5-9-2018

Idaho Power Company v. Tidwell Respondent's Brief Dckt. 45644

IN THE SUPREME COURT OF THE STATE OF IDAHO

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	**SUPREME COURT DOCKET NO. 45644-2018**
IDAHO POWER COMPANY, Applicant-Respondent, v.	**IDAHO PUBLIC UTILITIES COMMISSION NO. IPC-E-16-28**
KIKI LESLIE A. TIDWELL, Intervenor-Appellant, and	**RESPONDENT BRIEF OF THE IDAHO PUBLIC UTILITIES COMMISSION**
IDAHO PUBLIC UTILITIES COMMISSION, Respondent.	

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 from a final order on reconsideration issued by the Idaho Public Utilities Commission ("Commission"). The underlying administrative proceeding was initiated when Idaho Power Company applied to the Commission for a Certificate of Public Convenience and Necessity ("CPCN)" to build a new transmission line in the Wood River Valley. The Commission granted the requested CPCN. It also granted a timely intervenor-funding request, under Idaho Code § 61-617A, from one of the intervening parties. This appeal involves the Commission's denial of a late-filed intervenor-funding request from another intervenor.

Under Idaho Code § 61-617A, the Commission may order a regulated electric utility with annual gross intrastate annual revenues above $3.5 million to pay up to $40,000 in intervenors' collective costs for legal fees, witness fees, and reproduction costs. Idaho Code § 61-617A(2). The Commission must decide whether to order the utility to pay the costs based on considerations set forth in the statute. *Id.* As allowed by the statute, the Commission has adopted rules for its implementation. *See* IDAPA 31.01.01.161 *et seq.* The Commission's rules establish a deadline for intervenors to file intervenor-funding requests. IDAPA 31.01.01.164 ("Rule 164"). The deadline is, unless otherwise provided by order, "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.*

In the Commission proceeding at issue here, Ms. Tidwell requested intervenor funding nearly a month after the deadline. R. Vol. I, p. 164. The Commission denied the request as untimely. *Id.* at 175. Ms. Tidwell then filed a petition for reconsideration, which the Commissioned denied. *Id.* at 178-179, 180. Ms. Tidwell has appealed the Commission's final order denying reconsideration to this Court.

B. The Course of Proceedings

On November 8, 2016, Idaho Power Company applied for a CPCN to improve its system and secure adequate and reliable service for customers in the Wood River Valley. *Id.* at 8-34. Specifically, the Company requested a CPCN to build a new (second) transmission line and related facilities to provide redundant service from the Wood River substation near Hailey into the Ketchum substation. *Id.* The Company asked that the CPCN permit the particular line route and facilities identified in testimony accompanying the application. *Id.*

The Commission issued a Notice of Application and set a deadline for petitions to intervene. *Id.* at 36. The Commission granted timely petitions to intervene from Ms. Tidwell, Laura Midgley, the Sierra Club, Idaho Conservation League, and the City of Ketchum. *Id.* at 47, 63. The Commission also granted late petitions to intervene from CoxCom, LLC; Rock Rolling Properties, LLC; and Rock Rolling Properties #2, LLC. *Id.* at 84, 120. The Commission held a public hearing for the Company's customers in Ketchum, Idaho on July 26, 2017, and "technical" hearing to take evidence presented by the parties' experts in Boise, Idaho on August 8, 2017. *See id.* at 143. The August 8, 2017 technical hearing was the last evidentiary hearing in the case, and Ms. Tidwell and her counsel both attended it. Tr. Vol. I at List of Appearances. When the technical

hearing adjourned, the Commission's chair for the case, Commissioner Anderson, reminded the parties that any intervenor-funding requests would be due 14 days from that day (or August 22, 2017). Tr. Vol. I p. 686, L. 15-16. Intervenor Sierra Club timely requested intervenor funding on August 21, 2017. R. Vol. I, p. 136. Then, on September 15, 2017, the Commission issued its final order on the requested CPCN. *Id.* The Commission found that

> [a]t its root, this case presents the question of what facilities are required in the North Wood River Valley for Idaho Power Company to meet its obligation to provide service that promotes the "health, safety and convenience" of the public and that is "adequate, efficient, just and reasonable." [*Idaho Code*] § 61-302. Having reviewed the record, we find that the Company has demonstrated the need for a redundant line from the Wood River substation to the Ketchum substation.

Id. at 155. The Commission thus granted Idaho Power's requested CPCN. *Id.* at 160. In its order, the Commission also granted Sierra Club's timely request for intervenor funding. *Id.* at 159-160.

