commission reconsiders its determination of appropriate residential allowances, what

do you see as the primary considerations the Commission must make?

A. The determination of appropriate residential allowances is primarily a policy issue of how to apportion the costs and risks associated with extending distribution service to new customers. Current policy decisions regarding allowances to residential customers and residential developers should take into consideration: (1) current economic factors facing the Company and its customers, (2) consistency of allowances within each customer class, and (3) risks associated with the differences between requests made by residential *customers* and requests made by residential *developers*.

Once the Commission has settled on appropriate policy, the only remaining issue is to determine the appropriate method by which the allowances are to be determined.

Q. What policy rationale does Dr. Slaughter give for his recommendation?

A. Dr. Slaughter points to policy the Commission set in 1995 as precedent for policy in 2009. He quotes Commission Order No. 26780 issued in 1995 wherein the Commission stated:

> We find that new customers are entitled to have the Company provide a level of investment equal to that made to serve existing customers in the same class. Recovery of those costs in excess of embedded costs must also be provided for and the impact on the rates of existing customers is an important part of our consideration.

(Order 26780 at 17.)

Q. Does the Company agree with Dr. Slaughter that the level of investment that the Company should make on behalf of new customers via allowances for line installations and service attachments should not change over time?

A. No. While there is some value in having a consistent policy over time, there is also value in changing policy in light of changing circumstances. As I pointed out in my direct testimony in this proceeding, the Company has filed four general rate cases and two single-issue rate cases since 2003. The Company recently filed a Notice of Intent to file an additional general rate case later this year. In general, additional revenues generated from the addition of new customers and load growth are not keeping pace with the additional expenses created and required to provide ongoing safe and reliable service to new and existing customers. Given the current frequency of

rate case activity and recognition that the Company will still be making substantial investments in generation and transmission assets in coming years, the Company believes it is reasonable for the Commission to adjust its policy with regard to the level of investment that the Company should make on behalf of new customers via allowances for line installations and service attachments. What worked in 1995 is not working today.

In addition, I believe that the Commission must re-examine and update its historical policy regarding residential allowances to ensure consistent treatment within the residential class while at the same time recognizing the differences in risk associated with facilities constructed for customers or constructed for developers.

Q. In your opinion, did Dr. Slaughter follow the Commission instructions to address "what allowance amount is reasonable based upon the cost of new distribution facilities" when making his allowance recommendation for residential subdivisions?

A. No. The Commission's instruction to evaluate the cost of "new" distribution facilities is consistent with the Company's contention that current policy should be based upon current conditions. Dr.

Slaughter's recommendation is based upon 14 year-old policy and what he calls "the Company's embedded distribution costs." Rather than evaluating the costs of facilities currently required within a given subdivision, Dr. Slaughter proposes allowances be based upon historical investments of the Company on behalf of customers. In that regard, I believe that Dr. Slaughter includes costs that are unrelated to facilities required as part of residential subdivision requests and therefore should not be considered when determining allowances.

Q. What does Dr. Slaughter propose as the allowance to be funded by the Company inside a residential subdivision?

A. Dr. Slaughter proposes an allowance of $1,232 per lot within a residential subdivision.

Q. What methodology did Dr. Slaughter use to derive his $1,232 per lot recommendation?

A. Dr. Slaughter has simply re-packaged computations made by the Commission Staff earlier in this case. Those computations included costs related to investments the Company has made in substations, primary lines, secondary lines, transformers, services, and meters that have been allocated to the residential class in rate proceedings. Attachment 4 to Staff Comments in this

proceeding quantified total net plant for these six items per residential customer at $1,104. Staff Comments described an adjustment of this number to arrive at $1,232 per customer, an amount Staff described as a "revenue neutral" level. Staff did not make a proposal based upon its quantifications. Staff ultimately recommended no allowance inside subdivisions but instead proposed refunds equal to the cost of overhead transformers to developers as new homes are built and customers are connected. See Staff Comments at pp. 6-7.

Q. Does the Company believe that allowances for residential subdivisions should be based upon what Staff calls "revenue neutral" and Dr. Slaughter calls "embedded costs" that include substations, primary lines, secondary lines, transformers, services, and meters?

A. No. The Company disagrees with both the policy underlying the computations and the methodology used based upon that policy. The Commission did not utilize the Staff's computations when it made earlier determinations in this case and it should not accept those computations as re-presented by the BCA.

First, with regard to the methodology, the Commission should recognize that residential subdivision work orders typically include only a primary line (or

backbone), a number of transformers and secondary line to individual lots. There are no costs associated with substations, services, or meters in residential subdivision work orders. Service conductor and meters are not installed within subdivisions until later when homes are actually constructed and customer load occurs. In my opinion, there is no reason to provide allowances to developers for costs that are not incurred or included in the developer's work order to construct facilities necessary for the residential subdivision.

Second, with regard to consistency of policy, per Order No. 30853, residential customers outside of subdivisions receive allowances based solely on Standard Terminal Facilities. They receive no allowances for the costs of substations, primary lines, or secondary lines. In my opinion, it is not appropriate to base an allowance to developers for lots inside a residential subdivision on facilities that are not considered for allowances to residential customers outside of subdivisions.

Third, again with regard to consistency of policy, as pointed out by Dr. Slaughter, transformers often serve more than one ultimate customer. Offering an allowance on a per customer basis rather than on a per transformer basis can lead to the unreasonable result that the allowance is

greater than the cost of terminal facilities (in this case transformers) required to provide service. These excess allowances would theoretically be applied to other work order costs such as primary and secondary line construction, an allowance that is not provided to any other customer group. In my opinion, allowances should consistently be based upon terminal facilities and allowances should not exceed these costs.

Q. Further addressing the allowance computation methodology, does the Company believe that the Staff computation adopted by Dr. Slaughter represents a correct "revenue neutral" level that can be used for quantifying historical per residential lot investments made by the Company in residential subdivision work orders?

A. No. As I have discussed, the Staff computations include amounts for substations, meters, and service conductor which are not provided as part of residential subdivision work orders. Of the remaining three cost categories (transformers, primary lines, and secondary lines) only transformers are considered when determining allowances for all other customer classes. Furthermore, Staff included the costs of both primary and secondary transformers that receive allocation to residential class in general rate case proceedings. New

residential requests under Rule H provisions rarely, if ever, include primary transformers. In order to remain consistent with the treatment of all other customer classes, the Commission should isolate its review of Dr. Slaughter's computations to the transformer component.

Q. Please quantify the embedded net plant investment per customer in transformers *per* residential *customer* based upon data contained in Staff Comments in this proceeding.

A. Based upon Attachment 4 to Staff's Comments, the embedded net plant investment in transformers for the residential class is $314.80 per residential customer ($123,250,351 / 391,525 customers). As I pointed out previously in my testimony, this amount includes primary transformer costs that should not be included and are unrelated to Rule H requests.

Q. Can you quantify the embedded net plant investment in transformers *per* residential *transformer* based upon the numbers contained in Staff Comments?

A. Unfortunately, there is not an easy method to arrive at such a number. However I am told by the Company's Line Design Leader that the Company has installed approximately 132,662 transformers smaller than 150 kVA. These transformers can and do serve a variety of customer

classes. Using an allocation methodology used in rate cases based upon customer demands, my staff tells me that 60.6 percent of secondary transformer costs are allocated to the residential class. Using this percentage, the estimated number of residential transformers is 80,393 (132,662 x 0.606). Using that value, the embedded net plant per installed residential transformer is $1,533 per installed transformer. ($123,250,351 / 80,393 transformers.) Again, please remember that this number includes primary transformers as well as secondary transformers. Even so, the Commission approved allowance of $1,780 per installed residential transformer based upon current costs is more generous than an allowance of $1,533 per transformer that would result from an isolated look at the embedded cost of both primary and secondary transformation per installed residential transformer. If primary transformers were removed from the computation, the $1,780 allowance would appear even more generous.

Q. What rationale does Dr. Slaughter provide in support of his per customer allowance as opposed to a per transformer allowance?

A. Dr. Slaughter implies that developers of residential subdivisions should be awarded greater overall allowances via a per lot allowance than the overall

allowance provided to residential customers outside of subdivisions because more lots can be served per transformer within subdivisions than the number of customers served per transformer outside of subdivisions. However, Dr. Slaughter fails to consider the financial risk associated with lots that are left undeveloped; i.e., facilities have been installed and there is no connected load.

Q. Do you have an estimate of the number of undeveloped residential lots within subdivisions that currently have no homes, but have backbone and transformers available to provide service?

A. I am told that the current estimate of vacant, undeveloped residential lots in residential subdivisions where the Company has installed backbone line and transformers is greater than 20,000 lots.

Q. Notwithstanding the risk of non-development of residential lots within residential subdivisions, is there a difference between the number of *potential customers* served per transformer within a subdivision and the number of customers that are served per transformer outside of subdivisions?

A. Yes. The typical transformer installed outside a subdivision is a single phase 25 kVA transformer

that can typically serve 3 customers. The $1,780 allowance is based upon the installed cost of that transformer ($915) along with service conductor and metering ($865). The typical transformer installed inside a subdivision is a single phase 75 kVA transformer. The Company's and Commission Staff's position is that allowances should be based on the costs associated with overhead Terminal Facilities, which, in a residential subdivision, equates to transformers. The current installed cost of an overhead single phase 75 kVA transformer is $1,667. The Commission-approved allowance provided exceeds the cost of the typically installed transformer inside a subdivision by $113 per transformer, but offers an equivalent benefit to customers, whether located inside or outside a subdivision. As I have testified previously, service conductor and metering are provided to homeowners at a later time and are not costs incurred by developers.

