

LAWSON LASKI CLARK & POGUE, PLLC

ATTORNEYS AT LAW

Edward A. Lawson
eal@lawsonlaski.com

675 SUN VALLEY ROAD, SUITE A
POST OFFICE BOX 3310
KETCHUM, IDAHO 83340
TELEPHONE: 208-725-0055
FACSIMILE: 208-725-0076
WWW.LAWSONLASKI.COM

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Via Email and U.S. Mail

Blaine County Planning & Zoning Commission
c/o Tom Bergin
219 South 1st Ave., Suite 208
Hailey, ID 83333
tbergin@co.blaine.id.us

Re: Idaho Power Redundant Transmission Line
Our File No. 12155-001

Dear Commissioners:

We have been engaged by Cox Communications ("Cox") to represent its interests in connection with the application ("Application") by Idaho Power Company for a conditional use permit to erect a redundant power line. I am writing to express the concerns Cox has regarding Blaine County's ("County") consideration of implementing a pole height restriction for, or requiring the burial of, Idaho Power's second transmission line for purely aesthetic reasons. Cox understands and appreciates the sentiment for preserving scenic views, but an unreasonable restriction on pole height prohibiting the placement of fiberoptic and other cabling, or an outright requirement to underground the power lines will force Cox to incur a significant cost to bury its cabling. Under existing law such a decision would violate Cox's legal rights as a provider of television, telephone, cellular voice and data and other internet services including emergency connectivity and business data links vital to the health and safety of the public.

STANDARDS FOR CONSIDERATION

The County Code sets forth the applicable standards at section 9-25-3. Included among the standards is that the use will be "harmonious with and in accordance with" the objectives of the Code and the Comprehensive Plan¹; "will not be disturbing to

¹ The Comprehensive Plan states as objectives "stable employment" and development of "cottage industries".

existing neighboring uses;" and "will not create excessive additional requirements at public cost for public facilities or services and will not be detrimental to the economic welfare of the community."

The impacts of approval of a conditional use permit with an unreasonable pole height restriction precluding Idaho Power from accommodating Cox's cable on the pole, or mandating the cable be buried, requires a negative finding on each of the aforementioned standards. If Cox is not able to remain aerial with its cable it may be required to incur substantial costs to continue providing services which costs it will not be able to absorb or absorb concurrently in each area of its current market. Consequently, services could either suffer curtailment or be subject to price increases in one or more areas in Blaine County, directly impacting a substantial number of local residents and businesses. The consequence of potential curtailment of service or of increased pricing would act to destabilize employment, interfere with cottage industries, disturb existing neighboring uses, and would be generally detrimental to the economic welfare of the community. If the Commission is inclined to approve the Application, it should do so only on the condition that the cost imposed on Cox be reimbursed by the County.

DISCRIMINATION AGAINST COX

A County imposed restriction on pole height that forced Cox off the poles would also constitute discrimination against Cox in violation of Idaho Code § 50-3006, which states: "A local unit of government may not impose requirements that discriminate against a system operator *in any manner . . .*" (emphasis added).² The code section then provides a non-exhaustive list of examples which could be considered discrimination, including: "(a) the authorization or placement of facilities in public rights-of-way that is necessary for the provision of video services; (b) Access to a public building; or (c) The terms or conditions for access to any utility pole within the control of the local unit of government. (d) Provided, however, the provisions of this subsection shall not be construed to supersede an agreement, or portion of an agreement, related to the joint use of utility infrastructure within the control of the local unit of government, between the local unit of government and a video service." *Id.*

² Idaho Code defines "local unit of government" as: "a city, county, highway district or other governmental entity of the state of Idaho having maintenance and operation responsibility over the public rights-of-way within a geographical area for which a franchise ore certificate of franchise authority has been issued by a franchising entity." I.C. § 50-3002(10).

