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IDAHO PUBLIC UTILITIES COMMISSION

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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.

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AFFIDAVIT OF DORRELL R. HANSEN**

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:

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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 Ballistics 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

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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

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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
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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.)

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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

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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. Paragraphs 12 & 13.

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

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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

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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.*

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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.

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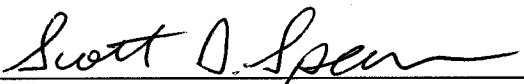
Additionally, ACHD notes once again that IPC objects to opinions of Mr. Hansen, but offers contrary opinions in the proposed Direct Testimony of Mr. Gregory W. Said beginning at page 7, line 4. Under IPC's erroneous view of the admissibility of evidence before the Commission, portions of the testimony 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, Attorney for the Petitioner,
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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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ADA COUNTY HIGHWAY DISTRICT



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