A request for service within a residential subdivision has an implied number of ultimate customers per transformer, whereas a request for service to a residential customer outside of a subdivision does not. However, if additional residential customers request service that can be served by an existing transformer, those customers only receive an allowance reflective of service conductor and

metering because the transformer is already there. As a result, Dr. Slaughter's conclusion that residential allowances outside of residential subdivisions are more generous than allowances within residential subdivisions is erroneous.

Q. Based upon your responsive testimony, what recommendation do you now make with regard to the appropriate level of allowances within residential subdivisions?

A. I recommend that the Commission reaffirm its original conclusion that an allowance of $1,780 per installed transformer is the appropriate allowance to be funded by the Company within residential subdivisions. The allowance is appropriate based upon policy that considers current economic conditions, consistent treatment between and within customer classes, and different risk attributes of new residential customers and residential developers. The methodology of determining an appropriate allowance within a residential subdivision based upon the current cost of transformers is appropriate and consistent with a policy that treats residential customers inside and outside subdivisions similarly.

Q. Do you have any additional comments on Dr. Slaughter's testimony on reconsideration?

A. Yes. On page 8 of his testimony on reconsideration, Dr. Slaughter includes a table that he attributes to Staff as his source. In fact, only a portion of the table is taken from Staff computations. Dr. Slaughter arrives at an incorrect conclusion that the Company will somehow achieve negative investment per customer by incorrectly equating what he terms "recovery through existing rates" with contributions in aid of construction. Generally speaking, as long as the Company provides any allowance, that allowance is representative of a Company investment on behalf of customers. The Company is entitled to recover depreciation expense as well as other O&M expenses associated with that investment. The Company is also entitled to an opportunity to earn a return on its investments. However, recovery of investment-related expenses should not be confused with contributions in aid of construction (e.g., work order expenses in excess of allowances) which offset rate base.

On page 10 of Dr. Slaughter's testimony on reconsideration, he states that as a result of a $1,780 per installed transformer allowance within a subdivision, "the Company will be in an excess earning situation with regard to its distribution plant." This conclusion suggests that the Company color codes its revenues and assesses under-

and over-earning of the Company's authorized rate of return by functional category. This is not a historic approach utilized by the Commission. I am confident that the Commission can and will monitor the earnings of the Company over time. In the last decade, the Company has found it difficult to earn its authorized rate of return, much less earn more than its authorized rate of return. The Commission should continue to consider the Company's actual earnings from a global perspective rather than a piecemeal perspective.

Q. Does that conclude your testimony?

A. Yes, it does.

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	**CASE NO. IPC-E-08-22** **ADA COUNTY HIGHWAY DISTRICT'S BRIEF IN OPPOSITION TO IDAHO POWER COMPANY'S MOTION TO STRIKE PORTIONS OF THE AFFIDAVIT OF DORRELL R. HANSEN**

COMES NOW, the ADA COUNTY HIGHWAY DISTRICT (hereinafter "ACHD"), in accordance with the Idaho Public Utilities Commission's Rules of Procedure (hereinafter "RP") 56, 256, 261 and 265 and hereby submits ADA COUNTY HIGHWAY DISTRICT'S BRIEF IN OPPOSITION TO IDAHO POWER COMPANY'S MOTION TO STRIKE PORTIONS OF THE AFFIDAVIT OF DORRELL R. HANSEN. Based upon the following, Idaho Power Company's (hereinafter "IPC") Motion should be denied.

I. STANDARD OF ADMISSIBILITY

In ruling on the IPC Motion to Strike portions of the Affidavit of Dorrell R. Hansen (the "Hansen Affidavit") it is important for the Idaho Public Utilities Commission (the "Commission") to consider the full text of RP 261 which provides as follows:

> The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order made, approved or confirmed by the Commission. Rules as to the admissibility of evidence used by the district courts of Idaho in non-jury civil cases are generally followed, but evidence (including hearsay) not admissible in non-jury civil cases may be admitted to determine facts not reasonably susceptible of proof under the Idaho Rules of Evidence. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or inadmissible on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho, and order the presentation of such evidence to stop. All other evidence may be admitted if it is a type generally relied upon by prudent persons in the conduct of their affairs. The Commission's expertise, technical competence and special knowledge may be used in the evaluation of the evidence. (Emphasis added.)

In its motion, IPC misstates the meaning and intent of RP 261, which clearly provides that the Commission is not bound by the Idaho Rules of Evidence. RP 261 further provides the Commission "may" exclude evidence that is "irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or inadmissible on the basis of any evidentiary privilege" and that all other evidence "may" be admitted "if it is a type generally relied upon by prudent persons in the conduct of their affairs". Finally, RP 261 provides the "Commission's expertise, technical competence and special knowledge" may be used to evaluate the evidence.

Moreover, Idaho Code § 61-601 specifically provides that hearings of the Commission are not bound by the Idaho Rules of Evidence. Section 61-601 provides:

> All hearings and investigations before the commission or any commissioner shall be governed by this act and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof neither the commission nor any commissioner shall be bound by the technical rules of evidence. (Emphasis added.)

Acknowledging Idaho Code § 61-601, the Idaho Supreme Court stated in *Boise Water Corp. v. Idaho Public Utilities Commission*, 97 Idaho 832, 838, 555 P.2d 163 (1976):

> The Commission is not bound by technical rules of evidence in deciding such issues, since it is a quasi-legislative body. (Emphasis added.)

97 Idaho at 838, 555 P.2d at 169. In so ruling, the Idaho Supreme Court referred to its earlier decision in *Application of Citizens Utilities Co.*, 82 Idaho 208, 351 P.2d 487 (1960) in which the Court stated in pertinent part:

> The public utility commission is a fact-finding, administrative agency and as such is not bound by the strict rules of evidence governing courts of law. (Citations omitted.) However, its findings must be supported by substantial and competent evidence. (Citations omitted.) It cannot make a finding based upon hearsay. (Emphasis added.)

82 Idaho at 213, 351 P.2d at 492. Also noteworthy is the following language from the Idaho Supreme Court in *Application of Lewiston Grain Growers*, 69 Idaho 374, 207 P.2d 1028 (1949) regarding the admissibility of evidence before the Commission under Idaho Code § 61-601:

> Generally speaking, the law governing the Commission contemplates a rule of liberality in the reception of evidence. (Emphasis added.)

69 Idaho at 380, 207 P.2d at 1032.

IPC's reliance upon *Esser Elec. v. Lost River Ballistsics Technologies, Inc.,* 145 Idaho 912, 118 P.3d 854 (2008) for its contention that portions of the Hansen Affidavit must be stricken because they do not comply with the standards for admissibility required of affidavits in motions for summary judgment is misplaced. First, this proceeding is not a summary judgment

proceeding and the standards of admissibility of affidavits under Idaho Rule of Civil Procedure ("I.R.C.P.") 56(e) are inapplicable. Second, this is not a court proceeding and the Idaho Rules of Evidence ("I.R.E.") are not applicable in this proceeding. I.C. § 61-601; I.R.E. 101; RP 261; *Boise Water Corp. v. Idaho Public Utilities Commission,* 97 Idaho 832, 838, 555 P.2d 163, 169 (1976). Third, even if this was a court proceeding, the Idaho Supreme Court has ruled that affidavits filed in court proceedings other than a motion for summary judgment, do not need to satisfy the standards for admissibility that are prescribed by the Idaho Rules of Evidence.

In *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 900-901, 188 P.3d 834, 842-843 (2008), the Idaho Supreme Court ruled that an affidavit in support of a motion for new trial is not required to comply with the Idaho Rules of Evidence. The Court began its analysis by noting that Idaho Rules of Civil Procedure (I.R.C.P.) Rule 56(e) governing affidavits in summary judgment proceedings requires that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein". The Court then explained:

> If we were to conclude that every affidavit filed in connection with every motion under the Idaho Rules of Civil Procedure must satisfy the Idaho Rules of Evidence, as suggested by the Respondents, the effect would be to render this provision of I.R.C.P. 56(e) mere surplusage. . . . We are also mindful of the admonition, contained in the I.R.C.P. 1(a) that the rules of civil procedure "shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." For these reasons, we conclude that an affidavit filed in connection with a motion for a new trial need not meet the standards of admissibility prescribed by the Idaho Rules of Evidence. FN5 We therefore conclude that the district court did not err when it denied Respondents' motion to strike the affidavit of counsel.
>
> FN5. We do not suggest that the trial court must blindly accept every fact or conclusion advanced in an affidavit in support of a new trial

what would not be admissible in evidence. To the contrary, the trial court may consider evidentiary deficiencies in evaluating the weight, if any, to be given an affidavit that would not be admissible in evidence. (Emphasis added).

145 Idaho at 900-901, 188 P.3d at 842-843.

The statements in the Hansen Affidavit clearly satisfy the standards of admissibility that are applicable in this proceeding before the Commission. The Commission is authorized and capable of applying its expertise, technical competence and special knowledge in evaluating the evidence that is presented in the Hansen Affidavit.