On September 19, 2017—28 days after the deadline for filing intervenor-funding requests per Rule 164—Ms. Tidwell filed her intervenor-funding request. *Id.* at 164-174, 200. The Commission denied her funding request for lateness on October 12, 2017. *Id.* at 175-177. Ms. Tidwell filed a timely petition for reconsideration, *id.* at 178-179, which the Commission denied. *Id.* at 180-182. Ms. Tidwell timely appealed to this Court. *Id.* at 183-188.

C. Concise Statement of the Facts

1. The Initial Proceeding and Commission Decision.

Relevant to Ms. Tidwell's appeal, Idaho Code § 61-617A and the Commission's Rules of Procedure (IDAPA 31.01.01.161-165) address intervenor funding and notify parties of their opportunity to request it. Further, it is undisputed that Commissioner Anderson reiterated the

deadline for requesting intervenor funding under Rule 164 at the close of the August 8, 2017 technical hearing, and that Ms. Tidwell and her legal counsel were in attendance. Tr. Vol. I at List of Appearances, p. 686, L. 15-16.[1] Indeed, another intervenor, Sierra Club, was well aware of, and complied with, the deadline for intervenor-funding requests. R. Vol. I., p. 136. Despite Ms. Tidwell's claim, discussed herein, that she was unaware of the availability of intervenor funding, information about intervenor funding, including the request deadline, was provided to Ms. Tidwell and her counsel and all other intervenors via the statute, Rules, and Commissioner Anderson's statement at the hearing.[2]

On September 15, 2017, the Commission issued a final order in the case that granted Idaho Power's requested CPCN and Sierra Club's timely-filed request for intervenor funding. *Id.* at 143. No one asked the Commission to reconsider that order.

2. Ms. Tidwell's Late Request for Intervenor Funding.

In her brief, Ms. Tidwell claims she filed her intervenor-funding request on September 16, 2017. Appellant's Br. at 2, 3. In fact, it was not received by the Commission Secretary, and thus not filed as required by Rule 14 of the Commission's Rules of Procedure (IDAPA 31.01.01.014), until September 19, 2017. R. Vol. I, p. 200. Regardless, it was due on August 22, 2017, and therefore was filed nearly a month late.

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[1] Ms. Tidwell's Counsel in the Commission proceeding was different than counsel in this appeal.

[2] Ms. Tidwell's assertion that the hearing transcript was "unavailable to intervenors," Appellant's Br. at 2, is false. Under the Commission's Rules of Procedure, any party or other person may request and pay for a transcript or portion of a transcript. IDAPA 31.01.01.286.09.

In the intervenor-funding application, Ms. Tidwell acknowledged that it was late, stating that she "was not aware of the possibility of Intervenor funding under Idaho Code 61-617A; my attorney never presented me this information." *Id.* at 164. Later, she "apologize[d] that this request is being submitted late due to the lack of communication that this compensation was available to me as an intervenor." *Id.* at 165. Her request also purported to describe how it meets the elements of Idaho Code § 61-617A. *Id.* at 164-165.

Ms. Tidwell's brief describes her intervenor-funding request as "a good-faith attempt at cooperation and acceptance of the agency's deadline" and a "good-faith attempt at fixing this procedural error." Appellant's Br. at 7. It does not explain how an intervenor-funding request filed nearly a month late can constitute "acceptance of the agency's deadline" or an attempt to fix a procedural error – let alone, what the "procedural error" was.

3. The Commission's Decision on Ms. Tidwell's Late Request for Intervenor Funding (Order No. 33906).

On October 12, 2017, the Commission issued an order denying Ms. Tidwell's intervenor-funding request as untimely. R. Vol. I, p. 175-177. The Commission noted that Ms. Tidwell was at the August 8, 2017 hearing when Commissioner Anderson stated when intervenor-funding requests were due, and that Ms. Tidwell's request was filed nearly a month late. *Id.* at 176. The Commission thus denied the request. *Id.*

4. Ms. Tidwell's Petition to Reconsider the Denial of Her Late Funding Request.

On October 22, 2017, Ms. Tidwell timely asked the Commission to reconsider its order denying her intervenor funding (Order No. 33906). *Id.* at 178. Contrary to her initial funding

request, where she admitted her funding request was late, in her petition for reconsideration Ms. Tidwell argued that her funding request was timely because she filed it when petitions for reconsideration of Order No. 33872 could still be submitted. *Id.* She also argued that the Commission "had a 'duty to provide a full and fair representation in the proceedings to all affected customers,'" *id.* (citation omitted), but that the Commission "failed to provide a fair proceeding by failing to provide adequate information" about Idaho Code § 61-617A to intervenors "in advance of the written September 15, 2017 written order." *Id.* She further asserted that her attorney thought that only non-profits could apply. *Id.* at 179.[3]

