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IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO POWER COMPANY,

Applicant-Respondent,

v.

KIKI LESLIE A. TIDWELL,

Intervenor-Appellant,

and

IDAHO PUBLIC UTILITIES COMMISSION,

Respondent.

DOCKET NO. 45644-2018

APPELLANT'S BRIEF

Appeal from Idaho Public Utilities Commission
Commissioner Eric Anderson, presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal of Order No. 33928 *Final Order Denying Reconsideration* (“Final Order”) in Idaho Public Utilities Commission Case No. IPC-E-16-28, issued by the Idaho Public Utilities Commission (“IPUC”) on November 17, 2017. The Final Order denied Ms. Tidwell’s petition for reconsideration concerning an award of intervenor funding. Intervenor funding awards are provided for under Idaho Code § 61-617A. However, the IPCU denied Ms. Tidwell’s request for intervenor funding because it was received after August 22, 2017. Ms. Tidwell contends that the agency failed to properly notice the August 22, 2017 deadline, and that the administrative rule governing intervenor funding requests is arbitrary, capricious, and an abuse of discretion, in addition to being unconstitutionally vague. This appeal seeks an award of attorney fees and clarification of administrative law questions related to intervenor funding requests.

B. Course of Proceedings and Disposition

On December 5, 2016, Kiki Leslie A. Tidwell (“Ms. Tidwell”) petitioned to intervene in Idaho Power’s *Application for Certificate of Public Convenience and Necessity for Wood River Valley* in IPUC Case No. IPC-E-16-28. Ms. Tidwell was the first intervenor in this case. Between November 29, 2016 and June 27, 2017, the IPUC published eleven notices or orders that were available to intervenors. On August 8, 2017, the IPUC held a technical hearing that was scheduled to continue on August 9, 2017, if needed. R. vol. I, pp. 77-78.

On September 15, 2017, the IPUC granted Idaho Power's Certificate of Public Convenience and Necessity (CPCN) and awarded intervenor funding to the Sierra Club in Order No. 33872. R. vol. I, pp. 143-160. September 15, 2017 was the first time Ms. Tidwell was aware that intervenor funding requests were available to intervenors and that the time to apply for intervenor funding requests had passed.

On September 16, 2017, Ms. Tidwell filed an intervenor funding request with the IPUC. R. vol. I, pp. 164-174. On October 12, 2017, the IPUC denied Ms. Tidwell's request in Order No. 33906. R. vol. I, pp. 175-177. Ms. Tidwell filed a petition for reconsideration on October 23, 2017. R. vol. I, pp. 178-179. The IPUC denied Ms. Tidwell's petition for reconsideration on November 17, 2017 in Order No. 33928. R. vol. I, pp. 180-182. This appeal was filed with the IPUC on December 27, 2017. R. vol. I, pp. 183-188.

C. Statement of Facts

IPUC Case No. IPC-E-16-28 began on November 28, 2016 and the final order was issued on November 17, 2017. In the almost year long process of this case, the IPUC never provided written notice of Rule 164, its requirements, or the August 22, 2017 deadline for intervenor funding requests. The only notice of the August 22, 2017 deadline that was provided to intervenors was a one sentence, oral proclamation by Commissioner Anderson at the August 8, 2017 evidentiary hearing where he said, "Intervenor funding requests under Rule 164 are due 14 days from today." R. vol. II, p. 686. This statement is only reflected in the transcript of the August 8, 2017 evidentiary hearing, which was unavailable to intervenors. Otherwise, if a party was to look back through the official record, Commissioner Anderson's determination that

intervenor funding requests were due 14 days from August 8, 2017 cannot be found, nor can it be reconstructed.