II. PARAGRAPH 3

In Paragraph 3 of the Hansen Affidavit, reference is made to certain exhibits, which were not attached. Paragraph 3's insertion in the Affidavit was a clerical error by ACHD and Paragraph 3 should be disregarded by the Commission.

III. PARAGRAPHS 6, 8, 12 & 13

A. Paragraphs 6 & 8.

In Paragraph 6 of the Hansen Affidavit, the Affiant states that under Idaho law, ACHD has exclusive jurisdiction, authority and control over all roads in Ada County, except the Interstate and state highways. In Paragraph 8, the Affiant states under Idaho law, utilities have the right to locate in the public rights-of-way, but the right of the utilities to use the public rights-of-way cannot be regarded as a permanent property right. The Affiant further states that when a road project impacts a utility in the public right-of-way, the utility is responsible for relocations and adjustments in a manner and at such places as to not inconvenience public use.

The statements in Paragraphs 6 and 8 should be construed as stating the Affiant's understanding of the laws that are relevant to this proceeding. Paragraph 9 of the Affidavit of

Dorrell R. Hansen clearly indicates his significant and substantial employment at ACHD from 1993 to the present; beginning as a Staff Civil Engineer, Drainage/Utility Division from 1993-1997; then Supervisor, Drainage/Utilities Division from 1997 to 2000; then Assistant Manager, Engineering Department from 2000 to 2006; and finally, Project Manager/Supervisor, Capital Projects Department from 2006 to the present. In Paragraph 11 of the Affidavit, Mr. Hansen testifies that he created and supervised the Utilities Division at ACHD and headed that division until 2006 as foundation for his subsequent opinions.

Mr. Hansen's understanding of ACHD's jurisdiction of the public right-of-ways under Idaho Code Title 40, Chapters 13 and 14 is relevant in these proceedings. The statutes provide:

> 40-1310. POWERS AND DUTIES OF HIGHWAY DISTRICT COMMISSIONERS.
> (1) The commissioners of a highway district have ***exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system, with full power to construct, maintain, repair, acquire, purchase and improve all highways within their highway system***, whether directly or by their own agents and employees or by contract. . . .
> (Emphasis added.)
>
> (8) The highway district board of commissioners shall have the ***exclusive general supervisory authority over all public highways, public streets and public rights-of-way under their jurisdiction, with full power to*** establish design standards, ***establish use standards***, pass resolutions and establish regulations in accordance with the provisions of title 49, Idaho Code, and control access to said public highways, public streets and public rights-of-way. (Emphasis added.)
>
> 40-1312. GRANT OF POWERS TO BE LIBERALLY CONSTRUED. The grant of powers provided in this chapter to highway districts and to their officers and agents, shall 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. The enumeration of certain powers that would be implied without enumeration shall not be construed as a denial or exclusion of other ***implied powers*** necessary for the free and efficient exercise of powers expressly granted. (Emphasis added.)

> 40-1406. POWERS AND DUTIES OF HIGHWAY COMMISSIONERS -- ONE HIGHWAY DISTRICT IN COUNTY -- HIGHWAY POWERS OF CITIES IN COUNTY ABOLISHED -- LAWS IN CONFLICT SUPERSEDED. The highway commissioners of a county-wide highway district shall exercise ***all of the powers and duties provided in chapter 13 of this title***, and are empowered to make highway ad valorem tax levies as provided by chapter 8, of this title.
>
> * * *
>
> Wherever ***any provisions*** of the existing laws of the state of Idaho are ***in conflict*** with the provisions of this chapter, the provisions of ***this chapter shall control and supersede*** all such laws. (Emphasis added.)

Additionally, Mr. Hansen's understanding of the responsibility of utilities to relocate is relevant to these proceedings. Idaho Code § 62-705 provides:

> 62-705. RIGHTS OF WAY FOR ELECTRIC POWER COMPANIES AND THE UNITED STATES OF AMERICA OR ANY AGENCY THEREOF. Any person, company or corporation incorporated or that may hereinafter be incorporated under the laws of this state or of any state or territory of the United States, and doing business in this state, the United States of America or any agency thereof, for the purpose of supplying, transmitting, delivering or furnishing electric power or electric energy by wires, cables or any other method or means, shall have and is hereby given the right to erect, construct, maintain and operate all necessary lines upon, along and over any and all public roads, streets and highways, except within the limits of incorporated cities and towns and across the right of way of any railroad or railroad corporation, together with poles, piers, arms, cross-arms, wires, supports, structures and fixtures for the purposes aforesaid, or either of them, in such manner and at such places as not to incommode the public use of the road, highway, street or railroad, or to interrupt the navigation of water, together with the right to erect, construct, maintain and operate upon said electric power line a telephone line to be used only in connection with the said electric energy and power line; . . . (Emphasis added.)

It is relevant and useful to the Commission to know Mr. Hansen's understanding of the relevant laws and the basis for that understanding. Because the Commission is not bound by technical rules of evidence in deciding such issues, the Commission has the authority to treat the statements in Paragraphs 6 and 8 as statements of Mr. Hansen's understanding of the laws

governing the issues before the Commission and to deny IPC's Motion to Strike Paragraphs 6 and 8.

ACHD would also point out to the Commission that Mr. Hansen is every bit as qualified to provide his understanding of ACHD's jurisdiction and the responsibilities of utilities to relocate pursuant to Idaho Code § 62-705 as is Mr. Gregory W. Said and Mr. David R. Lowry who have provided Direct Testimony in this case. Specifically, on page 6, lines 6-12 of his direct testimony, Mr. Said testifies as follows:

> Under Idaho law, government agencies charged with constructing, operating, and maintaining roads, such as the Idaho Transportation Department and the Ada County Highway District have the authority to require the relocation of Company-owned transmission and distribution facilities that are sited in road rights-of-way at Company expense.

On page 3, lines 2 to 5 of his direct testimony, Mr. David R. Lowry testified as follows:

> If a relocation of facilities is required due an identified and budgeted highway project, Idaho Power is legally required to fund the relocation cost.

ACHD notes with concern the disingenuous position IPC has taken in attacking Paragraphs 6 and 8 of the Affidavit of Dorrell R. Hansen while at the same time proffering similar testimony from its own witnesses. ACHD respectfully requests that the Commission deny the IPC's motion to strike Paragraphs 6 and 8 of the Affidavit of Dorrell R. Hansen.

B. <u>Paragraphs 12 & 13.</u>

In Paragraph 12 of the Hansen Affidavit, the Affiant states that he has extensive knowledge of ACHD's interactions with utilities in Ada County, including Idaho Power, on issues involving utility relocations in the public rights-of way on road projects and that historically, ACHD has had extensive problems in getting some utilities to relocate in a timely manner. He further states that the lack of coordination of utilities for road projects has caused

delay and contractor claims for road projects. In Paragraph 13, Affiant Hansen states that the proposed Rule 10 will severely impact ACHD's statutory responsibility to develop road projects and the public's use of the right-of-way.

IPC erroneously asserts that portions of Paragraphs 12 and 13 of the Affidavit of Dorrell R. Hansen "must" be stricken because they are inadmissible. As noted above with citations, the Commission is not bound by technical rules of evidence. The Commission is a quasi-legislative body, and the law governing the Commission contemplates a rule of liberality in the reception of evidence. *Application of Lewiston Grain Growers,* 69 Idaho 374, 380, 207 P.2d 1028, 1034 (1949). The Commission is authorized and capable of applying its expertise, technical competence and special knowledge to evaluate this evidence.

The IPC objections to the statements of Mr. Hansen in Paragraphs 12 and 13 are not well founded. In Paragraph 9 of his Affidavit, Mr. Hansen establishes his significant and substantial employment history at ACHD dealing directly with utilities from 1993 to 2000. In Paragraph 10 of his Affidavit, Mr. Hansen establishes his extensive personal knowledge of road development and the role that utility relocation can play as an "important element of project development, which can significantly impact a project schedule and costs." Also, in Paragraph 11 of the Affidavit, Mr. Hansen states that he created and supervised the Utilities Division at ACHD and headed that division until 2006.

Furthermore, in Paragraphs 12 and 13 of the Affidavit, Mr. Hansen describes the basis of his knowledge in describing the interactions with utility companies relating to relocations. Specifically in Paragraph 12, the Affidavit states:

> 12. I have extensive knowledge of ACHD's interactions with utilities in Ada County, including Idaho Power, on issues involving utility relocations in the public rights-of-way on road projects. The Utility Division was

created in an effort to coordinate the relocation of utilities on road projects.

These are undisputed facts which clearly establish Mr. Hansen's knowledge and experience with regard to the remainder of Mr. Hansen's statement in Paragraph 12, that:

> Historically, ACHD has had extensive problems in getting some utilities to relocate in a timely manner. The lack of coordination of utilities for road projects has caused delay and contractor claims for road projects.

These are also statements of fact and do not require citations to specific examples. The Commission is capable of weighing this evidence without citations to specific examples.