5. The Commission's Reconsideration Decision (Order No. 33928).

On November 17, 2017, the Commission denied Ms. Tidwell's petition for reconsideration of the order denying her funding request, Order No. 33906. *Id.* at 180-182. The Commission noted that, although Ms. Tidwell's petition for reconsideration argued that her intervenor-funding request was timely, the funding request itself acknowledged that it was late. *Id.* at 181. The Commission also referred to and quoted Rule 164, and noted that Chair Anderson "gave explicit notice to all parties at the conclusion of the technical hearing, including Ms. Tidwell and her counsel, about the deadline for intervenor funding requests." *Id.* The Commission consequently found "no reasonable basis for reconsideration of our prior decision finding Ms. Tidwell's request for intervenor funding untimely," and thus denied the petition for reconsideration. *Id.*

[3] Ms. Tidwell submitted both the intervenor-funding request and the petition for reconsideration personally, not through counsel.

II. ISSUES PRESENTED ON APPEAL

The Commission restates the issues as follows:

1. Whether the Commission's Order on Ms. Tidwell's intervenor-funding request (Order No. 33928) was unreasonable, unlawful, erroneous, or not in conformity with the law.

2. Whether Ms. Tidwell waived her remaining arguments on appeal by failing to raise them below.

3. Whether Ms. Tidwell is entitled to attorney fees on appeal.

In the following sections, the Commission addresses all of Ms. Tidwell's arguments in the context of these three issues.

III. STANDARD OF REVIEW

The Commission disagrees with Ms. Tidwell's reliance on *Idaho Fair Share v. Idaho Pub. Utilities Comm'n*, 113 Idaho 959, 963, 751 P.2d 107, 111 (1988) for the standard of review. *See* Appellant's Br. at 6. That case involved a challenge to the Commission's application of the statutory criteria in Idaho Code § 61-617A. Here, the Commission did not rule on the merits of Ms. Tidwell's intervenor-funding request under the criteria expressed in Idaho Code § 61-617A. Rather, the Commission denied her funding request because it was late under Commission Rule 164. Ms. Tidwell then petitioned the Commission to reconsider its decision to deny her funding request for untimeliness. The Commission denied her reconsideration request, too. This case is, therefore, an appeal from the Commission's denial of Ms. Tidwell's petition for reconsideration. Appellant's Brief at 1. When the Supreme Court reviews a trial court's decision to grant or deny a motion for reconsideration, it uses the same standard of review the lower court used in deciding

the motion for reconsideration. *Westby v. Schaefer*, 157 Idaho 616, 338 P.3d 1220 (2014). Under the Rules of Procedure of the Idaho Public Utilities Commission, a petition for reconsideration must state the grounds why the petitioner contends that the order was unreasonable, unlawful, erroneous, or not in conformity with the law. IDAPA 31.01.01.331. Therefore, the standard of review is whether Ms. Tidwell established that the Commission's order on Ms. Tidwell's original intervenor-funding request was unreasonable, unlawful, erroneous, or not in conformity with the law.

IV. ARGUMENT

A. The Commission's Order on the Intervenor-Funding Request Was Not Unreasonable, Unlawful, Erroneous, or Not in Conformity With the Law.

This is an appeal from the Commission's denial of Commission Order No. 33928, denying Ms. Tidwell's petition for reconsideration. Pursuant to IDAPA 31.01.01.331, a petition for reconsideration must state the grounds why the petitioner contends that the order was unreasonable, unlawful, erroneous, or not in conformity with the law. Ms. Tidwell's petition for reconsideration did not meet this standard.

The Commission applied Rule 164 in denying both her original request and the petition for reconsideration. Rule 164 states, in relevant part:

> 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.

IDAPA 31.01.01.164. The Rule plainly states the deadline for submitting intervenor-funding requests. The August 8, 2017 technical hearing was the last evidentiary hearing in the case, and

Ms. Tidwell and her counsel both attended it. Tr. Vol. I at List of Appearances. At the close of the hearing, the Commission's chair for the case reminded the parties that any intervenor-funding requests would be due 14 days from that day (or August 22, 2017). Tr. Vol. I p. 686, L. 15-16. Ms. Tidwell and her counsel were present at the hearing. Tr. Vol 1, at List of Appearances. Ms. Tidwell filed her request on September 19, 2017, which is clearly untimely.