Ms. Tidwell attended all of the IPUC hearings. Specifically, she attended the August 8, 2017 evidentiary hearing, which was scheduled to continue the following day. While the August 8, 2017 transcript states that Commissioner Anderson gave oral notice of the Rule 164 deadline, the record does not establish that Ms. Tidwell heard that announcement. R. vol. II, p. 686. In fact, Ms. Tidwell did not hear Commissioner's Anderson's oral pronouncement that intervenor funding requests were due 14 days from the August 8, 2017 evidentiary hearing. R. vol. I, p. 179. The announcement of the deadline by Commissioner Anderson was made just moments before 5:27 PM, after an all day long hearing. Tellingly, Commissioner Anderson described his sole comment about Rule 164 as a "little housekeeping thing[]." R. vol. II, p. 686. The legal right and opportunity to request \$18,538.47 in intervenor funding is not a little housekeeping thing.

On September 15, 2017, Ms. Tidwell received the first notice that intervenor funding requests were due on August 22, 2017 when Order No. 33872, which awarded intervenor funding to the Sierra Club, was received in the mail. R. vol. I, pp. 143-160. Prior to September 15, 2017, Ms. Tidwell was unaware of the intervenor funding availability. Ms. Tidwell submitted her application for intervenor funding one day after receiving IPUC Order No. 33872, which was the first time Ms. Tidwell was aware of the availability and deadline for intervenor funding. Ms. Tidwell was unaware of the opportunity to apply for intervenor funding, and Order No. 33872 was the first notice she received indicating the availability and deadline for intervenor funding requests.

Ms. Tidwell's application for intervenor funding acknowledges that it was submitted late per the IPUC's August 22, 2017 deadline, and it tries to reasonably explain the tardiness; her initial application was a good-faith attempt at cooperation and acceptance of the agency's deadline. R. vol. I, pp. 164-165, 178-179. Ms. Tidwell hoped that by acting in good-faith, the IPUC would use its discretion to award her late intervenor funding request as it had previously done in IPUC Case No. IPC-E-17-03. Unfortunately for Ms. Tidwell, the IPUC denied her application without ever considering whether she met the relevant factors under Idaho Code § 61-617A, and they used her good-faith attempt at fixing this procedural error as justification to deny her request. R. vol. I, pp.175-177, 180-182.

The IPUC denied Ms. Tidwell's request solely because it was received after the purported August 22, 2017 deadline for intervenor funding requests. R. vol. I, pp. 180-182. The denial was based on Idaho Administrative Procedure Act Rules 31.01.01.161-165, which provide procedural rules for intervenor funding requests. Specifically, IDAPA 31.01.01.164 (Rule 164) states:

Unless otherwise provided by order, an intervenor requesting intervenor funding must apply no later than fourteen (14) days after the last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders, or statements of position, whichever is last. Motions in opposition to intervenor funding must be filed within fourteen (14) days after the request for intervenor funding is filed.

Rule 164 is the heart of this appeal because it was the legal justification for denying Ms. Tidwell's request for intervenor funding.

The IPUC did not provide adequate notice to intervening parties that August 22, 2017 was the deadline for intervenor funding applications under Rule 164. Similarly, the IPUC failed to give proper notice to intervenors that any of the other triggering events

provided for in Rule 164 had occurred. As explained below, without the IPUC making a determination that Rule 164 is in effect, it is impossible for intervenors to accurately determine the correct intervenor funding request due date. As written, Rule 164 requires a determination by the IPUC that its 14-day deadline is in effect.

Ms. Tidwell's argument, therefore, relies on the fact that the August 22, 2017 deadline for intervenor funding applications was not noticed in writing, and that her application for intervenor funding was denied solely on the basis of the August 22, 2017 deadline.

II. ISSUES PRESENTED ON APPEAL

Ms. Tidwell presents the following issues on appeal:

1. Whether the IPUC failed to provide adequate notice to all parties that intervenor funding requests were due on August 22, 2017.
2. Whether the IPUC's denial of Appellant's intervenor funding request based solely on timing is arbitrary, capricious, and an abuse of discretion because the IPUC previously awarded intervenor funding to late applicants.
3. Whether the IPUC violated Idaho Code § 61-617A because it denied Ms. Tidwell's application solely based on timing.
4. Whether the August 8, 2017 was "the last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders, or statements of position," under Rule 164.
5. Whether Rule 164 is unconstitutional for reason of vagueness.
6. Whether Ms. Tidwell is entitled to an award of attorney fees.