Corroborating Mr. Hansen's testimony in Paragraph 12 of his Affidavit is the Statement of Purpose for Senate Bill 1097 (2009 Idaho Legislative Session) which, pursuant to IPR 263, the Commission may take official notice. The Statement of Purpose for Senate Bill 1097 provides:

> The purpose of this legislation is to provide for a proactive, coordinated process early in the development of public highway projects in an attempt to minimize costs, limit disruption of necessary public and private utility services, and limit or reduce the need for present or future relocation of such utility facilities. The legislation recognizes that the owner of utility facilities must recognize the essential goals and objectives of the public highway agency in proceeding with and completing a project, but provides the opportunity, by early involvement in the process, for the parties to actively seek ways to eliminate costs arising out of the relocation of utility facilities, or, if elimination of such costs is not feasible, to minimize relocation costs to the maximum extent reasonably possible. (Emphasis added)

With regard to Paragraph 13, Mr. Hansen's Affidavit states:

> 13. I have reviewed the Idaho Public Utilities Commission Rule 10, which transfers ACHD's authority to control the timing of the relocation of utilities to Idaho Power.

Given his stated background and technical knowledge of the subject area, Mr. Hansen is clearly not a lay witness in this matter. Thus, IPC's reliance upon I.R.E. 701 and *Hawkins v.*

Chandler, 88 Idaho 20, 396 P.2d 123 (1964) is misplaced. Mr. Hansen is obviously an expert witness with training, knowledge and experience whose opinions will assist the Commission in deciding this matter.

Even under I. R. E. 702, Mr. Hansen is qualified to provide an opinion to the Commission concerning the potential effects of Rule 10. *See, e.g., Weeks v. Eastern Idaho Health Services*, 143 Idaho 834, 153 P.3d 1180 (2007), in which the Idaho Supreme Court stated:

> ***Qualification.*** The district court held that Dr. Smith did not qualify as an expert on the issue of causation. The test for determining whether a witness is qualified as an expert is "not rigid" and can be found in Idaho Rule of Evidence 702. West v. Sonke, 132 Idaho 133, 138-39, 968 P.2d 228, 233-34 (1998). Idaho Rule of Evidence 702 states:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
>
> A qualified expert is one who possesses "knowledge, skill, experience, training, or education." I.R.E. 702. Formal training is not necessary, but practical experience or special knowledge must be shown to bring a witness within the category of an expert. Warren, 139 Idaho at 605, 83 P.3d at 779 (citing West, 132 Idaho at 138-39, 968 P.2d at 233-34). The proponent of the testimony must lay foundational evidence showing that the individual is qualified as an expert on the topic of his or her testimony.
>
> * * *
>
> The test for admissibility of expert testimony is Rule 702.

143 Idaho at 837-838, 153 P.3d 1186-1187.

As is clearly demonstrated in his Affidavit, Mr. Hansen is qualified as an expert on the topic of his testimony concerning utility relocations and is well qualified to give an expert opinion that Rule 10 will severely impact ACHD's statutory responsibility to develop road projects and the public's use of the right-of-way.

Additionally, ACHD notes once again that IPC objects to opinions of Mr. Hansen, but offers contrary opinions in the proposed Direct Testimony of Mr. Gregory W. Said beginning at page 7, line 4. Under IPC's erroneous view of the admissibility of evidence before the Commission, portions of the testimony of Mr. Gregory W. Said would be inadmissible because it is based on hearsay, is unduly repetitious, lacks foundation, and is conclusory and speculative. ACHD therefore notes with concern the disingenuous position IPC has taken in attacking portions of Paragraphs 12 and 13 of the Hansen Affidavit.

For all the reasons stated above, ACHD respectfully requests that the Commission deny the IPC's motion to strike portions of Paragraphs 12 and 13 of the Affidavit of Dorrell R. Hansen.

III. CONCLUSION

Based upon the foregoing, it is clear that the Commission is not bound by technical rules of evidence in deciding the issues before it because it is a quasi-legislative body and the law governing the Commission contemplates a rule of liberality in the reception of evidence. Even if the Affidavit of Dorrell R Hansen were subject to the rules of evidence, any noncompliance with the rules of evidence in Mr. Hansen's Affidavit would only go to the weight of the evidence, not its admissibility. There is no basis upon which the Commission should strike the subject testimony. ACHD respectfully requests that IPC's Motion to Strike be denied in all respects.

Respectfully submitted this 5th day of October, 2009.

Scott D. Spears

SCOTT D. SPEARS, Attorney for the Petitioner,
Ada County Highway District

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2009, I caused to be delivered by hand or by e-mail and U.S. Mail (postage pre-paid) in the manner indicated, a true and correct copy of the foregoing ADA COUNTY HIGHWAY DISTRICT'S BRIEF IN OPPOSITION TO IDAHO POWER COMPANY'S MOTION TO STRIKE PORTIONS OF THE AFFIDAVIT OF DORRELL R. HANSEN upon the following parties:

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	**CASE NO. IPC-E-08-22** **ADA COUNTY HIGHWAY DISTRICT'S MOTION TO STRIKE ALL OR PORTIONS OF WRITTEN TESTIMONY OF SCOTT D. SPARKS, DAVID R. LOWRY, AND GREGORY W. SAID**

COMES NOW, the ADA COUNTY HIGHWAY DISTRICT (hereinafter "ACHD"), in accordance with the Idaho Public Utilities Commission's Rules of Procedure (hereinafter "RP") 56, 250, 256, 261 and 266 and hereby moves the Commission for an Order striking all or portions of the prepared written testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said submitted in support of Idaho Power's Application in the above entitled case. For the following reasons, ACHD moves the Commission to strike in its entirety, the unsworn written testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said or in the alternative, certain portions of the testimony of David R. Lowry, and Gregory W. Said as identified hereunder.

I.
STANDARD OF ADMISSIBILITY

Idaho Code § 61-601 specifically provides that hearings of the Commission are not bound by the Idaho Rules of Evidence but that they governed by the Idaho Public Utilities Law and rules of practice and procedure adopted by the Commission. Section 61-601 states:

> All hearings and investigations before the commission or any commissioner shall be governed by this act and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof neither the commission nor any commissioner shall be bound by the technical rules of evidence. (Emphasis added.)

Commission Rules 250, 261 and 266 establish the standards of admissibility, which compel the exclusion of the Direct Testimony of Scott D. Sparks, David R. Lowry and Gregory W. Said in this proceeding.

RP 250 expressly requires that all testimony in formal Commission hearings be given under oath. The Rule provides:

> All testimony presented in formal hearings will be given under oath. Before testifying each witness must swear or affirm that the testimony the witness will give before the Commission is the truth, the whole truth and nothing but the truth. (Emphasis added.)

RP 261 provides as follows:

> The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order made, approved or confirmed by the Commission. Rules as to the admissibility of evidence used by the district courts of Idaho in non-jury civil cases are generally followed, but evidence (including hearsay) not admissible in non-jury civil cases may be admitted to determine facts not reasonably susceptible of proof under the Idaho Rules of Evidence. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or inadmissible on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho, and order the presentation of such evidence to stop. All other evidence may be admitted if it is a type generally relied upon by prudent

> persons in the conduct of their affairs. The Commission's expertise, technical competence and special knowledge may be used in the evaluation of the evidence. (Emphasis added.)

RP 266 provides that a witness's previously prepared and distributed testimony may be incorporated into the transcript of the hearing as if read, subject to the admissibility requirements of RP 261. RP 266 provides as follows:

> The presiding officer may order a witness's prepared testimony previously distributed to all parties to be incorporated in the transcript as if read if timely filed pursuant to an order, notice or rule requiring its filing before hearing. Without objection, the presiding officer may direct other prepared testimony to be incorporated in the transcript as if read. Admissibility of prepared testimony is subject to Rule 261. (Emphasis added).

Under the foregoing law, it is clear that in order to be admissible, evidence and testimony presented in this proceeding must be in compliance with the rules of the IPUC. The Direct Statements of Scott D. Sparks, David R. Lowry and Gregory W. Said do not comply with RP 250, 261 and 266 and they must be stricken.

II.
UNSWORN TESTIMONY OF SCOTT D. SPARKS, DAVID R. LOWRY, AND GREGORY W. SAID MUST BE STRICKEN

The unsworn Direct Testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said is inadmissible because it does not comply with RP 250. Moreover, it is well established that even in administrative hearings, unsworn testimony is inherently unreliable, incompetent, and lacking any evidentiary value. In *Gibraltar Mausoleum Corporation v. City of Toledo et al*, 106 Ohio App.3d 80, 665 N.E.2d 273 (1995), the Ohio Court of Appeals stated:

> In order to have any evidentiary value, the witnesses affidavit, deposition or oral testimony must be under oath. . . . Although the administration of the oath at a trial or at an administrative hearing may be expressly or impliedly waived, when no such waiver is apparent on the record, unsworn testimony cannot provide the preponderance of substantial,

reliable and probative evidence necessary to support an administrative decision. (Emphasis added).

Id. at 276. That the Commission has recognized that unsworn testimony is inherently unreliable, incompetent, and lacking any evidentiary value is obvious from its promulgation of RP 250 which as noted above, requires that all testimony to be under oath.

It is clear that the failure to comply with RP 250 renders the unsworn prepared written Direct Testimony of Scott D. Sparks, David R. Lowry and Gregory W. Said inadmissible in this case.

