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Ada Highway Dist. V. Public Utilities Com'n Respondent's Brief Dckt. 37294

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

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

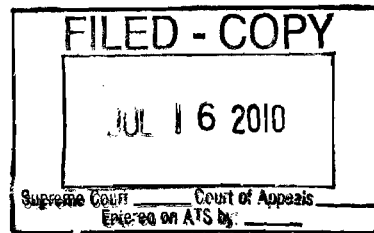
ADA COUNTY HIGHWAY DISTRICT,)

Petitioner-Appellant,)

v.)

IDAHO PUBLIC UTILITIES COMMISSION)
and IDAHO POWER COMPANY,)

Respondents on Appeal.)



RESPONDENT IDAHO POWER COMPANY'S BRIEF

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

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I. STATEMENT OF CASE

A. Nature of the Case.

In this case the Ada County Highway District (“ACHD”) is challenging the jurisdiction of the Idaho Public Utilities Commission’s (“Commission”) to set rates and charges for the services of regulated utilities under Title 61 of the Idaho Code. Commission Order No. 30955 issued in Case No. IPC-E-08-22 modifies Idaho Power’s line extension tariff to specifically require private parties to reimburse Idaho Power for costs it incurs to relocate facilities in the public rights-of-way to benefit the private party. The line extension tariff, commonly referred to as Rule H, already includes language addressing reimbursement for the costs of relocating Idaho Power’s facilities outside public rights-of-way.

ACHD has framed the issue before this Court as an attempt by the Commission to usurp ACHD’s exclusive jurisdiction over public rights-of-way. This is a red herring. The Commission’s Order clearly recognizes the *exclusive* authority of ACHD and other highway districts over public rights-of-way. The Commission’s exclusive jurisdiction over utility rate setting and ACHD’s exclusive jurisdiction over public rights-of-way do not conflict in the context of Idaho Power’s line extension tariff. Consequently, Commission Order No. 30955’s exercise of jurisdiction over utility facility relocation cost reimbursement to require private beneficiaries to reimburse Idaho Power where the relocation of facilities in public rights-of-way confers a private benefit should be upheld.

B. Course of Proceedings.

On October 30, 2008, Idaho Power Company (“Idaho Power” or “the Company”) filed an Application seeking authority to update and clarify its line extension tariff. R. Vol. I, pp. 1-55. Specifically, the Company sought to update the charges that recover the costs it incurs for installing new service lines and relocating existing electric distribution facilities for private parties. The existing language on relocations was expanded to include recovery of utility relocation costs within the public right-of-way from those receiving a private benefit. On November 26, 2008, the Commission issued a Notice of Application and Intervention Deadline. Order No. 30687; R. Vol. I, pp. 94-97. Four parties petitioned to intervene and were granted intervention: the Building Contractors Association of Southwestern Idaho (“BCA”), the City of Nampa, The Kroger Company, and Association of Canyon County Highway Districts (“ACCHD”). The Commission issued its Notice of Parties on December 30, 2008. R. Vol. I, pp. 126-128.

Pursuant to Order No. 30687, the parties met on January 14, 2009, to discuss the processing of this case. ACHD did not petition to intervene or participate in the prehearing conference. The participating parties agreed that the case did not require a technical hearing or pre-filed testimony and therefore recommended that the case be processed under Modified Procedure¹ with comments due no later than March 20, 2009. Order No. 30719; R. Vol. I, pp.

¹ “Modified Procedure” refers to development of the Commission’s record by written submissions following a preliminary Commission finding that the public interest may not require a hearing to consider the issues presented in that proceeding. IDAPA 31.01.01.201.

129-132. The comment deadline was subsequently extended until April 17, 2009, with response comments due no later than May 1, 2009. Order No. 30746; R. Vol. I, pp. 146-149.

On July 1, 2009, the Commission issued Order No. 30853 partially approving the Company's request to modify its line extension tariff. R. Vol. II, pp. 313-326. The ACHD, City of Nampa, Association of Canyon County Highway Districts (collectively "the Districts"), and the BCA all filed timely Petitions for Reconsideration. The Districts argued that the Commission exceeded its statutory authority in approving the changes to Section 10 of the tariff ("Relocations in Public Road Rights-of-Way"). The BCA objected to changes to the line extension rate structure concerning "allowances" or credits for the installation of new service and the elimination of subdivision lot refunds. On July 29, 2009, Idaho Power filed an Answer to the Petitions. R. Vol. II, pp. 383-404.

In Order No. 30883 issued August 19, 2009, the Commission granted in part and denied in part the Petitions for Reconsideration. R. Vol. III, pp. 405-410. The Commission granted reconsideration to the Districts to review the legal arguments, scheduling briefs and an oral argument on October 13, 2009. The Commission partially granted reconsideration to the BCA and scheduled an evidentiary hearing regarding the appropriate amount for line extension allowances contained in Rule H. The evidentiary hearing was held on October 20, 2009. Post-hearing reconsideration briefs were filed by BCA and Idaho Power on October 27, 2009. R. Vol. III, pp. 586-608. On November 9, 2009, the BCA filed a Petition for Intervenor Funding. R. Vol. IV, pp. 612-647.

After reviewing the initial record and the reconsideration testimony and briefs, the Commission issued final Order No. 30955 on reconsideration affirming, rescinding, amending, and clarifying parts of its initial Order pursuant to Idaho Code § 61-624. R. Vol. IV, pp. 648-678. On January 10, 2010, ACHD filed an appeal to the Supreme Court for the Commission's final Order. R. Vol. IV, pp. 679-683.

C. Statement of the Facts.

The vast majority of Idaho Power's distribution facilities are located on public road rights-of-way. Transmission facilities, because of their large size and for safety and operating reasons, are generally located on private rights-of-way or on public land where the Company obtains long-term permits for the location of transmission facilities.

The desirability of utilizing public road rights-of-way to locate electrical distribution facilities was recognized early in Idaho's history. In 1903, the Legislature established Idaho Code § 62-705, which granted electric utilities the right to utilize all public roads, streets, and highways for electric facilities so long as that usage did not "incommode the public use of the road, highway, street"

On October 30, 2008, Idaho Power applied to modify its line extension tariff. R. Vol. 1, pp. 1-55. Idaho Power proposed a new tariff Section 10 entitled "Relocations in Public Road Rights-of-Way" to specifically address the recovery of costs when the Company relocates its facilities in public rights-of-way pursuant to Idaho Code § 62-705. The tariff identifies when and to what extent the Company could recover costs it incurred in relocating facilities from private

beneficiaries² such as real estate developers or adjacent landowners. This determination of cost recovery from private parties involves only the Company and the affected private party. It has no impact on the jurisdiction of ACHD or the various highway districts (hereinafter referred to as the “Public Road Agencies”³) over their respective rights-of-way. Section 10 does not require cost recovery from Public Road Agencies for utility facility relocations that occur in public rights-of way.

1. How Section 10 Allocates Utility Relocation Costs.

Section 10 provides a simple, time-tested standard for determining whether the Company or a private beneficiary should pay for utility relocations caused by road improvements. The basic rule is that the private beneficiary should pay the same percentage of the utility relocation costs as it pays for the underlying road improvement costs. In summary, the Commission-approved Section 10 rules provide:

² Section 10 of the tariff originally filed with the Application on October 30, 2008, defined a “third-party beneficiary” as “private or public third parties such as real estate developers, local improvement districts, or adjacent landowners.” R. Vol. I, p. 22.