Ms. Tidwell's intervenor-funding request acknowledged that it was late, and explained that Ms. Tidwell "was not aware of the possibility of Intervenor funding under Idaho Code 61-617A; my attorney never presented me this information." *Id.* at 164. Ms. Tidwell also "apologize[d] that this request is being submitted late due to the lack of communication that this compensation was available to me as an intervenor." *Id.* at 165.

At that time, Ms. Tidwell's only explanation for filing late was that her attorney did not tell her about the availability of intervenor funding. Her explanation was not supported by affidavits. Her argument fails because, as a factual matter, it is uncontested that the hearing chairman stated on the record that the deadline for intervenor-funding requests was 14 days from the hearing. Tr. Vol 1, p. 686, L. 15-16. Thus, both Ms. Tidwell and her counsel had notice, via an on-the-record statement, that intervenor funding was available and that a deadline existed. Further, ignorance of procedural rules is generally inexcusable. *Washington v. Federal Sav. And Loan Ass'n v Transamerica*, 124 Idaho 913, 918, 856 P.2d 1004, 1009 (1993). Accordingly, the Commission correctly denied the request as untimely. R. Vol. I, p. 175-177.

In her petition for reconsideration, Ms. Tidwell changed her reasoning for the late filing. Rather than continuing to admit that her funding request was untimely, she instead stated that the

funding request was timely because it "was submitted during the period that a petition for reconsideration could have been submitted." R. Vol. I, p. 178. Ms. Tidwell claimed, on reconsideration, that the 14-day time period in Rule 164 did not start running on August 8, 2017. Instead, she argues, the 14 days for filing a funding request started running on the deadline for filing petitions for reconsideration, 21 days after the final order (IDAPA 31.01.01.331.01), and as a result, her request was timely. Ms. Tidwell's reading of Rule 164 ignores both the plain language of the Rule and common sense. Her argument assumes that, because a party *might* have submitted a brief, proposed order, or statement of position anytime during the 21 day reconsideration period, intervenor-funding requests were *automatically* due 14 days after the 21 day period had run, not at an earlier date. This interpretation would mean that funding requests could never be due 14 days after the evidentiary hearing, making that provision of Rule 164 superfluous. *See, Ameritel Inns, Inc. v. Pocatello-Chubbuck Auditorium or Cmty. Ctr. Dist.*, 146 Idaho 202, 204, 192 P.3d 1026, 1028 (2008) (In determining the ordinary meaning of a statute effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant).

As a factual matter, in this case, no subsequent briefs, proposed orders, or position papers were ordered or filed. Accordingly, the evidentiary hearing was the "last" event under Rule 164, and appropriately started the clock ticking. Moreover, any doubt about the plain language of the Rule was quashed by the meeting chair's statement on the record that intervenor-funding requests were due within 14 days of the hearing.

Had a party submitted any additional filings, such as a petition for reconsideration of a final order, the Commission could consider subsequent funding requests for costs incurred during the

subsequent phases of the proceeding, even when filed past the initial 14-day time period. In such cases, the time period for the subsequent filing starts running upon the "last" applicable event listed in Rule 164. *See, Building Contractors Ass'n of Sw. Idaho v. Idaho Pub. Util. Comm'n,* 151 Idaho 10, 253 P.3d 684 (2011) (acknowledging Commission denied first application as untimely but considered second application for costs incurred during reconsideration phase). In this way, the Commission gives effect to the entirety of Rule 164 and protects intervenors by not foreclosing subsequent or additional funding requests if a case moves into subsequent phases beyond issuance of a final order. Adopting Ms. Tidwell's position would eliminate the possibility that the time period could start running at the close of the evidentiary hearing, which the Rule plainly allows.

Ms. Tidwell also asserted in her petition for reconsideration that the Commission failed to "provide a full and fair representation in the proceedings to all affected customers" by "failing to provide adequate information" about Idaho Code § 61-617A to intervenors prior to the September 15, 2017 final order in the underlying case. R. Vol. I, p. 178. Ms. Tidwell misstates the statute. Idaho Code § 61-617A states that Idaho's policy is to encourage participation in Commission proceedings so all affected customers receive full and fair representation in the proceedings. The statute furthers this policy by providing the Commission discretion to order a utility to pay some or all of the costs of intervenors that apply, up to a cap, after taking into account certain considerations. Idaho Code § 61-617A(2). The statute thus encourages participation so all affected customers receive full and fair representation by allowing intervenors an opportunity to defray the costs they incurred by participating. The statute does not, as Ms. Tidwell asserts, require *the Commission* to provide such representation to customers. Indeed, Ms. Tidwell was represented

by counsel at the evidentiary hearing. Further, Ms. Tidwell has not claimed or shown that her or her counsel's alleged lack of knowledge or understanding about the intervenor-funding statute somehow discouraged her from participating or being fully represented in the underlying proceeding. Thus, there is no evidence to suggest that the policy behind the statute was somehow undermined in this case.