Failure to comply with RP 266 and 261 also renders the unsworn Direct Testimony of Scott D. Sparks, David R. Lowry and Gregory W. Said inadmissible in this case. RP 266 permits a party to submit a witness's prepared testimony if required pursuant to an order, notice or rule requiring its filing before hearing. Without objection, the presiding officer may direct other prepared testimony to be incorporated in the transcript as if read. Here, the proffered Direct Testimony does not comply with RP 250 and ACHD objects to it being incorporated in the transcript as if read. Thus, it must be excluded.

III.
PORTIONS OF WRITTEN TESTIMONY OF DAVID R. LOWRY AND GREGORY W. SAID MUST BE STRICKEN

Separate from the fact that prepared written testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said submitted in support of Idaho Power's Application in the above entitled case is unsworn and therefore inadmissible, portions of the prepared written testimony of David R. Lowry and Gregory W. Said must be stricken from the record because it offers inappropriate legal conclusions, is irrelevant, unreliable, lacking any evidentiary value and/or argumentative and therefore inadmissible.

A. Inadmissible Portions of the Prepared Written Testimony of David R. Lowry

ACHD hereby objects to the following portions of the prepared written testimony of David R. Lowry and moves that it be stricken from the record on the grounds that it offers inappropriate legal conclusions, is unreliable, irrelevant, and/or argumentative and therefore inadmissible pursuant to RP 261.

1. Page 2, Lines 10-12.

On page 2, lines 10-12 of his written testimony, David R. Lowry states:

> ". . . when those relocation costs should have been more appropriately been borne by real estate developers."

Clearly, this statement lacks adequate foundation and is an inappropriate attempt to offer a legal conclusion.

2. Page 3, Lines 2-5.

On page 3, lines 2-5 of his written testimony, David R. Lowry states:

> "If a relocation of facilities is required due to an identified and budgeted highway project, Idaho Power is legally required to fund the relocation cost."

This statement lacks adequate foundation and is an inappropriate attempt to offer a legal conclusion.

3. Page 3, Lines 17-20.

On page 3, lines 17-20 of his written testimony, David R. Lowry states:

> "However, the current Rule H tariff does not clearly address cost responsibility for all relocations, including relocations requested by a Public Road Agency on behalf of a third party."

This statement is an inappropriate attempt to offer a legal conclusion, is irrelevant, and is argumentative. The Commission is perfectly able to decide for itself whether Rule H clearly addresses cost responsibility for all relocation situations.

4. Page 7, Lines 7-12.

On page 7, lines 7-12 of his written testimony, David R. Lowry states:

> "ITD then requires Idaho Power and other private utility companies to fund to fund the relocation costs of their utility facilities. Correspondence between Idaho Power, ITD and the City of Nampa has been included as Exhibit No. 1 to my testimony to illustrate how this cost shifting occurs."

This statement relating to the Idaho Transportation Department is irrelevant to the requested reconsideration by ACHD, the City of Nampa and the Association of Canyon County Highway Districts. Additionally, it is irrelevant and lacks foundation as to "other private utility companies" as well as to an assertion of "cost shifting". Finally, ACHD notes that the Exhibit No. 1 to which Mr. Lowry refers was not labeled in compliance with RP 267.05 in that it does not provide Mr. Lowry's title with IPC as required (see example).

5. Page 8, Lines 16-20.

On page 8, lines 16-20 of his written testimony, David R. Lowry states:

> "Q. Do you believe the proposed Rule H relocation language, as described in greater detail in Mr. Spark's [sic] testimony, will provide Public Road Agencies and the public with needed clarity as to how responsibility for relocation costs is to be apportioned"
> "A. Yes."

This question and answer is irrelevant, lacks foundation and is argumentative; additionally, it does not provide testimony or facts.

B. <u>Inadmissible Portions of the Prepared Written Testimony of Gregory W. Said</u>

ACHD hereby objects to the following portions of the prepared written testimony of Gregory W. Said and moves that it be stricken from the record on the grounds that it offers inappropriate legal conclusions, is unreliable, irrelevant, and/or argumentative and therefore inadmissible pursuant to RP 261.

1. Page 3, Lines 17-22.

On page 3, lines 17-22 of his written testimony, Gregory W. Said states:

> "The company believes that these clarifications will alleviate misunderstandings where certain governmental entities have forced responsibility for funding line relocation expenses onto Idaho Power customers that should have been more appropriately be [sic] borne by developers."

This statement is irrelevant and speculative. The statement is made without foundation and is argumentative and should be reserved for argument of counsel.

2. Page 5, Lines 7-22

On page 5, lines 7-22 of his written testimony, Gregory W. Said states:

> "Is growth paying for itself?
> The clear answer is no. Additional revenues generated from the addition of new customers and load growth in general is not keeping pace with the additional expenses created and required to provide ongoing safe and reliable service to new and existing customers. While the provisions of Rule H have required some contributions in aid of construction for new distribution facilities, there are no requirements for contributions in aid of construction for new transmission or generation facilities which are also typically required to serve customer growth. Reducing the Company's new customer-related distribution rate base by reducing allowances and refunds will relieve one area of upward pressure on rates and will take a step toward growth paying for itself."

This statement lacks foundation for the conclusory statements and arguments made. This testimony is also irrelevant to the issues involved in this case. This statement is argumentative and should be reserved for argument of counsel.

3. Page 6, Lines 2-12

On page 6, lines 2-12 of his written testimony, Gregory W. Said states:

> "Q. Please describe how certain governmental entities are able to force payment of line installation expenses onto Idaho Power customers that should more appropriately be borne by developers."
> "A. Under Idaho law, governmental agencies charged with constructing, operating, and maintaining road, such as the Idaho Transportation

Department and the Ada County Highway District have the authority to require the relocation of Company-owned transmission and distribution facilities that are sited in road rights-of-way at Company expense."

This statement is an inappropriate attempt to offer a legal conclusion.

4. Page 7, Line 4 to Page 8, Line 13

On page 7, line 4 to page 8, line 13 of his written testimony, Gregory W. Said states:

"Mr. Lowry has informed me of a number of examples where I believe governmental entities have required the relocation of Company-owned transmission and distribution facilities at Company cost instead of seeking payment from third party developers. Mr. Lowry's testimony in this proceeding provides examples of instances where third-party developers have attempted to avoid Idaho Power's requirement that they make contributions in aid of relocating transmission and distribution facilities for their developments. When governmental entities require Idaho Power to relocate facilities and incur costs that should be properly paid for by local developers, it results in the inappropriate shifting of costs from local developers to the general rate paying customers of Idaho Power. Mr. Sparks describes in his testimony a newly drafted Rule H provision clarifying the rules governing cost responsibility for relocations. Hopefully these clarifications will assist the highway agencies in determining when relocation costs should be borne by developers and avoid further inappropriate cost shifting from local developers to Idaho Power customers."
"Q. Ultimately, what is the Company requesting in this proceeding?"
"A. The Company believes that as a result of Mr. Sparks' review and evaluation of the provisions of Rule H, the revisions to Rule H as proposed in this filing are in the best interest of Idaho Power customers. The proposed Rule H language provides a more logical and readable flow, updates costs to current levels, and reduces one aspect of upward pressure on rates. In addition, the new Rule H section addressing relocation of distribution facilities for third-party development will also assist in making sure that growth pays for itself rather than transferring additional costs to Idaho Power's rate paying customers."

This statement is replete with conclusory, argumentative, and duplicative testimony.

Additionally, this statement includes hearsay testimony in which Mr. Said is commenting on, and asserting as true, the testimony of other witnesses. The Commission is better in a position to weigh the testimony of other witnesses and decide for itself whether to credit or discredit such

testimony. Finally, the Commission can decide what is in the best interest of Idaho Power's customers.

IV.
COMPLIANCE STATEMENTS

1. Pursuant to RP 56.07, ACHD has reviewed all of the Commission's rules and agrees to comply with them.
2. Pursuant to RP 256.02, this Motion is made on fewer than 14 days notice for the reason that the Commission, in Order No. 30900 in the above entitled case, issued a Notice of Hearing for Oral Argument scheduling said Hearing for October 13, 2009, and a ruling on this Motion, as well as a Motion to Strike filed by IPC on September 21, 2009 and ACHD's Brief in Opposition to IPC's Motion to Strike filed on October 5, 2009, at the aforementioned hearing is anticipated. On October 6, 2009, ACHD provided actual notice of this Motion to at least one (1) representative of all parties by telephone or personal delivery.

V.
CONCLUSION

For the foregoing reasons, ACHD respectfully requests that the Commission grant this Motion to Strike and that it strike in its entirety, the unsworn written testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said or in the alternative, that it strike certain portions of the testimony of David R. Lowry, and Gregory W. Said as identified above.

Respectfully submitted this 6th day of October, 2009.