III. STANDARD OF REVIEW

The Commission is authorized to award intervenor funding requests pursuant to statute. The Supreme Court employs an abuse of discretion standard in reviewing such decisions. *Idaho Fair Share v. Idaho Public Utilities Comm'n*, 113 Idaho 959, 751 P.2d 107 (1988), rev'd on other grounds. *J.R Simplot Co., Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991). "The wording of I.C. § 61-617A makes it evident that the Commission is vested with the discretion to award attorney's fees and costs... The decision of the adjudicating body awarding fees will not be overturned absent an abuse of discretion." *Id.* at 963, 751 P .2d at 111.

IV. ARGUMENT

A. **IPUC failed to provide adequate notice to all parties that intervenor funding requests were due on August 22, 2017.**

The first issue on appeal is whether the IPUC gave adequate notice of the August 22, 2017 deadline for intervenor funding requests to comply with procedural due process requirements.

Rule 164 is a procedural rule that establishes a 14-day window for intervenors to apply for intervenor funding requests. IDAPA 31.01.01.164. According to Rule 164, intervenor funding requests are due "no later than fourteen (14) days after the last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders, or statements of position, whichever is last." *Id.* This court has also long held that "[t]o satisfy an essential requisite of procedural due process, a 'hearing' must be prefaced by timely notice which adequately informs the parties of the specific issues they must prepare to meet." *State v. Gibbs*, 94 Idaho 908, 914,

500 P.2d 209 (1972). In *Gibbs*, a criminal summons only informed the defendant that the issue to be heard was guilt or innocence. However, at the hearing, the court also entertained a jurisdictional question not contemplated in the summons. The Supreme Court of Idaho found that the defendant did not have adequate notice of the issues that would be heard, and thus, his due process rights were violated for lack of notice. But, most important to the case at hand, is IDAPA 31.01.01.016.01 (Rule 16), which requires all notices of the IPUC to be either mailed or emailed.

The IPUC did not provide notice that Rule 164 was an issue that would be contemplated at the August 8, 2017 evidentiary hearing, nor did it provide a mailed or emailed notice of the Rule 164 deadline as required by Rule 16. The IPUC also did not provide prior notice to intervenors that the August 8, 2017 evidentiary hearing would be the last evidentiary hearing or that August 8, 2017 was the last date for submitting briefs, proposed orders, or statements of position (*see* IDAPA 31.01.01.164). In fact, the scheduling order for the August 8, 2017 technical hearing included an additional day for the evidentiary hearing (August 9, 2017), and it was silent as to Rule 164. R. vol. I, p. 78. Similarly, the IPUC did not provide notice to intervenors after the August 8, 2017 hearing that Rule 164 was in effect as of August 8, 2017, and that the due date for intervenor funding requests was August 22, 2017. The only time in the entire ten-month proceeding that the IPUC mentioned Rule 164 was at the August 8, 2017 technical hearing when Commissioner Anderson devoted a one-sentence oral pronouncement that, “Intervenor funding requests under Rule 164 are due 14 days from today.” R. Partial Tr. vol. II, p. 686.

The inadequacy of this oral pronouncement is the crux of Ms. Tidwell's argument. There is simply no way to verify that Ms. Tidwell or the other intervenors heard Commissioner Anderson, and Ms. Tidwell strongly contends that oral announcements of deadlines for legislatively enacted rights is wholly inadequate. Rule 16 requires all notices to be mailed or emailed. Prior to Commissioner Anderson's statement, intervenors had no indication that the time limit contemplated in Rule 164 would begin on August 8, 2017. Had intervenors wished to go back and determine when the time limit in Rule 164 began, they would be unable to do so because there was no notice in the record available to intervenors that would allow them to make such a determination independent of an actual order or notice. If an intervenor had a hearing disability they would have similarly not known about the Rule 164 deadline, and the IPUC would be at risk of Americans with Disabilities Act violations. Or, had an intervenor been in conversation with counsel for the split second that Commissioner Anderson made his Rule 164 announcement they would also be without notice of the deadline. Simply put, the IPUC failed to take the action required by Rule 16 and Idaho case law that would put intervenors on notice that the Rule 164 deadline had been set.