At the Commission’s direction in Order No. 30853, on August 28, 2009, Idaho Power clarified this definition to read: “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.” R. Vol. III, p. 415.

On Reconsideration, Commission Order No. 30955 ultimately renamed the definition “Private Beneficiary,” which is “any individual, firm or entity that provides funding for road improvements performed by a Public Road Agency or compensates the Company for the Relocation of distribution facilities as set forth in Section 10. A Private Beneficiary may include, but is not limited to, real estate developers, adjacent landowners, or existing customers of the Company.” R. Vol. IV, pp. 664 and 677.

³ The Rule H line extension tariff approved by Commission Order No. 30955 defines a “Public Road Agency” as any state or local agency which constructs, operates, maintains or administers public road rights-of-way in Idaho, including where appropriate the Idaho Transportation Department, any city or county street department, or a highway district. R. Vol. IV, p. 676. The approved tariff is included in its entirety in the Addendum to this Brief.

a. If the Public Road Agency determines that it will use 100 percent of its own funds for the road improvements that necessitate the utility relocation, then Idaho Power would pay 100 percent of the utility relocation costs it incurs. R. Vol. IV, p. 677.

b. If the Public Road Agency determines that 100 percent of the cost of a road widening or other improvement should be funded by payments from a party other than the Public Road Agency, “a private beneficiary,” then it will be presumed that the highway project is being performed to exclusively benefit the private beneficiary making the contribution. In that instance, utility relocation costs would be reimbursed 100 percent by the private beneficiary. *Id.*

c. If the Public Road Agency determines a highway improvement should be funded partially by using the Public Road Agency’s own funds and partially by a contribution from a private beneficiary, then the utility would collect the same percentage of relocation costs from the private beneficiary. *Id.* For example, if the Public Road Agency was funding 40 percent of the cost of a right-of-way improvement from its own funds and a private beneficiary was paying an impact fee or otherwise funding the other 60 percent of the cost of the right-of-way improvement, the utility would collect 60 percent of its relocation expense from the private beneficiary and the balance would be recovered in the Company’s electric rates.

The cost-sharing arrangement outlined in Section 10 is administratively simple and allows the Public Road Agency to determine to what degree the road improvement and resulting utility relocation are for a public purpose versus the benefit of a private party. This policy also ensures that the costs of relocations are borne by the parties benefitting from the requests and not by all of the Company’s customers through higher electric rates.

2. The Commission's Initial Order No. 30853.

On July 1, 2009, the Commission issued final Order No. 30853. R. Vol. II, pp. 313-326. Idaho Power had proposed, and the Commission approved, Section 10 as a mechanism to determine who, as between Idaho Power and private beneficiaries, has responsibility for the costs of facility relocations in public rights-of-way. The Commission specifically noted that Section 10 in no way grants Idaho Power or the Commission authority to impose relocation costs on a Public Road Agency. *Id.*, p. 325. The Commission found it persuasive that if a Public Road Agency determines that a private third party should pay for a portion of a road improvement project, it is a reasonable and appropriate indication of responsibility for the allocation of utility relocation costs incurred as a result of the road improvement project. *Id.* Furthermore, based on concerns noted by the parties, Idaho Power was directed to clarify and resubmit the definitions of "Local Improvement District" and "Third-Party Beneficiary." *Id.*

3. ACHD's Petition for Reconsideration.

ACHD filed a Petition for Reconsideration on July 22, 2009, requesting reconsideration and clarification on the Commission's approval of Section 10 of Idaho Power's line extension tariff relating to utility relocations. R. Vol. II, pp. 341-357. ACHD requested reconsideration on the grounds that Section 10 of Rule H usurps the exclusive jurisdiction of Public Road Agencies over public rights-of-way and that the portions of Rule H requiring Local Improvement Districts to pay any portion of relocation costs violate Article 8 § 2 and Article 7 § 17 of the Idaho Constitution. The ACCHD and the City of Nampa filed similar Petitions for Reconsideration. *Id.*, pp. 379-382. Additionally, the BCA petitioned for reconsideration of unrelated portions of

Rule H. *Id.*, pp. 358-372. Idaho Power filed an Answer to the Petitions on July 29, 2009. *Id.*, 383-404.

On August 19, 2009, the Commission issued Order No. 30883 granting reconsideration, setting forth a briefing schedule and asking Idaho Power to make certain clarifications to its proposed Rule H. *Id.* at Vol. III, pp. 405-410. Idaho Power filed the clarifications requested by the Commission on August 28, 2009. R. Vol. III, pp. 411-427. In recognition that the ACHD and Idaho Transportation Department had already adopted regulations related to utility relocations on public rights-of-way, Idaho Power proposed a new provision to Section 10 of Rule H to make clear that their existing regulations would not be subject to and in no way conflict with Section 10 of Rule H. The proposed “savings clause” stated:

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 relocations costs between the utility and Third-Party Beneficiaries that are substantially similar to the rules set out in Section 10 of Rule H.

Id., p. 427.

4. The Commission’s Order on Reconsideration.

After briefing and oral argument, the Idaho Public Utilities Commission issued Order No. 30955. R. Vol. IV, pp. 648-678. In that Order, the Commission approved a modified version of Section 10. The Commission generally held that Section 10 does not usurp the Public Road Agencies’ exclusive jurisdiction over public rights-of-way within their districts. *Id.*, p. 658. Although it is reasonable to expect a Local Improvement District to include the cost of necessary utility facility relocations as part of the total funding amount of the district improvement, the

Commission “was not persuaded that the Commission could compel such reimbursement” and declined to include language in Section 10 requiring Local Improvement Districts to pay relocation costs. *Id.*, p. 662. Thus, the Commission replaced the term “Third-Party Beneficiaries,” which included Local Improvement Districts, with “Private Beneficiaries,” which does not include any governmental entities. *Id.*, pp. 660-664 and p. 676.

The Idaho Public Utilities Commission also rejected Idaho Power’s proposal that Section 10 require payment of relocation costs to Idaho Power “in advance of the company’s relocation work” because Idaho Power had other ways to recover its relocation costs, including the termination of service to a developer that refuses to pay the relocation costs. *Id.*, pp. 665-666. The Commission approved the newly added “savings clause” to Section 10, clarifying that Section 10 “shall not apply to Relocations within public road rights-of-way of Public Road Agencies which have adopted legally binding guidelines for the allocation of utility relocations costs between the Company and other parties that are substantially similar to the rules set out in Section 10 of Rule H.”⁴ R. Vol. IV, p. 678.

On its own initiative, the Idaho Public Utilities Commission also added a new section, Section 11, to Rule H that incorporated provisions of Idaho Code § 40-210. Section 11 directs Idaho Power Company to participate in road project design or development meetings if the project may require relocation of distribution facilities to minimize relocation expense to the maximum extent possible.

⁴ This “savings clause” language was approved in Order No. 30955 issued on November 30, 2009. Although similar, the language quoted on page 24 of ACHD’s Appellant Brief was taken from the Company’s August 28, 2009, filing and not wholly adopted by the Commission. *See* R. Vol. II, p. 427.