Scott D. Spears

SCOTT D. SPEARS, Attorney for the
Petitioner, Ada County Highway District

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2009, I caused to be delivered by hand or by e-mail and U.S. Mail (postage pre-paid) in the manner indicated, a true and correct copy of the foregoing ADA COUNTY HIGHWAY DISTRICT'S MOTION TO STRIKE ALL OR PORTIONS OF WRITTEN TESTIMONY OF SCOTT D. SPARKS, DAVID R. LOWRY, AND GREGORY W. SAID upon the following parties:

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ADA COUNTY HIGHWAY DISTRICT

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October 8, 2009

VIA HAND DELIVERY

Jean D. Jewell, Secretary
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Re: Case No. IPC-E-08-22 (Rule H)
Opposition to Ada County Highway District's Motion to Strike All or Portions of Written Testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said

Dear Ms. Jewell:

Pursuant to IPUC Procedural Rule 256.02 (b), Idaho Power Company hereby informs the Commission that it opposes the Ada County Highway District's Motion to Strike All or Portions of Written Testimony of Scott D. Sparks, David R. Lowry, and Gregory W. Said. Because of the lateness with which the Motion was filed, Idaho Power Company requests that it be heard on the Motion in person at the Oral Argument noticed for October 13, 2009, at 1 p.m.

Very truly yours,

Lisa D. Nordstrom

Lisa D. Nordstrom

LDN:csb
cc: service list

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of October 2009 I served a true and correct copy of the within and foregoing NOTICE OF OPPOSITION TO ACHD'S MOTION TO STRIKE upon the following named parties by the method indicated below, and addressed to the following:

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Attorneys for Intervenors The Building Contractors Association of Southwestern Idaho

RECEIVED
2009 OCT 27 PM 4:13
IDAHO PUBLIC UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS	**CASE NO. IPC-E-08-22** **BUILDING CONTRACTORS ASSOCIATION OF SOUTHWESTERN IDAHO'S POST-HEARING BRIEF**

The Building Contractors Association of Southwestern Idaho ("Building Contractors"), by and through its attorneys of record, Givens Pursley LLP, and pursuant to the Commission's direction at the conclusion of its technical hearing, submits this Post-Hearing Brief in the above-captioned matter.

This proceeding was initiated by Idaho Power Company ("Idaho Power" or "Company") based on its premise that growth is not paying for itself, and that "reducing allowances and refunds [for line extensions to serve new customers] will relieve one area of upward pressure on rates and will take a step toward growth paying for itself." Said Direct Testimony, Tr., p. 6, ll. 20-22. The implication of this statement is that the Company actually is incurring costs to extend service to new customers that cannot be recovered through its existing rate structure. In

other words, the line extension/distribution component of the Company's rate base is not being satisfied by the revenues generated by new customers, and hence, *line extensions are a source of upward pressure on rates.*

This premise is wholly unsupported by facts. The Company has provided no information whatsoever to demonstrate that its current rates do not produce a return to the Company sufficient to recover its current investments in distribution facilities.[1] Indeed, the Company agrees that, provided its per-customer investment in line extensions is limited to an amount equal to its embedded costs in distribution facilities, there is no "upward pressure on rates" attributable to line extensions serving new customers because the Company's current rates are "sufficient to recover the costs of the new facilities."[2]

So, reducing the Company's overall allowances for new residential customers to a level well below its embedded costs for distribution as proposed does not "relieve one area of upward pressure on rates," because under the current tariff, which contemplates a Company allowance that approximates the Company's embedded costs,[3] there is no upward pressure from that component to be relieved.

---

[1] *See* Transcript, p. 107, l. 22 – p. 108, l. 2:

Q. By Mr. Creamer: Has the Company submitted any documentation in this proceeding showing the extent to which line extension costs themselves are the source of additional expense?

A: By Mr. Said: No, and it's not my contention that that's the sole driver of rate increases.

[2] *See* Transcript, p. 108, ll. 20–25; p. 121, ll. 1–8:

Q. By Mr. Creamer: And if the Company absorbs costs for new distribution facilities that are equal to or less than the costs for existing customers, that upward pressure [on rates] is eliminated, isn't it?

A. By Mr. Said: For that component.

Q. By Mr. Creamer: To the extent that the Company's investment in distribution facilities to serve new customers does not exceed its current embedded costs for distribution facilities, then the Company's current rates are sufficient to recover the costs of the new facilities; do you agree with that?

A. By Mr. Said: For that particular element of rates.

[3] *See* Richard Slaughter Reconsideration Testimony, p. 243, l. 21 to p. 244, l. 3: From Staff Attachment 9, page 2 of 4, it is clear that under "Current Rule H" approved by Order 26780, the developer's "Net Cost" plus the $800 per lot refund almost exactly equals the 'Work Order Cost per lot,' which in turn are almost exactly equal to the average embedded cost of $1,232 computed by Staff."

The Company repeatedly has emphasized, however, that its current and anticipated costs for new generation and transmission facilities are not being recovered under existing rates. It is apparent that the increased new customer charges for the Company's distribution system being proposed by the Company, and the resulting amounts earned by the Company on the new distribution in excess of embedded costs, will go to pay other Company costs for generation and transmission.

> Q. By Mr. Creamer: In your response on reconsideration, you stated that the Company's position that because of the substantial investments that are to be made in generation and transmission assets, the Company thinks it's reasonable for the Commission now to adjust its policy concerning the level of Company investment in line extensions; correct?
> A. By Mr. Said: Correct.
> Q. And to require more investment from the new customers for those line extension facilities than in the past?
> A. That's correct.
> Q. As a result, then, the new customers as they pay these costs for the line extension for the distribution facilities, that helps offset pressure on existing customers' rates from generation and transmission and other sources; isn't that correct?
> A. Well, its all customers from that point forward in time, yes.

See Transcript, p. 288, l. 9 – p. 289, l. 2.

The result will be that to become an "existing customer," the "new" customer must pay up front for line extension costs and thereafter pay, in addition, residential rates that include a portion which already provides the Company full recovery for the specific costs of those facilities

Although the proposed increased line extension charge to a new customer (manifested through a reduced Company investment) would be identifiable to distribution facilities that serve that new customer, the inclusion of embedded distribution costs in existing rates that the new customer also would be required to pay would provide net benefits for the Company that inevitably would go to reduce the *existing* customers' share of distribution, generation and

transmission costs (i.e., costs that clearly are not specifically identifiable to the new customer). The Company's proposed tariff revision, then, is simply a means to make the new customer pay an upfront cost (ostensibly for the ability to become a new customer) that inevitably will defray some of the costs that otherwise would be charged to existing customers for new generation and transmission. *That* is what the Idaho Supreme Court found objectionable in *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 690 P.2d 350 (1984), and *Boise Water Corp. v. Public Utilities Comm'n*, 128 Idaho 534, 916 P.2d 1259 (1996).

The Company concedes the lack of facts suggesting any differences between new and existing residential customers with respect to their costs of service, electrical consumption or time, and nature or pattern of use of electricity. Said Testimony, Transcript, p. 124, l. 8 – p. 125, l. 10. The Company proposes to reduce its investment in facilities to serve new customers because they are new, and because this reduced investment will help the Company offset pressure on rates for its existing customers created by the need for new generation and transmission. *See* Transcript, p. 288, l. 9 – p. 289, l. 2.

At least in 1995, when the Company sought to reduce its line extension allowances, it was willing to provide an allowance at least equal to its embedded costs of facilities already included in rates because, as the Company represented to the Commission, it would ensure that "new customers are treated the same as existing customers in terms of the rates that they pay." Said Testimony, Transcript, p. 292, ll. 8-16, quoting from his Rebuttal Testimony submitted in Case No. IPC-E-95-18, marked for identification as Exhibit 206.

The Company's position now is that so long as the new customer pays the same rates as existing customers after he or she has paid the proposed increased line extension charges and ceased being an "applicant," there is equal treatment as among customers because they then are

all simply "existing customers." Another Company argument appears to be that the proposed tariff is proper because it, at least, treats all new *applicants* the same "in terms of their contribution to become a customer." Transcript, p. 389, ll. 11-18. The same argument could have been made in the *Boise Water Corp.* case—once the applicants for new service paid the increased hook-up charge, they too became "existing customers" subject to the same rates as other existing customers. But that did not change the fact that Boise Water's proposed increased contribution to become a customer bore no real relationship to the cost to interconnect, but rather was calculated to offset other costs attributable to all customers, i.e., water treatment.

Even Staff appears to support a continuing level of Company investment in line extensions, as reflected through allowances that can be recovered through existing rates. On pages 3 and 5 of its Comments, Staff indicates that Company investment should at least equal the average embedded cost per customer:

> Staff believes that the goal in setting allowance and refund amounts for distribution line extensions should be to eliminate the impact on existing electric rates. More specifically, Staff believes the line extension rules should provide a new customer allowance (Company investment) that can be supported by electric rates paid by that customer over time. . . .

Staff's position apparently is that the Company should continue to provide a per-residential customer investment for connections and line extensions equivalent to an amount that will be supported by the revenue stream embedded in the Company's current rates. Staff Comments at p. 4. If so, Building Contractors agrees.

Using a residential customer revenue stream that is embedded in the Company's current sales rate structure, Staff calculated the Company investment that can be supported by current rates without applying either upward or downward pressure on the Company's rate structure (i.e., "revenue neutral") to be $1,232.44.

The Company objected to Staff's "revenue neutral" computation methodology, but it proffered no number of its own. The most Mr. Said offered regarding the Company's investment in line extension as compared to its actual embedded costs was that "currently it's probably greater than embedded cost."