This situation specifically and unfairly prejudiced those intervenors that either did not hear Commissioner Anderson's statement that funding requests were due August 22, 2017 or were not present due to other factors (it is our understanding that intervenor Laura Midgley was unable to attend the August 8, 2017 hearing and was similarly unaware of the intervenor funding deadline). The only notice of Rule 164 that could have been received by intervenors was if they happened to hear a one sentence proclamation made by Commissioner Anderson at 5:27 PM,

after an all-day technical hearing. R. Partial Tr. vol. II, 686. There are a myriad of ways in which oral notice fails to effectively set the intervenor funding request deadline, all of which can be remedied with a simple written statement setting forth the deadline for intervenor funding requests. Rule 16 provides a solution to this problem, but the IPUC failed to comply with its requirements.

“One of the purposes of adequate notice is to inform the affected individuals of the issues to be presented at the hearing so they can reasonably prepare their case.” State, Dept. of Law Enforcement v. Engberg, 109 Idaho 530, 533, 708 P.2d 935 (App. 1985) (citing State v. Gibbs, 94 Idaho 908, 500 P.2d 209 (1972)). Here, adequate notice was not given to Ms. Tidwell, and her legislatively granted right to request intervenor funding quietly passed.

B. IPUC’s denial of Appellant’s intervenor funding request based solely on timing is arbitrary, capricious, and an abuse of discretion because the IPUC has previously awarded intervenor funding to late applicants.

The IPUC has previously granted late intervenor funding requests. In IPUC Case No. IPC-E-17-03, the Community Action Partnership Association of Idaho (CAPAI) submitted a late intervenor funding request. The IPUC’s final order in that case granted CAPAI’s late intervenor funding request. Curiously, in its order granting intervenor funding, the IPUC did not address the issue of timing for the intervenor funding request, and it was completely silent as to why it granted intervenor funding under Rule 164, even though the application was late.

An agency action is arbitrary, capricious, or an abuse of discretion when there is a lack of reasoned decision-making. *See Lane Ranch Partnership v. City of Sun Valley* (“Lane Ranch II”),

145 Idaho 87, 91, 175 P.3d 776, 780 (2007) (citing *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 739, 536 P.2d 729, 734 (1975)); Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L. Rev. 273, 365 (1993); and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Idaho Supreme Court has not yet directly addressed whether agency actions need to be consistent with prior agency action. However, it has come close.

In 1980, the Supreme Court of Idaho stated, “So long as the Commission enters sufficient findings to show that its action is not arbitrary and capricious, the Commission can alter its decisions.” *Washington Water Power Co. v. Idaho Public Utilities Commission*, 101 Idaho 567, 579, 617 P.2d 1242, 1254 (1980). But, several other state and federal decisions have contemplated this question more directly. Richard H. Seamon, *Idaho Administrative Law: A Primer for Students and Practitioners*, 51 Idaho Law Review 421, 443-444 (2015). The United States Supreme Court stated that “[a]n agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *Fed. Comm’n Comm’n v. Fox Television Stations, Inc.*, 127 S. Ct. 1800, 1811, 556 U.S. 502, 515 (2009). In *FCC v. Fox Television Stations, Inc.* the Commission’s new policy concerning censoring certain expletives was not arbitrary or capricious because the FCC “acknowledged that its recent actions have broken new ground, taking account of inconsistent ‘prior Commission and staff action’ and explicitly disavowing them...” *Id* at 1812, 517. The rule out of that case is that agencies must adequately explain inconsistencies with prior administrative actions if their inconsistent actions are going to be valid.