Commission Order No. 30955 directed Idaho Power to file new tariff sheets consistent with the Order. R. Vol. IV, p. 674. The Commission adopted the Company's tariff on November 30, 2009, for rates and charges effective December 1, 2009.⁵

On January 10, 2010, ACHD filed an appeal to the Supreme Court from the Commission's final Order. R. Vol. IV, pp. 679-683.

II. ISSUES PRESENTED ON APPEAL

- A. Whether the Commission Has Jurisdiction Under Idaho Law to Establish How a Utility Will Recover the Costs It Incurred to Relocate Its Facilities Within Public Rights-of-Way From Private Beneficiaries.**
- B. Whether Commission Order No. 30955 Is a Lawful Exercise of the Commission's Authority to Regulate Utility Operating Expenditures and Recovery Thereof.**

III. STANDARD OF REVIEW

The standard of review on appeal from an Order of the Commission has been clearly articulated in Idaho law. Article V, Section 9 of the Idaho Constitution provides that the Supreme Court shall have jurisdiction to review on appeal any Order of the Commission. An issue not presented to the Commission for rehearing will not be considered on appeal. Idaho Code §§ 61-626 and 61-629; *Industrial Customers of Idaho Power v. Idaho Public Utilities Comm'n*, 200 P.U.R. 4th 371, 134 Idaho 285, 288, 1 P.3d 786, 789 (2000); *Key Transp., Inc., v. Trans Magic Airlines Corp.*, 96 Idaho 110, 112-13, 524 P.2d 1338, 1340-41 (1974). Idaho Code § 61-629 defines the scope of the Supreme Court's limited review and states in relevant part:

⁵ For the Court's convenience, the Rule H tariff has been included in its entirety in the Addendum to this Brief.

The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the Order appealed from violates any right of the appellant under the Constitution of the United States or of the state of Idaho.

See also Rosebud Enterprises, Inc., v. Idaho Public Utilities Comm'n, 128 Idaho 609, 618, 917 P.2d 766, 775 (1996); *A. W. Brown Co., Inc., v. Idaho Power Co.*, 121 Idaho 812, 815, 828 P.2d 841, 844 (1992).

In 2000, the Supreme Court recited the review standards and degree of deference that must be given to decisions of the Commission. In *Industrial Customers*, the Court stated that review of Commission determinations as to “questions of law” is limited to determining whether the Commission has regularly pursued its authority and whether the constitutional rights of the appellant have been violated. *Industrial Customers*, 134 Idaho at 288, 1 P.3d at 789. Regarding “questions of fact,” the Court stated that where the Commission’s findings are supported by substantial, competent evidence in the record, the Court must affirm those findings and the Commission’s decision. *Id.*; *Hulet v. Idaho Public Utilities Comm’n*, 138 Idaho 476, 65 P.3d 498 (2003); *Rosebud Enterprises v. Idaho Public Utilities Comm’n*, 128 Idaho 624, 631, 917 P.2d 781, 788 (1996). *See also A. W. Brown*, 121 Idaho at 815-16, 828 P.2d at 844-45 and *Empire Lumber Co. v. Washington Water Power*, 114 Idaho 191, 193, 755 P.2d 1229, 1231 (1987), *cert. denied*, 488 U.S. 892, 109 S.Ct. 228, 102 L.Ed.2d 218 (1988).

The Commission’s findings of fact are to be sustained unless it appears that the clear weight of the evidence is against its conclusion or that the evidence is strong and persuasive that the Commission abused its discretion. *A. W. Brown*, 121 Idaho at 816, 828 P.2d at 845 *Utah-*

Idaho Sugar Co. v. Intermountain Gas Co., 100 Idaho 368, 376, 597 P.2d 1058, 1066 (1979). This Court will not displace the Commission's findings of fact when faced with conflicting evidence, even though the Court would have made a different choice had the matter been before it *de novo*. *Rosebud Enterprises*, 128 Idaho at 618, 917 P.2d at 785; *Hayden Pines Water Company v. IPUC*, 111 Idaho 331, 336, 723 P.2d 875, 880 (1986).

The Commission's findings need not take any particular form so long as they fairly disclose the basic facts upon which the Commission relies and support the ultimate conclusions. What is essential are sufficient findings to permit the reviewing court to determine that the Commission has not acted arbitrarily. *Rosebud Enterprises*, 128 Idaho at 624, 917 P.2d at 781; *Boise Water Corp. v. Idaho Public Utilities Comm'n*, 97 Idaho 832, 840, 555 P.2d 163, 171 (1976); *Washington Water Power Company v. Idaho Public Utilities Commission*, 101 Idaho 567, 575, 617 P.2d 1242, 1250 (1980).

IV. ARGUMENT

A. The Purpose of Section 10: "Relocation in Public Road Rights-of-Way."

Idaho Power proposed Section 10 for several reasons: (1) to reduce the incidence of Public Road Agencies shifting relocation costs from local developers and landowners to Idaho Power's main body of customers, (2) to explicitly recognize the Commission's authority to determine how Idaho Power recovers relocation costs from private parties for utility facilities located in public rights-of-way, (3) to provide uniformity in Idaho Power's dealings with the dozens of municipalities and highway districts within its service territory, and (4) to confirm the

Commission's authority to require private parties to reimburse Idaho Power for relocation costs the private parties cause Idaho Power to incur.

1. Reduce the Shifting of Developer Expenses to Idaho Power Customers.

First, Idaho Power believed it was necessary to add Section 10 to address instances where Public Road Agencies inappropriately facilitate the shift of relocation expenses from developers to Idaho Power and its customers. Idaho Power witness David R. Lowry presented direct testimony describing this recent trend toward shifting relocation expenses. Tr. Vol. II, pp. 5-8. To illustrate this problem, Mr. Lowry described how the developers of the Gateway Mall in Nampa submitted plans to have the intersection of Happy Valley Road and Stamm Lane rebuilt as a new entrance into the Mall. When informed that the project was postponed for a year, Idaho Power refunded the collected relocation cost for the project to the developer at the developer's request. Shortly thereafter, a request for relocation was received from the City of Nampa for the same intersection with no disclosure of the interest of a third-party developer. Mr. Lowry noted that "it was only through the communication of Idaho Power employees that the discovery of the third-party developer beneficiary interest in the 'city's' project was made." Tr. Vol. II, p. 159, LL. 2-13.

ACHD has acknowledged the cost-shifting problem in the past. ACHD argued in the underlying case 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." R. Vol. III, p. 469. Nampa and ACCHD made the same claim in more detail in their Joint Brief. The Joint Brief stated:

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.

R. Vol. III, p. 437.

These statements indicate that in their dealings with local developers, one of the Public Road Agencies' principal concerns would be making sure that payments to Idaho Power for utility relocations are minimized to encourage local economic development. Idaho Power is concerned that without Section 10, this will be done at the expense of Idaho Power's customers outside of the Public Road Agencies' districts.

Because there are so many Public Road Agencies 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 propose Section 10 in its line extension tariff. In effect, this would provide a general framework to make cost allocations of utility relocations more transparent and less susceptible to inappropriate subsidization of local economic development.