The issue of risk and how it should be allocated as between the Company, its ratepayers and real estate developers is an appropriate one to be considered in this case. Changing economic conditions have highlighted this. There are, however, ways to acknowledge and assign risk components in the line extension tariff, particularly by providing a portion of the Company allowance as a refund to the developer when new customers in subdivisions take service. Dr. Slaughter's Testimony on Reconsideration suggested that an allowance equal to the Company's embedded distribution cost be given as a credit against the total design cost. This approach, if given as an upfront allowance, does place more risk on the Company, but it was proposed in the context of the Building Contractors' interpretation of the limited scope of reconsideration granted by the Commission (i.e., that "allowances" but not "refunds" were to be addressed). Building Contractors agree with Staff Comments, however, to the effect that an "allowance" is simply the portion of Idaho Power's line extension costs collected through electric rates representing the investment in new facilities. Building Contractors believe the allowance can be realized in whole or in part through refunds to reduce Company risk that residential lots in subdivisions may not be developed. Mr. Said agreed that providing the allowance as a refund reduces the investment risk of the Company.

CONCLUSION

The Company's application in this proceeding is based on an entirely unsupported assertion that by amending the tariff as requested, the Commission will relieve an area of upward

pressure on rates. For this to be true, it would have to be shown that the Company's line extension costs are not being recovered under its existing rates, which the Company must admit, has not been shown. Upward pressure on rates is driven by existing and anticipated generation and transmission costs. The Company admittedly wishes to address these costs by charging new customers more for line extensions regardless of its ability to fully recover, or over-recover, any allowance for line extensions that does not exceed its embedded costs.

Here, without any supporting facts showing new customers' line extension costs are driving rate increases or that new customers are different than existing customers in the cost of service, amount of energy consumed, or the time, nature or pattern of their use, the Company seeks to change a sound, longstanding Commission policy that, heretofore, has furthered the rules concerning treatment of new versus existing utility customers established by decisions of the Idaho Supreme Court. Without presenting supporting facts and with a faulty premise, Idaho Power proposes changes to its line extension tariff that would have significant negative economic impacts on real estate development, on the cost of new homes and on the people who buy them. Provided the Company's allowances are maintained at a level equal to its embedded costs as under the current tariff, the Commission is assured that it *has* addressed the potential that line extension costs would become an area of upward pressure on rates.

There are numerous mechanisms that can be employed to address the generation and transmission components of the Company's costs that admittedly are affecting rates. Reducing Company allowances and charging new customers a higher "contribution to become a customer" is not an appropriate means to that end.

For the foregoing reasons, Building Contractors respectfully request that the Company's proposal to establish a uniform $1,780 terminal facilities allowance for new residential service be

denied and that the Commission rescind Order 30853 in that regard. Building Contractors further request that a $1,233 per residential customer allowance be established and maintained unless and until facts are presented in a future proceeding establishing a new embedded cost number warranting an adjustment to such allowance. In residential subdivisions, that portion of the $1,233 allowance in excess of the Company's investment in terminal facilities serving the subdivision could be provided as a refund to the developer to reduce risk to the Company that lots will not be occupied and served.

Respectfully submitted this 27th day of October, 2009.

GIVENS PURSLEY, LLP

By: _____
Michael C. Creamer
Attorneys for Intervenor The Building
Contractors Association of Southwestern Idaho

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of October, 2009, a true and correct copy of the foregoing was served upon the following individual(s) by the means indicated:

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October 27, 2009

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Re: Case No. IPC-E-08-22
Rule H

Dear Ms. Jewell:

Enclosed for filing please find an original and seven (7) copies of Idaho Power Company's Post-Hearing Brief on Reconsideration in the above matter.

Very truly yours,

Lisa D. Nordstrom

Lisa D. Nordstrom

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO MODIFY ITS RULE H LINE EXTENSION TARIFF RELATED TO NEW SERVICE ATTACHMENTS AND DISTRIBUTION LINE INSTALLATIONS.	))))))	CASE NO. IPC-E-08-22 IDAHO POWER COMPANY'S POST-HEARING BRIEF ON RECONSIDERATION

At the technical hearing held on October 20, 2009, the Commission provided an opportunity for Parties to file a post-hearing brief summarizing their respective positions. Idaho Power Company (hereinafter "Idaho Power" or "Company") hereby submits its Post-Hearing Brief on Reconsideration and urges the Commission to affirm the findings it made in Order No. 30853.

I. Order No. 30853 Requires Those That Cause Costs to be Incurred to Pay Those Costs.

Idaho Power initiated this proceeding to implement changes to its Rule H in furtherance of one of the fundamental principles of electric utility regulation; that to the extent practicable, utility costs should be paid by those entities that cause the utility to incur the costs. This principle is often referred to as "cost-causation" and is one of the

bedrocks of utility regulation. Idaho Power's Rule H is a good example of how the Commission exercises its jurisdiction to address a "cost-causation" by requiring those entities that cause Idaho Power to incur additional costs to pay those additional costs. If the "cost-causers" do not pay, the electric rates for the utilities' other customers will be higher than they would otherwise be. In light of current circumstances, if that result is allowed, Idaho Power's rates are neither "just and reasonable" as required by Idaho Code § 61-503 nor non-discriminatory and non-preferential as required by Idaho Code § 61-315.

It is true that under Order No. 30853, Idaho Power would invest less toward line installations than it has in the past by limiting its investment to terminal facilities. The Company makes many investments for new customers for the numerous parts of its system that comprise its electric service, and the fact is that Idaho Power's investment per customer is increasing. There are two principal drivers that effect growth in rates over time: (1) inflation and (2) growth-related costs. The growth in rates over the past five years (over 21 percent) has outpaced pure inflation, demonstrating that growth is not paying for itself. Idaho Power's Answer to Petitions for Reconsideration at 8. Other than Rule H, no means of assessing the costs of serving new customers directly to those specific customers currently exists.

To the extent that Order No. 30853 requires a new customer payment greater than that made to serve existing customers, it is a reflection that different circumstances exist in 2009 than did in 1997 when the Commission issued Order No. 26780. Rule H addresses the costs that must be paid by individuals who are not currently customers of Idaho Power for the opportunity to become customers. If the new line installation investment is solely to provide service to specific applicants/new customers, the

Commission is authorized by law to require that the applicants/new customers bear the cost of that new investment. *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 421, 690 P.2d 350, 356 (1984). So long as all potential new customers/applicants are treated in a like manner, there is no unlawful discrimination.

Line installation charges offset the actual per-customer cost of physically connecting to Idaho Power's distribution system and have no relationship to existing or past customers. In light of the Company's increased investments in generation and transmission that must be made to serve both old and new customers on its system as a whole that will be paid for by the entire rate paying public, it is reasonable and prudent for the Commission to require that connection costs for individual customers be more fully funded by the individual customers causing them. Having developers/applicants fund line extensions will also reduce ratepayer exposure to speculative development, at a time when the Company has currently installed primary (backbone) line and transformers to more than 20,000 lots without new customers taking service. Tr. at 280.

II. Order No. 30853's Adoption of a Standard Terminal Facilities Allowance Ensures that New Customers Are Treated Similarly.

Regardless of whether construction is inside or outside of a subdivided development, Order No. 30853 requires the Company to provide customers and developers a fixed allowance equal to the Company investment toward their required terminal facilities. Customers are eligible to receive maximum allowances up to $1,780 for single-phase services and $3,803 for three-phase services per service attachment, whereas developers of subdivisions (with no connected load) are eligible to receive the same amounts for *each transformer installed* within a development. In no instance will allowances exceed the cost of the facilities provided.

The $1,780 allowance approved by Order No. 30853 was based upon the current installation cost of Standard Terminal Facilities for single-phase service. Standard Terminal Facilities costs include the costs associated with providing and installing one overhead service conductor and one 25 kVa transformer to serve a 200 amperage meter base. Tr. at 267. Based upon this allowance, customers that require non-typical, larger than standard transformation outside of subdivisions will be required to pay, as a contribution in aid of construction ("CIAC"), those work order costs that exceed the Standard Terminal Facilities cost of $1,780. Developers receive a $1,780 allowance toward installed transformers and are responsible for the costs of new primary conductor constructed between the existing distribution facilities and the customers' terminal facilities, as well as any secondary conductor constructed between the transformers and junction boxes.

Most customers receive the equivalent of overhead service attachments without any personal investment because the allowance (credit) provided by the Company (investment) covers the entire cost of the required service. Customers requesting services beyond the "standard" or most commonly installed facilities are required to pay all costs above the provided allowance. If the customer wants underground service, or if the customer is building a large home that requires larger than standard transformation, or if the customer is some distance from existing facilities, that customer is responsible for the additional costs of providing service. As a result, customers are treated and charged equitably based on a standard overhead service, thereby mitigating intra-class and cross-class subsidies.

III. Order No. 30853 Maximizes Limited Resources Available for Facility Investment.

If Idaho Power had unlimited access to capital, the Building Contractors' recommendation to continue requiring the Company to spend significant amounts of capital on distribution facilities, so that customers will experience the impacts of inflation as it occurs, might not impact the Company's ability to replace or upgrade existing facilities. However, to the extent that the Company must invest in new distribution facilities for the benefit of new customers, the Company will have less capital available for other capital projects. The Building Contractors argue that new investment benefits existing customers by lowering average costs, but those benefits must be examined from a wider perspective and compared to the benefits that may be derived if the limited capital resources are utilized for other purposes.