In Ms. Tidwell's case, the IPUC did exactly what *FCC v. Fox Television Stations, Inc.* explained was prohibited: it strictly construed Rule 164 without explanation, even though it had previously ignored the requirements of Rule 164 in CAPAI's request. The IPUC also failed to enter findings explaining why its earlier grant of late intervenor funding requests was appropriate in the CAPAI case, but not in Ms. Tidwell's case; the IPUC's decision to strictly construe Rule 164's 14-day deadline was not explained or contemplated in light of the fact that they had previously allowed late intervenor funding applications. It seems that the IPUC simply decided, without explanation, that this was a case where Rule 164 would be applied strictly. Disregarding specific administrative rules in one instance while strictly enforcing them in others, and doing so *sub silentio*, is the exact kind of arbitrary and capricious action that the United States Supreme Court contemplated and prohibited in *FCC v. Fox Television Stations, Inc* and the Idaho Supreme Court contemplated in *Washington Water Power Co. v. Idaho Pub. Utils. Comm'n*.

Ms. Tidwell's case is not unlike the CAPAI case, except that CAPAI's application for intervenor funding was accepted and approved, while Ms. Tidwell's application for intervenor funding was denied. The record shows that the IPUC denied Ms. Tidwell's intervenor funding request solely because it was submitted late. R. vol. I. pp. 175-176. Despite Ms. Tidwell applying for funding on the day that she became aware intervenor funding requests were due, the IPUC decided that it would strictly construe Rule 164, even though it had previously awarded late intervenor funding requests without any explanation. The inconsistency and lack of explanation for why the IPUC would accept one applicant's intervenor funding request while denying another's is the definition of arbitrary and capricious decision making and it is the very type of action

prohibited by administrative agencies. Ms. Tidwell respectfully asks this court to rule that inconsistent agency actions are only valid if adequately explained.

C. IPUC violated Idaho Code § 61-617A because it denied Ms. Tidwell's application solely based on timing.

Idaho Code § 61-617A sets out four standards upon which awards of intervenor funding requests are to be evaluated. The IPUC did not deny Ms. Tidwell's application for intervenor funding because it failed to comply with the factors of Idaho Code § 61-617A, nor did any other parties to the case object to Ms. Tidwell's request for intervenor funding. Instead, the IPUC found a convenient way to deny Ms. Tidwell's application for intervenor funding due to a procedural error for which she was unaware because the deadline had not been properly noticed. The legislature did not intend for the public to fall victim to complex and unknown procedural rules when seeking costs and attorney fees. Instead, the intent of the legislature was unmistakably codified in Idaho Code § 61-617A(1), which states that it is "the policy of this state to encourage participation at all stages of all proceedings before the commission so that all affected customers receive full and fair representation in those proceedings."

Such a policy is directly opposed to tricky and unknown procedural rules that can be silently used to avoid legislatively mandated policies. The IPUC has discretion in implementing this law, but that discretion must be reasoned and based in fact. *Lane Ranch Partnership v. City of Sun Valley* ("Lane Ranch II"), 145 Idaho 87, 91, 175 P.3d 776, 780 (2007) (citing *Enterprise, Inc. v. Nampa City*, 96 Idaho 734, 739, 536 P.2d 729, 734 (1975)); Michael S. Gilmore & Dale D. Goble, *The Idaho Administrative Procedure Act: A Primer for the Practitioner*, 30 Idaho L.

Rev. 273, 365 (1993); and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And, when looked at in conjunction with Idaho Code § 61-617A, it is clear that the IPUC acted contrary to the legislatively enacted policy of Idaho Code § 61-617A and beyond the authorization given to it by the legislature.

Denying Ms. Tidwell's application solely on the basis of Rule 164 is antithetical to the legislature's intent, and beyond the authority delegated to the IPUC as an administrative agency because the IPUC failed to consider the appropriate factors.

D. The August 8, 2017 evidentiary hearing was not “the last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders, or statements of position,” under Rule 164.