Neither Idaho Power nor the Commission disagrees with ACHD's contention that the public benefits from road projects funded by entities of government, third parties, and developers. R. Vol. II, p. 399. However, utility rates that socialize costs of utility relocation in public rights-of-way that have been inappropriately shifted from developers to utility customers

– the majority of which live outside the area served by the public road agency – cannot be just and reasonable as required by Idaho Code §§ 61-301 and -502. Idaho Power customers in Pocatello do not benefit from roadway improvements solely benefitting a new shopping center in Nampa; however, they pay for relocation costs in excess of the public benefit in their rates. *Id.* Section 10 addresses this issue of fundamental fairness and is squarely within the Commission’s jurisdiction.

2. Recognize Commission Rate Setting Jurisdiction Over Reimbursement of Company Relocation Costs.

Second, for at least 30 years, Idaho Power’s line extension tariffs have required that parties who request the relocation of Company utility facilities *outside* public rights-of-way are obligated to pay for the costs of the relocations. R. Vol. II, p. 272. However, the tariff did not address how the utility’s relocation costs should be assigned *inside* public rights-of-way. Idaho Power therefore proposed Section 10 to resolve the ambiguity and clearly delineate cost responsibility for private parties requesting utility relocations within public rights-of-way.

3. Uniformly Allocate Idaho Power’s Relocation Costs to Private Beneficiaries.

Third, Section 10 allocates the costs of Idaho Power’s relocation of facilities within the public right-of-way in a uniform manner to private beneficiaries, no matter which Public Road Agency is involved. Idaho Power has dealings with the dozens of municipalities and highway districts within its service territory, some of which do not address cost allocation for relocation of utility facilities located in the public rights-of-way in their ordinances. By incorporating such language into Section 10, Idaho Power offers consistency and uniformity to its road construction counterparts throughout southern Idaho.

4. Assess Utility Costs to “Cost Causers.”

Finally, Section 10 is intended, to the extent permitted by law, to accomplish exactly what the rest of Idaho Power’s line extension tariff is intended to accomplish – to recover costs from those parties that cause Idaho Power to incur costs. Idaho Power initiated this proceeding to implement changes to its line extension tariff in furtherance of one of the fundamental principles of utility regulation; that to the extent practicable, utility costs should be paid by those entities that cause the utility to incur the costs. This cost of service principle is often referred to as “cost-causation” and promotes both fairness and accurate consumer price signals. “Simply put, it has been traditionally required that all approved rates reflect to some degree the costs actually caused by the customer who must pay them.” *K N Energy, Inc., v. F.E.R.C.*, 133 P.U.R. 4th 607, 968 F.2d 1295, 1300 (C.A.D.C.1992). Idaho Power’s Rule H tariff is a good example of how the Commission exercises its jurisdiction to address “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 Company’s other customers will be higher than they would otherwise be. Order No. 30955, p. 13; R. Vol. IV, p. 660. 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. *Id.*

This principle is not unfamiliar to ACHD and other Public Road Agencies. In the past, they have expressed the need to assess and recover impact fees from entities that require the Public Road Agencies to construct road improvements. Public Road Agencies, like Idaho Power, have frequently emphasized the need to have “growth pay its way.” For example, on

August 26, 2009, ACHD adopted Impact Fee Ordinance No. 208 (replacing Impact Fee Ordinance No. 202) with intent to “promote orderly growth and development by establishing uniform standards by which those who benefit from new growth and development pay a proportionate share of the cost of new public facilities under the jurisdiction of the Ada County Highway District which are needed to serve new growth and development”⁶ Recovering costs of utility relocations is no different. Growth should pay its way.

B. The Exclusive Jurisdiction of the Public Road Agencies Over Public Road Rights-of-Way is Undisputed.

Order Nos. 30853 and 30955 acknowledge that the Public Road Agencies have exclusive jurisdiction and authority to require Idaho Power to relocate its facilities in public road rights-of-way, at no cost to the Public Road Agency, where the facilities would incommode the public use. R. Vol. II, p. 324 and Vol. IV, p. 656. Public Road Agencies 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. *Id.* Consequently, Idaho Power only has a permissive right to use the public rights-of-way for its facilities and if a Public Road Agency directs Idaho Power to relocate its facilities to a new location in the public right-of-way because those facilities “incommode the public,” this does not constitute a taking of Idaho Power’s property. These points of law are not in dispute.

All parties agree that Public Road Agencies like ACHD have authority to determine when relocation of utility facilities in public rights-of-way is necessary. “Although highway

⁶ Ada County Highway District Impact Fee Ordinance No. 208 can be found at http://www.achd.ada.id.us/Departments/ROWDS/Docs/Impact_Fees/Ordinance/Final/1_Ord_208.pdf.

districts have broad powers and authority over streets and highways, it must be held in balance with the statutory responsibilities of other entities.” *Alpert v. Boise Water Corp.*, 118 Idaho 136, 143, 795 P.2d 298, 305 (1990) *citing Worley Highway Dist. v. Kootenai County*, 104 Idaho 833, 663 P.2d 1135 (Ct.App. 1983). The authority to require relocation does not give Public Road Agencies authority to decide if the utility will receive any subsequent reimbursement from third parties *other* than the general public if private parties also benefit from the facilities relocation. For if Public Road Agencies had that authority, how would they institute a utility rate or charge to recover the cost from private beneficiaries? Because the cost of relocating utility facilities directly bears on utility rates and charges, reimbursement of utility relocation expenses must fall within the jurisdiction of the Commission.

C. The Commission Has Jurisdiction Under Idaho Law to Determine Which Costs Incurred to Relocate Utility Facilities Within the Public Road Rights-of-Way May Be Collected From Private Beneficiaries.

It is ACHD’s position that Public Road Agencies have sole and complete jurisdiction to determine when relocation is required to avoid “incommoding the public.” Idaho Power agrees. However, the ACHD goes one step further and contends that its authority to require relocation also gives it the sole discretion to decide if the utility will receive any reimbursement from third parties benefitting from the road improvement and relocation. It is this second step that encroaches on the Commission’s jurisdiction. The Commission has an obligation to protect the public interest, which covers every citizen of the state of Idaho receiving utility service from regulated public utilities. When it comes to allocating the costs of utility facility relocations to determine utility rates and charges, the Commission has exclusive jurisdiction.

1. Commission Has Broad Authority Within Its Limited Jurisdiction.

ACHD correctly notes in its Brief that the jurisdiction of the Commission is limited to that expressly granted by the Legislature. *Washington Water Power Company v. Kootenai Environmental Alliance*, 99 Idaho 875, 591 P.2d 122 (1979). Idaho Power agrees. However, it cannot be seriously argued (and ACHD does not so argue) that the Commission does not have the authority to regulate how utilities will recover the costs of relocating facilities in their rates and charges. This includes the authority to require the beneficiaries of a utility facilities relocation to financially contribute and offset the cost of that relocation. Such contributions affect rates because if the utility receives a contribution in aid of construction, it does not have to include those costs in its rates, thereby reducing upward pressure on rates.

In spite of this long-standing principle of cost-causation ratemaking, ACHD in effect argues that *in this one situation* the Legislature has divested the Commission of its authority to determine how utilities will recover the cost of relocating utility facilities in their rates. ACHD insists that in this one instance, the Legislature intended that the regulation of how utilities recover the costs of relocating their facilities should be handed over to the dozens of state and local Public Road Agencies in Idaho Power's service territory.