Customer CIACs reduce rate base growth and Idaho Power does not earn a return on them. A larger CIAC payment by a customer or developer will reduce the responsibility of existing customers to pay for facilities that do not serve them. Now is the time for the Commission to reduce Company investment in new distribution facilities in order to allow for investment in other infrastructure that is more valuable to customers.

IV. Building Contractors' Proposed Alternative to Order No. 30853 Is Flawed.

The Building Contractors' proposal as described by Dr. Slaughter's testimony would provide an upfront allowance to developers (not customers) of residential subdivisions equal to $1,232 *per lot* within the subdivision. He compares this embedded cost number to the Commission-ordered allowance within residential

subdivisions of $1,780 *per installed transformer.* This is not a valid comparison for several reasons.

First, the Building Contractors' $1,232 per lot allowance within a residential subdivision is based upon historical investments that the Company has made on behalf of customers. Those computations include embedded costs related to investments the Company has made in substations, primary lines, secondary lines, transformers, services, and meters that have been allocated to the residential class in rate proceedings.

However, the Building Contractors' proposed $1,232 allowance does not reflect costs found in most residential subdivision work orders, which typically include only a primary line (or backbone), a number of transformers, and secondary line to individual lots. There are no costs associated with substations, services, or meters in residential subdivision work orders, yet these costs are included in the $1,232 amount. Tr. at 276. Service conductor and meters are not installed within subdivisions until later when homes are actually constructed and customer load occurs. Thus, the Building Contractors' proposal would provide allowances to developers for costs that are not incurred or included in the developer's work order to construct facilities necessary for the residential subdivision. The Building Contractors' embedded cost allowance proposal is also inconsistent with the Company's treatment of other customer classes, where only transformers (not primary or secondary lines) are considered for allowances. Tr. at 277.

It should also be noted that the Building Contractors' proposed per lot allowance of $1,232 included the costs of both primary and secondary transformers that receive allocation to residential class in general rate case proceedings. New residential

requests under Rule H provisions rarely, if ever, include primary transformers. Tr. at 277-78.

Second, per Order No. 30853, residential customers outside of subdivisions receive allowances based solely on Standard Terminal Facilities. They receive no allowances for the costs of substations, primary lines, or secondary lines. The Building Contractors' proposal would offer an unlawful preference to developers by offering a more generous allowance for speculative lots inside a residential subdivision based on facilities that are not considered for allowances to actual new residential customers outside of subdivisions.

Third, because transformers often serve more than one ultimate customer, offering developers an allowance on a per lot basis rather than on a per transformer basis can also lead to the unreasonable result that the allowance is greater than the cost of terminal facilities (in this case transformers) required to provide service. By contrast, if additional residential customers request service that can be served by an existing transformer, under Order No. 30853, those customers only receive a terminal facilities allowance reflective of service conductor and metering because the transformer is already there.

V. The Commission Has Exclusive Jurisdiction over Utility Facility Relocation Expense.

The Idaho Legislature has given the Commission authority to regulate how Idaho Power charges its customers for facility relocations through a variety of statutes. Idaho Code § 61-501 vests the Commission with the power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of the Public Utilities Act. Idaho Code § 61-503 and -

507 provide the Commission with the power to set rates, charges, rules, regulations and practices of the utilities it regulates. Utilities are prohibited by Idaho Code § 61-315 from granting any preference or disadvantage to customers with regard to rates, charges, services or facilities. Idaho Code § 61-301 requires that utility charges for any product or commodity be just and reasonable lest it be declared unlawful. Finally, Idaho Code § 61-302 requires that every public utility maintain service and facilities that are "adequate, efficient, just and reasonable. A specific reference granting the Commission authority over "relocation of utility facilities located in public rights-of-way" is not necessary.

In exercising its jurisdiction, the Idaho Supreme Court has noted that the Commission is allowed all power necessary to effectuate its purpose. In *Grindstone Butte Etc. v. Idaho Power*, 102 Idaho, 175, 627 P.2d 804 (1981), the Court explained that the Commission operates in the public interest and can take into consideration relevant criteria in setting utility rates and charges. The Idaho Supreme Court clearly envisioned Commission jurisdiction over Rule H-type issues when it stated in *Idaho State Homebuilders*, *supra*, that the Commission could establish non-recurring charges for line extensions.

Idaho Power constructs relocations of its facilities for its customers every day. Those relocations are governed by Rule H, which has been in effect in one form or another for at least thirty years. If a public road agency asked Idaho Power to relocate its facilities not in the public right-of-way in order to accommodate construction of a new building for the public road agency, Rule H would apply and would require that the public road agency bear the cost of that relocation. The Petitioners do not assert that the Commission has no jurisdiction over utility facility relocations in those situations.

It is only when utility facilities are located in public road rights-of-way that the petitioners assert that the Commission is divested of jurisdiction over utility facility relocations. In that one instance, they argue an exception to the general rule is legally mandated. Yet there is nothing in Idaho Code §§ 61-301, -501, -502, or -503 to suggest that the Legislature divested the Commission of its authority to determine how utilities will recover the cost of relocating utility facilities in their rates if public road relocations are involved.

The Commission is obligated to protect the public interest and is charged with ensuring that costs of utility facility relocation have not been unreasonably charged to Idaho Power customers when, in fact, the relocation of utility facilities wholly or partially benefits a person or entity other than the public. If costs are being unreasonably allocated, the Commission has the authority to provide a remedy. It is reasonable and prudent that the Commission should approve rules that require the third party causing facility relocation to reimburse Idaho Power so that the costs of the relocation are not unfairly shifted to the Company's customers.

VI. Section 10 of Rule H Should be Applied to LIDs.

In their briefs, the Petitioners argue that local improvement districts (or "LIDs") must be excluded from the application of Section 10 of Rule H. They argue that because LIDs are created by government units, i.e., a city, highway district, or public road agency, they must be excluded from the application of Section 10 of Rule H. Idaho Power respectfully disagrees. First, a LID is not a public road agency that is charged with operating and maintaining public roads. An LID is simply a vehicle by which taxation can occur but not be included in the general budget of a public road agency. The only function the LID performs is to collect money. Where the local improvement

district is paying for the road improvements in question, the local improvement district should also pay for the cost of relocating the power line as required for the improvements. The local improvement district typically derives funding from adjacent private businesses and land owners and those parties, who are directly benefiting from the power line relocation, should bear the costs of the relocation rather than the utility's customers as a whole. Idaho Power does not believe it is unreasonable to expect a LID to include an amount to cover the cost of utility facility relocation in the amount of money it will fund.

In light of problems the Company has experienced with LIDs as referred to in the testimony of Company witness David Lowry and the fact that it would be very easy for LIDs to include cost of utility relocations in their initial funding, Idaho Power urges the Commission to retain LIDs among the entities subject to Section 10 of Rule H.

VII. Conclusion.

The Commission's findings in Order No. 30853 were based upon substantial and competent evidence in the record. For the reasons described above and in the entirety of the Commission's record, Idaho Power respectfully requests the Commission issue an Order affirming its findings in Order No. 30853 and denying the Petitions for Reconsideration filed in this case.

DATED at Boise, Idaho, this 27th day of October 2009.

Lisa D. Nordstrom

LISA D. NORDSTROM
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of October 2009 I served a true and correct copy of IDAHO POWER COMPANY'S POST-HEARING BRIEF ON RECONSIDERATION upon the following named parties by the method indicated below, and addressed to the following:

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October 29, 2009

VIA HAND DELIVERY
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Boise, Idaho 83720-0074

Re: Case No. IPC-E-08-22 – Rule H
Idaho Power Company's Consent to Extend Rule H Tariff Effective Date

Dear Commissioners:

Under the provisions of Idaho Code § 61-626(2), hearings and filings on reconsideration must take place within thirteen (13) weeks after the date petitions for reconsideration were filed. The Commission must then issue its reconsideration order within twenty-eight (28) days after the matter is fully submitted. Idaho Power Company ("Idaho Power") is aware that the Commission may desire additional time after the November 1, 2009, effective date set forth in Order No. 30853 to prepare its reconsideration order, which would be appropriate since the technical hearing transcript and post-hearing briefs upon which the Commission will base its order were filed earlier this week.

Because the Commission stated in Order No. 30853, "IT IS FURTHER ORDERED that the charges and credits authorized by this Order shall become effective for services rendered on or after November 1, 2009" and denied the Building Contractors' Motion to Stay, Idaho Power has been preparing to implement the new tariff on November 1. However, Idaho Power hereby advises the Commission that it is willing to consent to an extension of the November 1, 2009, Rule H tariff effective date set forth in Order No. 30853 until December 1, 2009. Should the Commission decide to issue an order extending the effective date until December 1, the Commission could use the full twenty-eight (28) days to prepare its order with several subsequent days remaining for the Company to prepare conforming tariffs and submit them for Commission approval in advance of the effective date.

Very truly yours,

Lisa D. Nordstrom

Lisa D. Nordstrom

LDN:csb
cc: Service list

P.O. Box 70 (83707)
1221 W. Idaho St.
Boise, ID 83702

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October 2009 I served a true and correct copy of the foregoing CONSENT TO EXTEND RULE H TARIFF EFFECTIVE DATE upon the following named parties by the method indicated below, and addressed to the following:

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