Ms. Tidwell further claimed, in her petition for reconsideration, that the Commission has the "burden to explain" the intervenor-funding mechanism to her and to her counsel. R. Vol. I, p. 178. Ms. Tidwell provided no authority for this bald assertion. In *Greenfield v. Smith*, 162 Idaho 246, 253, 395 P.3d 1279, 1286 (2017), a *pro se* litigant in a legal malpractice case argued that the trial court had a duty to explain to her the effects of a motion for summary judgment. The Idaho Supreme Court disagreed, stating the well-established rule that *pro se* litigants are not accorded any special consideration and are not excused from procedural rules. *Id.* If courts do not have to explain legal principals and procedures to litigants, then administrative agencies, such as the Commission, similarly have no duty to explain statutes and rules to *represented* participants, let alone to their counsel. Accordingly, Ms. Tidwell's assertion that the Commission had a burden to explain Idaho Code § 61-617A and Rule 164 to her and her counsel is meritless. For the foregoing reasons, the Commission's denial of Ms. Tidwell's petition for reconsideration should be affirmed.

B. Ms. Tidwell Has Waived the Remaining Arguments in Her Appeal Because She Did Not Raise Them Below.

Ms. Tidwell raised the issues discussed in Section A, above, when she petitioned the Commission to reconsider its denial of her intervenor-funding request. She has also raised them

here as part or all of her first and fourth issues on appeal. Apart from those issues, however, Ms. Tidwell failed to raise these issues in her petition for reconsideration before the Commission. Ms. Tidwell now adds four new issues and arguments on appeal. These include:

(1) The Commission had to e-mail or mail her a written notice that intervenor-funding requests would be mentioned at the final evidentiary hearing on August 8, 2017, and that they would be due 14 days after the hearing. Ms. Tidwell raises this issue as part of her first issue on appeal – that the Commission failed to adequately notify her when funding requests were due. *See* Appellant's Br. at 7;

(2) The Commission acted arbitrarily, capriciously, and abused its discretion by denying her intervenor-funding request as untimely when it previously granted intervenor funding to a late petitioner in another. This issue is Ms. Tidwell's second issue on appeal. *See* Appellant's Br. at 5, 9-12;

(3) The Commission "violated" Idaho Code § 61-617A by denying Ms. Tidwell's intervenor-funding request under Rule 164. This is Ms. Tidwell's third issue on appeal. *See* Appellant's Br. at 5, 12-13; and

(4) Intervenor-funding Rule 164 is unconstitutionally vague. This is Ms. Tidwell's fifth issue on appeal. *See* Appellant's Br. at 5, 14-16.

The Court should decline to consider these four issues because Ms. Tidwell is raising them for the first time on appeal. It is well-settled that, in an appeal from the Commission, matters may not be raised for the first time on appeal. Objections that were not raised before the Commission in a petition for reconsideration, will not be considered for the first time by the Idaho Supreme

Court. *McNeal v Idaho PUC,* 142 Idaho 685, 132 P.3d 442 (2006) (holding that, where the appellant's petition for reconsideration at the Commission failed to raise a certain argument, the "argument may not be raised for the first time on appeal"). "The rationale behind the rule is to afford the [Commission] an opportunity to rectify any mistake before presenting the issue to the Supreme Court." *Eagle Water Co. v. Idaho PUC*, 130 Idaho 314, 316-17, 940 P.2d 1133, 1135-36 (1997). Here, Ms. Tidwell failed to present the four matters above to the Commission in her petition for reconsideration. She thus deprived the Commission of its opportunity to rectify any mistake before she appealed. Accordingly, the Court should decline to consider these issues here.[4]

Nonetheless, because Ms. Tidwell has raised these four new arguments here, in the sections below the Commission shows why they fail.