Idaho Power does not believe any intent to limit the Commission's jurisdiction to regulate utility cost recovery is manifested in any of the cases or statutes cited by ACHD. Instead, Idaho Power contends that the Commission has been given exclusive jurisdiction to determine utility rates and charges arising out of the cost of relocation of utility facilities. The

Company's position is supported by Idaho statutes and case law. Idaho Code § 61-501 provides as follows:

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 § 61-502 provides:

DETERMINATION OF RATES. Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, fares, tolls, rentals, charges or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursions or commutation tickets, or that the **rules, regulations, practices, or contracts or any of them, affecting such rates**, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges or classifications are insufficient, **the commission shall determine** the just, reasonable or sufficient **rates**, fares, tolls, rentals, charges, classifications, **rules, regulations, practices or contracts** to be thereafter observed and in force **and shall fix the same by order as hereinafter provided**, and shall, under such rules and regulations as the commission may prescribe, fix the reasonable maximum rates to be charged for water by any public utility coming within the provisions of this act relating to the sale of water. (Emphasis added.)

Idaho Code § 61-507 provides:

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. (Emphasis added.)

These sections of the Idaho Code make clear that the Legislature has granted the Commission broad authority to regulate the practices and contracts of utilities as they affect rates. They also make it clear that the Commission has the authority to determine just and reasonable utility practices and contracts, and to issue orders addressing those practices.

Idaho Code § 61-503 provides:

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 § 61-301 provides:

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. (Emphasis added.)

Idaho Code § 61-302 also provides:

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.

While ACHD argues on page 21 of its Appellate Brief that facilities relocation is not a “service” for which the Commission can set a charge because it is not “electric service” as defined by Idaho Code § 61-332A,⁷ these foregoing sections are not so narrowly drawn. Idaho Code §§ 61-301 and 61-503 require the Commission to set just and reasonable charges for any utility commodity furnished or *any service* rendered. Relocating electric facilities to accommodate the interests of others is a service for which Idaho Power collects a charge. A relocation charge is one of the nonrecurring charges imposed on new customers to extend existing distribution line referenced in the *Homebuilders* decision. *Idaho State Homebuilders v. Washington Water Power*, 107 Idaho 415, 421, 690 P.2d 350 (1984). Such charges are common in utility regulation and the Commission has set charges to recover the costs of utility services such as these for decades.

ACHD argues that Section 10 adopted by the Commission exceeds the authority granted to the Commission by the Idaho Constitution and Legislature. Idaho Power disagrees. In the case of *Grindstone Butte Mutual Canal Co. v. Idaho Public Utilities Commission*, 102 Idaho 175, 627 P.2d 804 (1981), the Idaho Supreme Court analyzed the constitutional and statutory limitations placed on the Commission and found the Commission had broad authority over a public utility’s rates and charges. The Court stated:

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

⁷ The definition of “electric service” pertains specifically to the Electric Supplier Stabilization Act codified at Idaho Code §§ 61-332 through 61-334C.

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).

Section 10 of Idaho Power's Rule H falls squarely within the Commission's grant of authority as described in the above-cited cases and statutes. 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 right-of-way relocations are involved. In these statutes, the Legislature invested the Commission with broad authority to regulate the services, practices, and contracts of utilities as they affect customer rates.

The Commission is charged with ensuring that costs of utility facilities 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. This Commission's authority is entirely separate from the jurisdiction of Public Road Agencies to determine when relocations within the public rights-of-way must be made.

2. The Commission Does Not Exceed Its Jurisdiction.

Although much is made of the Public Road Agencies' exclusive jurisdiction over the supervision, construction, operation, and maintenance of highways within their districts, Section 10 of Idaho Power's Rule H tariff addresses the entirely separate issue of whether the utility's cost of relocation should be borne by the utility (and its customers) or by a third party who directly benefits from the relocation. This determination involves the reimbursement of the Company by the private beneficiary and has no impact on the Public Road Agencies' jurisdiction over its rights-of-way. If Idaho Power seeks reimbursement from a private beneficiary for relocation costs assigned to the Company by a Public Road Agency, it should be of no concern to the Public Road Agency (which is not a party to subsequent reimbursement dealings).

Moreover, the Commission's Order does not seek to contravene the common law rule that the utility's use of the public road right-of-way is subordinate to the paramount use of public road right-of-way if that use interferes with the public benefit. Section 10 does not require Public Road Agencies to reimburse the Company for public right-of-way relocation costs where relocation is required to benefit the public. The Commission would have jurisdiction only over the portion of the relocation paid the by utility, and the utility's subsequent collection of the proportional amount that benefitted a private party.

ACHD's misinterprets how Section 10 will apply to recovery of utility relocation expenses from private beneficiaries. ACHD believes that Section 10 will "preempt" public road agency regulations that are not substantially similar to Section 10. Appellant Brief at p. 26; Tr. at 58, LL. 1-4. This conclusion is inaccurate – no language exists anywhere in Section 10 that

would prevent a Public Road Agency ordinance from determining the relocation cost responsibility to the utility as required by the Public Road Agency. The Commission only has ratemaking jurisdiction to determine how Idaho Power must recover its costs from private beneficiaries. There is no conflict between the two. This is the point of Commissioner Smith's quotes cited on pages 15 and 26 of the Appellant's Brief and what ACHD continues to misunderstand. As Commissioner Smith makes clear, "The tariff is only applicable to the utility and the people who are taking services under the conditions where the rules apply. It cannot invalidate your [ACHD's] resolution." Tr. Vol. I, p. 61, LL. 16-19. Moreover, the savings clause should be viewed "as an accommodation of your [ACHD's] existing practices so that they [Section 10 provisions] don't get in the way of what's already in place." *Id.*, p. 61 L. 24 – p. 62, L. 2.

If the Public Road Agency's ordinance governing the initial relocation cost allocation is different than Section 10 governing the utility's subsequent reimbursement of its costs, so be it. They operate sequentially and Section 10 does not constrain the Public Road Agencies operations or authority. In short, ACHD has no claim or injury resulting from the application of Section 10 to the utility and private beneficiaries. ACHD has no cost responsibility for utility relocations in public rights-of-way.

ACHD also misunderstands the purpose of Section 11, which directs the Company to participate in public road project design or development meetings to eliminate or minimize relocation costs in public road rights-of-way. With the exception of Idaho Power, Section 11 imposes no affirmative obligation on any party that is not already imposed by Idaho Code § 40-

210. Section 11 makes it clear that Idaho Power has more than the mere option to participate in these meetings – it has a duty imposed by the Commission to participate and minimize costs to its customers. If the Court were to strike Section 11 from the Company’s tariff, Idaho Code § 40-210 would still apply by its terms and nothing would change.

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 private party causing facility relocation to reimburse Idaho Power so that the costs of the public right-of-way relocation are not unfairly shifted to the Company’s customers.

D. Commission Order No. 30955 Is a Lawful Exercise of the Commission’s Jurisdiction to Regulate Utility Operating Expenditures and Recovery Thereof.