Even if the court determines that notice of Rule 164 was sufficient, the IPUC incorrectly determined that Rule 164 went into effect on the August 8, 2017 evidentiary hearing. Unless otherwise stated in an order, Rule 164 states that intervenor funding requests are due 14 days after the last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders, or statements of position, whichever is last. IDAPA 31.01.01.164.

The IPUC failed to take into account that the date of the last deadline for submitting briefs was November 2, 2017, which is 21 days after the Final Order was served and the due date for petitions for reconsideration. R. vol. I, p. 176. Under IDAPA 31.01.01.255 (Rule 255), any party may move to file briefs, proposed orders, or statements of position. Thus, because final orders by the IPUC are all subject to petitions for reconsiderations, the deadline to submit briefs, proposed orders, or statements of position had not yet passed.

Without an order to the contrary, the Rule 164 deadline would not have begun until 14 days after November 2, 2017, at the earliest. The true deadline for filing intervenor funding requests was November 16, 2017, which would have been 14 days after the last opportunity to file briefs, proposed orders, or statements of position without an order stating otherwise. Any requests prior to that date would have opened up intervenors to additional attorney fees if petitions for reconsideration and other further proceedings occurred.

Based on the November 2, 2017 deadline for submitting petitions for reconsideration, the deadline for submitting briefs, proposed orders, or statements of position under Rule 164 was after August 8, 2017, and the 14-day window to apply for intervenor funding was actually between November 2, 2017 and November 16, 2017. Under the plain language of Rule 164, August 22, 2017 would only be the intervenor funding deadline if an order “otherwise stated.” Since there was no order, the deadline for submitting applications for intervenor funding was after August 22, 2017.

Ms. Tidwell’s request for intervenor funding was submitted on September 16, 2017, a month before the November 16, 2017 deadline. Ms. Tidwell’s request for intervenor funding was timely and should not have been dismissed because it was late.

E. Rule 164 is unconstitutional for reason of vagueness.

As written, Rule 164 is arbitrary and capricious because it is too imprecise and vague to accurately determine when the rule takes effect. After the above discussion, it should be clear that Rule 164 is extremely vague when applied to real-world IPUC cases because numerous

interpretations of Rule 164 are plausible, and the justification for picking one over the other is act in arbitrary decision-making.

The Supreme Court of the United States has held that agency rules cannot be overly vague. “[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317, 567 U.S. 239, 254 (2012).

Intervenors are unable to know what is required of them under Rule 164, unless a written order is provided by the IPUC. But, adding to the confusion is that the IPUC’s interpretation of Rule 164 is often at odds with intervenor’s interpretations. As demonstrated by this IPUC case and other cases involving intervenor funding, Rule 164 does not allow the IPUC to act with precision or the necessary guidance in enforcing Rule 164. Without written notice of Rule 164 or an order stating the Rule 164 deadline, it is difficult to determine the date of the last evidentiary hearing or when the last deadline for briefs, proposed orders, or statements of position are due. Additionally, Rule 252 allows the commissioner to continue hearings, making it impossible to know with any certainty when “the last evidentiary hearing” will occur unless the last evidentiary hearing is noticed after it has occurred. IDAPA 31.01.01.252. That did not happen in Ms. Tidwell’s case.

Similarly, and as mentioned above, a petition for reconsideration opens the door for briefs, proposed orders, and statements of position. *See Building Contractors Assn. of*

Southwestern Idaho v. Idaho Public Utilities Comm'n., 151 Idaho 10, 253 P.3d 684 (2011); IDAPA 31.01.01.252 and 255. Without a determination by the IPUC that the Rule 164 deadline would be on a date certain, it is impossible for intervenors to determine the deadline for intervenor funding requests because Rule 164 is too imprecise and vague.