1. Ms. Tidwell Had Adequate Notice of Idaho Code § 61-617A and Rule 164.

Ms. Tidwell argues the Commission did not adequately notify her that intervenor-funding requests were due on August 22, 2017, in part because the Commission did not e-mail or mail her a written notice that funding requests would be mentioned at the final evidentiary hearing on August 8, 2017, and that they would be due 14 days after the hearing. Appellant's Br. at 7 (citing IDAPA 31.01.01.016 (Rule 16)). This argument fails because Ms. Tidwell assumes the hearing chairman issued an "order" regarding the availability of intervenor funding and was, therefore,

[4] An exception to the rule against appellate courts considering issues not raised below is that the Court may consider constitutional issues for the first time on appeal if doing so is necessary for subsequent proceedings in the case. *Murray v. Spalding*, 141 Idaho 99, 101–02, 106 P.3d 425, 427–28 (2005). Although Ms. Tidwell raises a constitutional challenge when arguing that Rule 164 is unconstitutionally vague, because there are no subsequent proceedings in this case, the exception does not apply. This Court should thus still decline to consider the vagueness issue.

obligated to provide such order by mail or e-mail under Rule 16. Ms. Tidwell's assumption is incorrect. Rule 16 does not apply, and the Commission did not have to issue a "notice" or "order" relating to intervenor-funding requests. The words "notice" and "order" are terms of art used in specific contexts throughout the Rules of Procedure of the Idaho Public Utilities Commission, which specify when the Commission will issue a notice or order. *See, e.g.*, IDAPA 31.01.01.102 (notices issued and orders served in petition for declaratory order cases); IDAPA 31.01.01.123 (notice of application issued in rate cases); IDAPA 31.01.01.204 (orders in modified procedure cases); IDAPA 31.01.01.212 (notice of prehearing conference).

In contrast, Rule 164 does not require the Commission to issue an order. In fact, Rule 164 states that "unless otherwise provided by order," intervenors must request funding no later than 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. Unless the Commission wishes to deviate from the timeframe in the Rule, it need not issue an order. The hearing chairman's statement on the record of the due date for funding requests was not a notice or an order, as those terms are used in the rules. Ms. Tidwell's assertion that the hearing chairman's statement was the only way intervenors would have known of the availability of intervenor funding, or of the deadline for such requests, is erroneous. The intervenor-funding statute and Rule 164 speak for themselves. And, as explained above, the Commission did not have to notify parties, intervenors, or counsel about the existence of the statute or the rule. Ms. Tidwell and her counsel are charged with notice of both.

This Court's rulings in cases involving requests for relief from final judgment provide guidance here. For instance, in *Washington v. Federal Sav. And Loan Ass'n v Transamerica*, 124 Idaho 913, 856 P.2d 1004 (1993), the head of the Transamerica's litigation department mistakenly believed that he had thirty days to respond to a complaint and missed the true deadline. Default judgment was thus entered against Transamerica. When Transamerica sought relief from the default judgment based on excusable neglect, this Court stated that "ignorance of the laws or rules of procedure are generally inexcusable." *Id.* at 916-917. (citing 11. C. WRIGHT, A MILLER, FEDERAL PRACTICE AND PROCEDURE § 2858 p. 170 (1973)). There was no confusion over conflicting documents, statutes, or rules, "there was only a misinterpretation or ignorance of Idaho law." *Id.* at 918, 856 P.2d at 1010 (distinguishing *Schraufnagel v. Quinowski*, 113 Idaho 753, 747 P.2d 775 (Ct.App. 1987)). The Court cited several additional cases for the proposition that "failure to know and meet filing deadlines are inexcusable mistakes of law." *Id. citing Gro-Mor Inc., v. Butts,* 109 Idaho 1020, 712 P.2d 721 (Ct.App. 1985); *Hearst Corporation v. Keller,* 100 Idaho 10, 592 P.2d 66 (1979) *reversed on other grounds; Newbold v. Arvidson*, 105 Idaho 663, 672 P.2d 231 (1983). Similarly, in several other types of civil cases, this Court has held that a lawyer's mistake of law is an insufficient basis upon which to reverse a lower court's order. *See, Danti v. Danti,* 146 Idaho 929, 941–42, 204 P.3d 1140, 1152–53 (2009) (In child custody case, "well-settled rule in Idaho that the negligence, mistakes, or unskillfulness of counsel do not provide a basis for setting aside a civil judgment"); *Esser Elec. v. Lost River Ballistics Techs., Inc.,* 145 Idaho 912, 917, 188 P.3d 854, 859 (2008) (In real property case, "equity will not relieve against a judgment at law on account of any ignorance, unskillfulness, or mistake of the party's attorney (unless caused by the

opposite party) nor for counsel's negligence or inattention"); *Donovan v. Miller*, 12 Idaho 600,605, 88 P. 82, 84 (1906) (In contract case, "it is well established that a mistake or unskillfulness of an attorney is not sufficient to authorize an injunction to issue to restrain the enforcement of a judgment at law"). Similarly, here, the Commission did not have to give Ms. Tidwell or her counsel notice of the statute or Rule, and her lack of knowledge of the statute or Rule does not mean that the Commission must excuse her noncompliance.