ACHD directs the bulk of its Brief to describing the exclusive jurisdiction the Public Road Agencies possess to manage public highways and public rights-of-way within the Public Road Agencies’ respective geographic boundaries. It characterizes Section 10 of the Company’s Rule H tariff as an encroachment on the Public Road Agencies’ authority to exercise its ongoing responsibilities for constructing, operating, and maintaining road systems.

ACHD cites *Village of Lapwai v. Alligier*, 78 Idaho 124, 129, 229 P.2d 475, 479 (1956) as support for their position. *Lapwai* confirms the common law rule that municipalities, through franchise agreements with utilities, exercise authority within their municipal boundaries to allow

or disallow a utility to locate facilities in their streets and alleys. *Lapwai*, however, does not address the central question presented here, that is a utility's ability to obtain compensation from private parties that receive a benefit when a city requires the relocation of utility facilities within the public right-of-way when that utility has a valid franchise to operate in that city.

The California Court of Appeal addressed this issue of the common law rule in 1987 when it held a developer liable for costs incurred in the relocation of Pacific Gas and Electric Company's ("PG&E") electrical power poles. Dame Construction Co., a private land development company, argued that PG&E was solely liable for the relocation costs because of the common law rule that a franchised utility must bear its own costs of relocation when requested to move its equipment by an authorized governmental agency. Dame maintained that in the absence of express statutory authority, which PG&E admitted was lacking, a utility cannot shift this obligation to others, even where a private developer undertakes the improvements that make the equipment relocation necessary. The Court held that the common law rule, that a franchised utility must bear its own costs of relocation when requested to move its equipment by an authorized governmental agency, does not apply to a dispute over relocation costs between a utility and a private developer. The Court held that "where a private party, on its own initiative and not that of the government, develops a parcel of land and thereby creates or aggravates a need for public improvement requiring the relocation of existing utility equipment, the private party, and not the utility, must bear the necessary relocation costs." *Pacific Gas & Electric Company v. Damé Construction Co., Inc.*, 191 Cal.App.3d 233, 236 Cal.Rptr. 351 (1987). Because PG&E's ratepayers were comparable to municipal taxpayers protected from bearing the

cost burden by the common law rule codified in California Public Utilities Code § 6297, the Court found that analogous reasoning favored imposing liability on Dame. By clarifying Idaho Power's line extension tariff to confirm that private beneficiaries must reimburse Idaho Power for their proportional share of public rights-of-way relocation expenses, the Commission is simply articulating that cost responsibility for the relocation of utility facilities must follow the benefits derived by the relocation.

ACHD also cites *State ex rel Rich v. Idaho Power Co.*, 32 P.U.R. 3d 75, 81 Idaho 487, 346 P.2d 596 (1959) in support of their position. Again, *Rich* does not speak to the issue presented by Section 10 of the line extension tariff. In the *Rich* case, the Idaho Board of Highway Directors had sought a declaratory judgment to determine the constitutionality of a statute passed by the Idaho Legislature in 1957 providing that utilities would be reimbursed out of dedicated state highway funds for the cost of relocating their utility facilities located on any federal-aid primary or secondary system or on the inter-state system of Idaho public highways, when determined necessary by the Idaho Board of Highway Directors. While *Rich* upheld the common law rule that utilities locating facilities in public rights-of-way can be required to relocate their facilities at their own expense if the safety of the public required it, the principal issue addressed in *Rich* was the source of funding for the utility's cost of relocation. In *Rich*, the court decided that the recently passed statute requiring utility relocation costs be reimbursed to the utility out of the dedicated state highway fund violated the Idaho Constitution's prohibition on the lending of state credit.

No such issue exists here. Under Idaho Power's proposed Section 10, public highway funds are never used to reimburse Idaho Power for relocation expense. To the extent it is applicable to this case, *Rich* is essentially a restatement of the common rule law. Neither Idaho Power nor the Commission seeks to contravene the common law rule that the Company's use of the public road right-of-way is subordinate to the paramount use of public road right-of-way if that use interferes with the public benefit. Section 10 does not require any of the Public Road Agencies to reimburse the Company for relocation costs where relocation of utility facilities in the public right-of-way is required. It is only in those cases where the road widening or improvement principally benefits a private party that the Commission must play a role to ensure that the costs of the relocation are not unfairly shifted to utility customers.

Although ACHD asserts repeatedly that Section 10 of Rule H would be a material abridgement of the Public Road Agencies' authority and would therefore compromise its ability to manage highways and roads, it does not provide any examples of a fundamental management function of the Public Road Agencies 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 330,⁸ which is similar to Section 10 of Rule H, for more than twenty years. For instance, ACHD refers to Section 10's silence on improvements to public rights-of-way that would normally be paid for by a private developer but for ACHD's determination that it would have made that improvement within three years. ACHD

⁸ Adopted in 1986, Resolution 330 establishes regulations for utility and sewer relocations within the public rights-of-way under the jurisdiction of ACHD. These regulations include the assignment of financial responsibility and establishment of operational procedures. ACHD Appellant Brief, p. 4.

Appellate Brief, pp. 6-7 and 24. As Company witness David Lowry explained, this three-year exception is not a conflict. Tr. Vol. II, p. 157, LL. 19-24.

If a private developer causes ACHD to accelerate road work that would have otherwise been made by ACHD within three years, Idaho Power would be responsible for the cost of relocating its utility facilities for the road work under both Resolution 330 and Section 10. Under Section 10, Idaho Power may only recover relocation costs from a private developer if the private developer pays for part or all of the road work requiring the utility relocations. Where the ACHD road work would otherwise have been made by ACHD within three years, the private developer would not be required to pay for the road work, and thus would not be required to pay for the resulting Idaho Power utility relocation work either. Thus, the result is the same under both Resolution 330 and Section 10; in either case, Idaho Power is required to bear the cost of relocating its facilities for private related road work that would have otherwise been made by ACHD within three years.

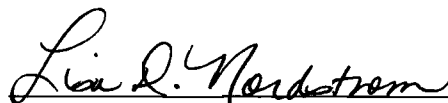
Section 10 of Rule H allows the Public Road Agencies to continue to: (1) fully exercise their authority to determine that Idaho Power must relocate its facilities in public rights-of-way to accommodate road improvements and (2) determine the percentage, if any, a road improvement will benefit a third party and collect that percentage from the third party. Under Section 10 of Rule H, Idaho Power will use the same percentage the Public Road Agency initially used to allocate the costs of the road improvement to then seek reimbursement of the Company's cost of relocation of Idaho Power facilities from the same private beneficiaries that contributed to the costs of the road improvement. If a dispute between Idaho Power and a

private beneficiary should arise concerning cost recovery by Idaho Power, the Commission would have jurisdiction to resolve the reimbursement dispute.

IV. CONCLUSION

Idaho Power acknowledges the continuing vitality of 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." Idaho Power does not 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 the facilities are in a public right-of-way. Section 10 does not encroach on the Public Road Agencies' authority in this regard; it only establishes how Idaho Power must allocate those costs among its customers and private beneficiaries *after* the Public Road Agencies' have made their initial determination. However, once Idaho Power has relocated its facilities as directed by the Public Road Agencies, they have no jurisdiction to determine how the utility will seek *subsequent reimbursement* from private parties benefitting from the facilities relocation. This is the separate and exclusive ratemaking 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 Court uphold the Commission's findings in Order Nos. 30853 and 30955. Idaho Code § 61-629.