While the intent of Rule 164 is obvious – and Ms. Tidwell has no objection to the simple existence of a deadline for intervenor funding requests – the language of the rule creates somewhat of an unknowable and imprecise deadline that even a seasoned attorney has a hard time figuring out, let alone a non-attorney intervenor. A rule that cannot be accurately predicted as to when it takes effect can only be applied arbitrarily and capriciously, and necessarily violates the Vagueness Doctrine as stated in *FCC v. Fox Television Stations, Inc.* A rule as vague as Rule 164 cannot hold muster against the requirements of the Constitution.

As a result, while a 14-day deadline for submitting intervenor funding requests is eminently reasonable, when that deadline occurs must be accurately determinable and applied consistently. Rule 164 cannot achieve this low bar, as written. As a result, it is unconstitutional for reason of vagueness.

F. Ms. Tidwell is entitled to an award of attorney fees on appeal.

Ms. Tidwell was required to obtain the advice and services of counsel to bring this appeal and is entitled to an award of attorney fees and costs on appeal pursuant to the private attorney general doctrine, Idaho Code §§ 12-117, 61-617A, and Idaho Appellate Rules 40 and 41.

1. This Case Satisfies the Requirements of the Private Attorney General Exception to the American Rule on Attorney Fees.

The private attorney general doctrine forms a strong basis for an award of attorney fees in this case. The private attorney general doctrine was developed to allow for an award of attorney fees when an action meets three specific requirements: (1) the strength or societal importance of the public policy indicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision. *Hellar v. Cenarrusa*, 106 Idaho 571, 577-78, 682 P.2d 524, 530-31 (1984).

The societal importance of the public policy requiring adequate notice is enshrined by the Due Process clause of 5th Amendment of the U.S. Constitution and its application to states via the 14th Amendment of the U.S. Constitution. Due process, specifically proper notice and an opportunity to be heard, are fundamental to the rule of law in the United States of America. Similarly, administrative bodies in this country are required to act in a reasoned decision-making process. *Judulang v. Holder*, 132 S. Ct. 476, 484 (2011), *see also* *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 537 (2009) (“If [a] [federal] agency takes action not based on neutral and rational principles, the [federal] APA grants federal court power to set aside the agency action as ‘arbitrary’ or ‘capricious’”); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (“adjudication is subject to the requirement of reasoned decision making”).

Additionally, the Idaho legislature has specifically stated that it is the policy of the State of Idaho to encourage intervenor funding, and encouraging intervenor shall take the form of reimbursing intervenors for attorney fees and costs. This litigation is a direct result of this

legislatively enacted public policy. Thus, the societal importance of ensuring that administrative agencies act within these boundaries is paramount to upholding the public policy mandated by the U.S. Constitution and expanded by the Idaho legislature.

Holding the IPUC accountable to administrative law requirements of proper notice and due process is necessarily the duty of private citizens. Since administrative agencies, like the IPUC, are subdivisions of the state, the attorney general's office is more often devoted to defending agency action. Only private citizen action can hold the administrative bodies accountable to the low burden of reasoned decision making, and only private citizens will bring suits arguing against specific administrative rules.

Finally, the number of people that stand to benefit from this action is significant because requiring proper notice procedures for Rule 164 will affect all future intervenors in public utility cases. For all of the foregoing reasons, Ms. Tidwell respectfully requests an award of attorney fees under the private attorney general doctrine, to include those requested by her as an intervenor and the additional costs required to bring this action.

2. Idaho Code § 12-117 is an appropriate basis for an award of attorney fees because the IPUC's actions were arbitrary, capricious, and an abuse of discretion.

Idaho Code § 12-117 provides for an award of attorney fees to the prevailing party and against a state agency or other political subdivision if the non-prevailing party acts without a reasonable basis in fact or law. Idaho Code § 12-117 serves "as a deterrent to groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes

agencies should never have made.” *Neighbors for a Healthy Gold Fork v. Valley County*, 145 Idaho 121, 138, 176 P.3d 126, 143 (2007).

An action that is arbitrary, capricious, or an abuse of discretion is necessarily an action brought without reasonable basis in law.

As a result, and if Ms. Tidwell is the prevailing party, Idaho Code § 12-117 provides Ms. Tidwell with an avenue to recover attorney fees and costs.