2. The Commission Did Not Act Arbitrarily or Capriciously.

For her second issue on appeal, Ms. Tidwell argues that the Commission acted arbitrarily, capriciously, and abused its discretion by denying her intervenor-funding request as untimely. Appellant's Br. At 5, 9-12. In support of her argument, Ms. Tidwell points out that the Commission has previously granted intervenor funding to a late petitioner in a different, unrelated case. *Id.* at 9. As noted above, Ms. Tidwell failed to raise this issue below. She thus deprived the Court of an adequate record on appeal to assess this claim. For example, the record on appeal does not contain the Commission's order from the prior case, or reveal whether the Commission found the prior petition was late but that the petitioner had extenuating circumstances justifying the late filing, or whether the Commission simply did not recognize the prior petition was late and awarded intervenor funding assuming it was timely. Ms. Tidwell has offered this Court no basis upon which to review her claim that the Commission acted arbitrarily, capriciously, and with an abuse of discretion when it denied her late funding request despite having previously accepted a another intervenor's late funding request in an unrelated case. Therefore, her argument fails.

Finally, Ms. Tidwell's argument that the Commission's denial of her untimely request is not sustainable because the decision was "based solely on timing" is simply nonsensical, and therefore must be rejected.

3. The Commission Did Not Violate Idaho Code § 61-617A.

For her third issue on appeal, Ms. Tidwell argues that the Commission "violated" Idaho Code § 61-617A by denying Ms. Tidwell's intervenor-funding request under Rule 164. Appellant's Br. at 5, 12-13. The gist of this argument seems to be that Rule 164, which sets the timeframe for intervenor-funding requests under Idaho Code § 61-617A, is "complex," "unknown," and "tricky." *Id.* This argument fails because it essentially rehashes Ms. Tidwell's prior argument that neither she nor her counsel knew of Rule 164. As stated above, however, this Court has consistently held that ignorance of the laws or rules of procedure are generally inexcusable. *Washington v. Federal Sav. And Loan Ass'n v Transamerica*, 124 Idaho at 918, 856 P.2d at 1009. Ms. Tidwell's argument that the Rule is unknown or complex is also belied by the fact that another intervenor filed a timely intervenor-funding request, which the Commission considered and ruled on. R. Vol 1, p.136-142; 158-159. Ms. Tidwell has not shown that her ability to intervene and meaningfully participate in the underlying case was hampered by the denial of her late request for intervenor funding. Accordingly, the Commission's application of Rule 164 did no violence to the policy underlying Idaho Code § 61-617A.

4. Rule 164 Is Not Vague.

Ms. Tidwell's fifth argument on appeal is that Rule 164 is unconstitutionally vague. *See* Appellant's Br. At 5, 14-16. Ms. Tidwell's vagueness argument fails. When a constitutional

challenge is made, every presumption is in favor of the constitutionality of the regulation, and the burden of establishing unconstitutionality rests upon the challenger. *Lindstrom v. Dist. Bd. of Health Panhandle Dist. I,* 109 Idaho 956, 959, 712 P.2d 657, 660 (Ct. App. 1985). The void for vagueness doctrine was defined as follows in *Wyckoff v. Board of County Commissioners of Ada County*, 101 Idaho 12, 15, 607 P.2d 1066, 1069 (1980):

> [A] statute is unconstitutionally vague when its language does not convey sufficiently definite warnings as to the proscribed conduct, and its language is such that men [or women] of common intelligence must necessarily guess at its meaning.

H & V Eng'g, Inc. v. Idaho State Bd. of Prof'l Engineers & Land Surveyors, 113 Idaho 646, 649, 747 P.2d 55, 58 (1987). Although most decisions invoking the "void for vagueness" doctrine deal with criminal statutes and ordinances, the doctrine applies equally well to civil ordinances. *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 716, 791 P.2d 1285, 1295 (1990). "However, greater tolerance is permitted when addressing a civil or non-criminal statute as opposed to a criminal statute under the void for vagueness doctrine." *Id.* (citing *Chalmers v. City of Los Angeles*, 762 F.2d 753 (9th Cir.1985)); *Cowan v. Bd. of Comm'rs of Fremont Cty.*, 143 Idaho 501, 513–14, 148 P.3d 1247, 1259–60 (2006). Ms. Tidwell has not met her burden to overcome the presumption of constitutionality.