Respectfully submitted this 16th day of July 2010.



LISA D. NORDSTROM

Attorney for Respondent Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July 2010 I served a true and correct copy of RESPONDENT IDAHO POWER COMPANY'S BRIEF upon the following named parties by the method indicated below, and addressed to the following:

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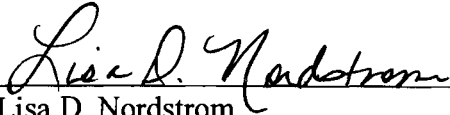
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RULE H
NEW SERVICE ATTACHMENTS
AND DISTRIBUTION LINE
INSTALLATIONS OR
ALTERATIONS

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.

Easement is the Company's legal right to use the real property of another for the purpose of installing or locating electric facilities.

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1. **Definitions (Continued)**

Fire Protection Facilities are water pumps and other fire protection equipment, served separately from the Applicant's other electric load, which operate only for short periods of time in emergency situations and/or from time to time for testing purposes.

Line Installation is any installation of new distribution facilities owned by the Company. Line Installations are exclusive of Service Attachments and eligible for Vested Interest Refunds.

Line Installation Allowance is the portion of the estimated cost of a Line Installation funded by the Company.

Line Installation Charge is the partially refundable charge assessed an Applicant or Additional Applicant whenever a Line Installation is built for that individual.

Local Improvement District is an entity created by an authorized governing body under the statutory procedures set forth in Idaho code, Title 50, Chapter 17 or Idaho Code § 40-1322. For the purpose of Rule H, the term LID also includes Urban Redevelopment projects set forth in Idaho Code, Title 50, Chapter 20.

Multiple Occupancy Projects are projects that are intended to be occupied by more than four owners or tenants. Examples include, but are not limited to condominiums and apartments.

Point of Delivery is the junction point between the facilities owned by the Company and the facilities owned by the customer; OR the point at which the Company's lines first become adjacent to the customer's property; OR as otherwise specified in the Company's tariff.

Prior Right of Occupancy is a designated area within the public road right-of-way where the Company and the Public Road Agency have agreed that the costs of the Relocation of facilities in the designated area will be borne by the Public Road Agency. For example, a Prior Right of Occupancy may be created when the Public Road Agency expands the public road right-of-way to encompass a Company Easement without compensating the Company for acquiring the Easement but the parties agree in writing that the subsequent Relocation of distribution facilities within the designated area will be borne by the Public Road Agency.

Private Beneficiary is any individual, firm or entity that provides funding for road improvements performed by a Public Road Agency or compensates the Company for the Relocation of distribution facilities as set forth in Section 10. A Private Beneficiary may include, but is not limited to, real estate developers, adjacent landowners, or existing customers of the Company.

Public Road Agency is any state or local agency which constructs, operates, maintains or administers public road rights-of-way in Idaho, including where appropriate the Idaho Transportation Department, any city or county street department, or a highway district.

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1. **Definitions (Continued)**

Relocation is a change in the location of existing distribution facilities.

Residence is a structure built primarily for permanent domestic dwelling. Dwellings where tenancy is typically less than 30 days in length, such as hotels, motels, camps, lodges, clubs, and structures built for storage or parking do not qualify as a Residence.

Service Attachment is the interconnection between the Company's distribution system and the Applicant's or Additional Applicant's Point of Delivery.

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 ampere 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 ampere 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.

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.

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1. Definitions (Continued)

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

Upgrade is a request by a customer to increase capacity and/or size of Company-owned distribution facilities. Upgrades are eligible for Vested Interest Refunds.

Vested Interest is the right to a refund that an Applicant or Additional Applicant holds in a specific section of distribution facilities when Additional Applicants attach to that section of distribution facilities.

Vested Interest Charge is an amount collected from an Additional Applicant for refund to a Vested Interest Holder.

Vested Interest Holder is an entity that has paid a refundable Line Installation Charge to the Company for a Line Installation. A Vested Interest Holder may also be an entity that has paid a refundable charge to the Company under the provisions of a prior rule or schedule.

Vested Interest Refund is a refund payment to an existing Vested Interest Holder resulting from a Vested Interest Charge to an Additional Applicant.

Vested Interest Portion is that part of the Company's distribution system in which a Vested Interest is held.

Work Order Cost is a cost estimate performed by the Company for a specific request for service by an Applicant or Additional Applicant. The Work Order Cost will include general overheads limited to 1.5 percent. General overheads in excess of 1.5 percent will be funded by the Company.

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2. General Provisions

- a. Cost Information. The Company will provide preliminary cost information addressing in the charges contained in this rule, to potential Applicants and/or Additional Applicants. This preliminary information will not be considered a formal Cost Quote and will not be binding on the Company or Applicant but rather will assist the Applicant or Additional Applicant in the decision to request a formal Cost Quote. Upon receiving a request for a formal Cost Quote, the Applicant or Additional Applicant will be required to prepay non-refundable engineering costs to the Company. A Cost Quote will be binding in accordance with its terms.
- b. Ownership. The Company will own all distribution line facilities and retain all rights to them.
- 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.

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2. General Provisions (Continued)

- 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.
- k. Fire Protection Facilities. The Company will provide service to Fire Protection Facilities when the Applicant pays the full costs of the Line Installation including Terminal Facilities, less Company Betterment. These costs are not subject to a Line Installation Allowance, but are eligible for Vested Interest Refunds under Section 6.a.
- l. Customer Provided Trench Digging and Backfill. The Company will, at its discretion, allow an Applicant, Additional Applicant or subdivider to provide trench digging and backfill. In a joint trench, backfill must be provided by the Company. Costs of customer-provided trench and backfill will be removed from or not included in the Cost Quote and will not be subject to refund.

3. Line Installation Charges

If a Line Installation is required, the Applicant or Additional Applicant will pay a partially refundable Line Installation Charge equal to the Work Order Cost less applicable Line Installation Allowances identified in Section 7.

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4. Service Attachment Charges

a. Overhead Service Attachment Charge. If an overhead Service Attachment is required, the Applicant or Additional Applicant will pay a non-refundable Service Attachment Charge equal to the Work Order Cost less applicable Service Attachment allowances identified in Section 7.

b. Underground Service Attachment Charge. Each Applicant or Additional Applicant will pay a non-refundable Underground Service Attachment Charge for attaching new Terminal Facilities to the Company's distribution system. The Company will determine the location and maximum length of service cable.

i. Single Phase 400 Amps or Less

Underground Service Cable (Base charge plus Distance charge)

Base charge from:

underground	\$ 41.00
overhead including 2" riser	\$408.00
overhead including 3" riser	\$560.00

Distance charge (per foot)

Company Installed Facilities with:

1/0 underground cable	\$7.04
4/0 underground cable	\$7.62
350 underground cable	\$9.65

Customer Provided Trench & Conduit with:

1/0 underground cable	\$2.15
4/0 underground cable	\$2.73
350 underground cable	\$4.17

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.

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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.

The Vested Interest Charge will not exceed the sum of the Vested Interests in the Line Installation. If an Additional Applicant connects to a portion of a vested Line Installation which was established under a prior rule or schedule, the Vested Interest Charges of the previous rule or schedule apply to the Additional Applicant.