Idaho Code further defines "system operator" as: "any person or group of persons who provide video service and directly, or through one (1) or more affiliates, own a significant interest in the system or facilities through which the video service is provided and which person has been issued a certificate of franchise authority pursuant to the provisions of this chapter." I.C. § 50-3002(17).

Here, a height requirement permitting Idaho Power to continue its services as usual but requiring Cox to underground its cable would clearly favor Idaho Power and disfavor Cox, even though there is no reasonable distinction between the two. If the County imposes a restriction which will negatively impact Cox, but no other service providers, it would be a clear violation of Idaho Code § 50-3006. Forcing Cox to underground its equipment would also force Cox to realize the substantial cost of undergrounding the cable used to service its customers, a further showing of the County's proposed restriction being discriminatory to Cox and its customers.

In *Continental Oil Co. v. City of Twin Falls*, the Supreme Court of Idaho held that arbitrarily classifying similar businesses differently was unlawful. 49 Idaho 89, 286 P. 353 (1930). Similarly, here, the County would effectively be making an arbitrary distinction between two different utility companies who provide similar services if it imposed a height requirement that did not allow Idaho Power to continue to accommodate Cox on its poles.

Further, subsection (3) of Idaho Code section 50-3006 states: "A local unit of government shall provide the holder of a certificate of franchise authority with open, nondiscriminatory and competitively neutral access to the public rights-of-way that is necessary for the provision of video services." The mere fact that § 50-3006 has two specific statements prohibiting local units of government from discriminating against utilities again shows a clear intention by the legislature that this statute be interpreted in a broad sense ensure similar of utilities.

Additionally, the last subsection of the Idaho Video Service Act states: "The provisions of this chapter are intended to be construed to be consistent with the federal cable communications policy act of 1984, 47 U.S.C. sections 521 through 573." I.C. § 50-3011. One of the purposes listed in the federal cable communications act is to: "promote competition in cable communications and minimize *unnecessary regulation* that would *impose an undue economic burden* on cable systems." 47 U.S.C. § 521(6) (emphasis added).³ Taken together, Idaho Code § 50-3006 and 47 U.S.C. § 521(6) clearly show a legislative intent favoring utility companies, or at least an intent to be accommodating to utility companies. What the County is considering conflicts with what the legislature intended. Moreover, the height restriction under consideration serves a limited aesthetic purpose and would impose an *undue economic burden* on Cox, in the amount of over one million dollars in order for Cox to continue its services.

³ A "cable system" is defined as: "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming, and which is provided to multiple subscribers within a community . . ." 47 U.S.C. § 522(7).

COUNTY AUTHORITY TO REGULATE POLE HEIGHT

Secondly, the Idaho Public Utilities Commission ("PUC") previous approval of Idaho Power's Line preempts the County's authority to place any additional restrictions on the approved Line that would not be accommodative of Cox. On September 15, 2017, in the decision granting Idaho Power's request for the Line, the PUC acknowledged that "Idaho Power's proposed design for the overhead portion of the line will allow for attachment of Cox's equipment while keeping pole heights to a minimum. We appreciate the willingness of Cox and Idaho Power to work together to find a solution." *In the Matter of the Application of Idaho Power Company for a Certificate of Public Convenience and Necessity to Construct System Improvements for Wood River Valley Customers*, 2017 WL 4150691, at *13 (Idaho P.U.C. 2017).

The Idaho legislature has clearly expressed an intention to reserve regulatory powers over public utilities to the Idaho PUC. Because of this reserved power, we believe that the Idaho PUC's grant of Idaho Power's application for a second transmission line (at a height where Cox would be able to attach its equipment) preempts inconsistent restrictions the County may wish to impose.

CONCLUSION

Hopefully the foregoing adequately explains the concerns of Cox Communications associated with the decision on Idaho Power Company's application for a conditional use permit. We intend to be present at your next hearing on the application and available then or at any time to answer any questions you may have.

Sincerely,

LAWSON LASKI CLARK & POGUE, PLLC



Edward A. Lawson