3. Idaho Code § 61-617A is an appropriate basis for an award of attorney fees because Ms. Tidwell meets the substantive requirements for such an award.

Idaho Code § 61-617A allows intervenors in public utility commission cases to recoup some or all of their costs associated in participating. The intent of this statute is clear: encourage public participation in otherwise inaccessible administrative procedures. In Ms. Tidwell’s initial application to the IPUC for intervenor funding, she explained why she qualified for intervenor funding under the stated factors. R. vol. I, pp. 164-165. Ms. Tidwell’s rationale for why she deserves an award of attorney fees and costs under Idaho Code § 61-617A are the same now as they were in September, except that her current appeal also stands to significantly clarify and improve the intervenor funding process for all future intervenors. Ms. Tidwell has satisfied the requirements to receive intervenor funding because she materially contributed to the IPUC’s decision, the costs claimed are reasonable and constitute a significant financial hardship for Ms. Tidwell, her recommendation to the IPUC differed materially from the testimony and exhibits of the IPUC, and Ms. Tidwell’s participation addressed issues of concern to the general public affected by Idaho Power’s proposal. Furthermore, the IPUC did not deny Ms. Tidwell’s

application for intervenor funding for failing to satisfy the above requirements. Instead, her application for intervenor funding was denied solely based on timing.

Ms. Tidwell meets the statutory requirements to receive funding from the IPUC. Furthermore, the IPUC did not deny her initial applications for intervenor funding based on the statutory factors required under Idaho Code § 61-617A. Ms. Tidwell respectfully requests that she be awarded the attorney fees and costs associated with her original application for fees and costs, in addition to the costs and fees associated with this current appeal as a continuation of her original intervenor action.

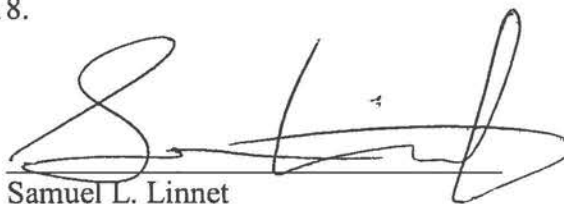
4. Ms. Tidwell seeks an award of attorney fees under Idaho Appellate Rule 40.

Idaho Appellate Rule 40 provides an award of attorney fees to the prevailing party. If Ms. Tidwell prevails on her appeal, she respectfully asks this court to award attorney fees.

V. CONCLUSION

For the foregoing reasons, Order No. 33928 should be set aside. Ms. Tidwell should be awarded attorney fees and costs to the full extent allowed by Idaho Code § 61-617A. Ms. Tidwell also respectfully requests reasonable attorney fees and costs on appeal.

DATED this 10 day of April, 2018.

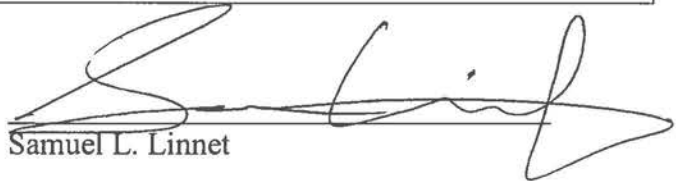
A handwritten signature in black ink, appearing to read 'S. Linnet', written over a horizontal line.

Samuel L. Linnet
Attorney for Appellant/Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10 day of April, 2018, I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to each of the following:

<input checked="" type="checkbox"/> Fed Ex <input checked="" type="checkbox"/> E-Mail	Donovan E. Walker Idaho Power Company PO Box 70 Boise, ID 83707-0070 dwalker@idahopower.com dockets@idahopower.com
<input checked="" type="checkbox"/> Fed Ex <input checked="" type="checkbox"/> E-Mail	Camille Christen Deputy Attorney General Idaho Public Utilities Commission PO Box 83720 Boise, ID 83720-0074 camille.christen@puc.idaho.gov


Samuel L. Linnet