6. Other Charges

- a. Alteration Charges. If an Applicant or Additional Applicant requests a Relocation, Upgrade, Conversion or removal of Company facilities, the Applicant or Additional Applicant will pay a non-refundable charge equal to the Cost Quote.
- b. Engineering Charge. Applicants or Additional Applicants will be required to prepay all engineering costs for Line Installations and/or Alterations greater than 16 estimated hours. Estimates equal to or less than 16 hours will be billed to the Applicant or Additional Applicant as part of the construction costs, or after the engineering is completed in instances where construction is not requested. Engineering charges will be calculated at \$60.00 per hour.

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6. Other Charges (Continued)

- c. Engineering Charges for Agencies and Taxing Districts of the State of Idaho. Under the authority of Idaho Code Section §67-2302, an agency or taxing district of the State of Idaho may invoke its right to decline to pay engineering charges until the engineering services have been performed and billed to the agency or taxing district. Any state agency or taxing district that claims it falls within the provisions of Idaho Code §67-2302 must notify Idaho Power of such claim at the time Idaho Power requests prepayment of the engineering charges. Idaho Power may require that the state agency or taxing district's claim be in writing. If the state agency or taxing district that has invoked the provisions of Idaho Code Section §67-2302 does not pay the engineering charges within the 60 day period as provided in that statute, all the provisions of that statute will apply.
- d. Rights-of-Way and Easement Charge. Applicants or Additional Applicants will be responsible for any costs associated with the acquisition of rights-of-way or easements.
- e. Temporary Line Installation Charge. Applicants or Additional Applicants will pay the installation and removal costs of providing Temporary Line Installations.
- f. Temporary Service Attachment Charge. Applicants or Additional Applicants will pay for Temporary Service Attachments as follows:
- i. Underground - \$41.00
- The Customer-provided pole must be set within two linear feet of the Company's existing transformer or junction box.
- ii. Overhead - \$179.00
- 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.

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6. Other Charges (Continued)

- 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.

- i. Joint Trench Charge. Applicants, Additional Applicants, and subdividers will pay the Company for trench and backfill costs included in the Cost Quote. In the event the Company is able to defray any of the trench and backfill costs by sharing a trench with other utilities, the cost reduction will be included in the Cost Quote.
- j. Underground Service Return Trip Charge. When a residential Customer agrees to supply the trench, backfill, conduit, and compaction for an underground service, an Underground Service Return Trip Charge of \$68.00 will be assessed each time the Company's installation crew is dispatched to the job site at the Customer's request, but is unable to complete the cable installation and energize the service.

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7. Line Installation and Service Attachment Allowances

The Company will contribute an allowance toward the Terminal Facilities and Line Installation costs necessary for Line Installations and/or Service Attachments. Allowances are based on the cost of providing and installing Standard Terminal Facilities for single phase and three phase services.

a. Allowances for Overhead and Underground Line Installations and Overhead Service Attachments

<u>Class of Service</u>	<u>Maximum Allowance per Service</u>
Residential:	
Schedules 1, 4, 5	\$1,816.00
Non-residence	Cost of new meter only
Non-residential:	
Schedules 7, 9, 24	
Single Phase	\$1,816.00
Three Phase	\$3,658.00
Large Power Service	
Schedule 19	Case-By-Case

b. Allowances for Subdivisions and Multiple Occupancy Projects

Developers of Subdivisions and Multiple Occupancy Projects will receive a \$1,816.00 allowance for each single phase transformer installed within a development and a \$3,658.00 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.

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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.

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9. Local Improvement Districts

Unless specifically provided for under this paragraph, a Local Improvement District will be provided service under the general terms of this rule.

The Company will provide a cost estimate and feasibility study for a Local Improvement District within 120 days after receiving the resolution from the requesting governing body. The Cost Quote will be based on Work Order Costs and will not be considered binding on the Company if construction is not commenced within 6 months of the submission of the estimate for reasons not within the control of the Company. The governing body issuing the resolution will pay the Company for the costs of preparing the cost estimate and feasibility study regardless of whether the Line Installation or Alteration actually takes place.

After passage of the Local Improvement District ordinance, the Company will construct the Line Installation or Alteration. Upon completion of the project, the Company will submit a bill to the Local Improvement District for the actual cost of the work performed, including the costs of preparing the cost estimate and feasibility study. If the actual cost is less than the estimated cost, the Local Improvement District will pay the actual cost. If the actual cost exceeds the estimated cost, the Local Improvement District will pay only the estimated cost. The governing body will pay the Company within 30 days after the bill has been submitted.

A Local Improvement District will be eligible for a Line Installation Allowance for any new load connecting for service upon the completion of the Line Installation. A Local Improvement District will retain a Vested Interest in any Line Installation to the Local Improvement District. A Local Improvement District may waive payments for Vested Interest from Additional Applicants within the Local Improvement District.

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10. Relocations in Public Road Rights-of-Way

The Company often locates its distribution facilities within state and local public road rights-of-way under authority of Idaho Code § 62-705 (for locations outside Idaho city limits) and the Company's city franchise agreements (for locations within Idaho city limits). At the request of a Public Road Agency, the Company will relocate its distribution facilities from or within the public road rights-of-way. The Relocation may be for the benefit of the general public, or in some cases, be a benefit to one or more Private Beneficiaries. Nothing in this Section bars a Local Improvement District (LID) from voluntarily paying the Company for Relocations.

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

- a. Road Improvements Funded by the Public Road Agency - When the Relocation of distribution facilities is requested by the Public Road Agency to make roadway improvements or other public improvements, the Company will bear the cost of the Relocation.
- b. Road Improvements Partially Funded by the Public Road Agency - When the Public Road Agency requires the Relocation of distribution facilities for the benefit of itself (or a LID) and a Private Beneficiary, the Company will bear the Relocation costs equal to the percentage of the Relocation costs allocated to the Public Road Agency or LID. The Private Beneficiary will pay the Company for the Relocation costs equal to the percentage of the road improvement costs allocated to the Private Beneficiary.
- c. Road Improvements not Funded by the Public Road Agency - When the Relocation of distribution facilities in the public road rights-of-way is solely for a Private Beneficiary, the Private Beneficiary will pay the Company for the cost of the Relocation.
- d. Prior Right of Occupancy - When the Company and the Public Road Agency have entered into an agreement regarding a Prior Right of Occupancy, the costs of Relocation in such designated area will be borne by the Public Road Agency, or as directed in the agreement.

All payments from Private Beneficiaries to the Company under this Section shall be based on the Company's Work Order Cost.

This Section shall not apply to Relocations within the public road rights-of-way of Public Road Agencies which have adopted legally binding guidelines for the allocation of utility relocation costs between the Company and other parties that are substantially similar to the rules set out in Section 10 of Rule H.

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11. Eliminating or Minimizing Relocation Costs in Public Road Rights-of-Way

Pursuant to Idaho Code § 40-210, the Company will participate in project design or development meetings upon receiving written notice from the Public Road Agency that a public road project may require the relocation of distribution facilities. The Company and other parties in the planning process will use their best efforts to find ways to eliminate the cost of relocating utility facilities, or if elimination is not feasible, to minimize the relocation costs to the maximum extent reasonably possible. This provision shall not limit the authority of the Public Road Agency over the public road right-of-way.

12. 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.