Because Ms. Tidwell's argument does not implicate constitutionally protected conduct (such as free speech or freedom of association) she must show that Rule 164 is impermissibly vague in all of its applications. *Lindstrom v. Dist. Bd. of Health Panhandle Dist. I*, 109 Idaho 956, 960, 712 P.2d 657, 661 (Ct. App. 1985). Failing that, she must show that Rule 164—as applied to

her—is impermissibly vague. *Id.* Ms. Tidwell's arguments do not meet her burden. Rule 164 is not vague. Another intervenor successfully and timely applied for intervenor funding, which belies any argument that a person of common intelligence had to guess at its meaning. *See* R. Vol 1, p.136-142; 158-159. Additionally, the reasons that Ms. Tidwell gives for filing her funding request late are: 1) she was not aware of the possibility of intervenor funding, 2) her funding request was late due to a lack of communication, 3) the request was actually timely, 4) the Commission had a duty to provide information about intervenor funding, and 5) her attorney thought that only non-profits could ask for funding. *Id.*, p. 164-165; 178-179. None of these reasons, even if true, relate to the language of Rule 164 being either facially vague, or vague as applied to her. Rather, they merely evidence an ignorance of the existence of the Rule or a misreading of its substance. Additionally, the fact that a petition for reconsideration could create more than one opportunity for intervenor funding does not make the rule vague. *See, Building Contractors Ass'n of Sw. Idaho v. Idaho Pub. Util. Comm'n,* 151 Idaho 10, 253 P.3d 684 (2011) (acknowledging Commission denied first intervenor-funding request as untimely but considered second request for costs incurred during reconsideration phase). As discussed previously, the Rule gives effect to the intervenor funding statute. In conclusion, Ms. Tidwell has not met her burden to show that Rule 164 is unconstitutionally vague.

C. Ms. Tidwell Is Not Entitled to Attorney Fees on Appeal.

Ms. Tidwell seeks attorney fees on appeal under: 1) the private attorney general doctrine, 2) Idaho Code § 12-117, 3) Idaho Code § 61-617A, and 4) Idaho Appellate Rule 40. Each of these bases for award of attorney fees is without merit.

1. Ms. Tidwell Is Not Entitled to Attorney Fees Under the Private Attorney General Doctrine.

Idaho is an "American Rule" state requiring "each party to bear their own attorney fees absent statutory authorization or contractual right." *Owner-Operator Independent Drivers Ass'n v. Idaho PUC*, 125 Idaho 401, 407, 871 P.2d 818, 824 (1994); *Heller v. Cenarrusa*, 106 Idaho 571, 578, 682 P.2d 524, 531 (1984). The private attorney general doctrine allows for an award of attorney fees when a civil action "meets three specific requirements: (1) great 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; and (3) the number of people standing to benefit from the decision." *Owner-Operator*, 125 Idaho at 408, 871 P.2d at 825; *Heller*, 106 Idaho at 578, 682 P.2d at 531. In *Kootenai Medical Center v. Bonner County Com'rs*, this Court held that the private attorney general doctrine is not available to award attorney fees against the State. 141 Idaho 7, 10, 105 P.3d 667, 670 (2004), citing *State v. Hagerman Water Right Owners* ("*HWRO*"), 130 Idaho 718, 947 P.2d 391 (1997) abrogated on other grounds by *Syringa Networks, LLC v. Idaho Dept. of Admin.* 155 Idaho 55, 305 P.3d 499 (2013). As the Court explained in *HWRO*, the private attorney general doctrine arises from the authority of Idaho Code § 12-121. . . ." 130 Idaho at 725, 947 P.2d at 398. However, this Court has stated that Section 12-121 "does not . . . authorize an award of attorney fees on appeal of an agency ruling." *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 6, 232 P.3d 322, 327 (2010).

Second, even if the private attorney general doctrine applied, Ms. Tidwell has not satisfied the first and third elements of the doctrine. The first element requires that the litigation be pursued

to benefit the public, rather than to protect private pecuniary interests. *HWRO*, 130 Idaho at 726, 947 P.2d at 399. In *HWRO*, this Court noted that if a party is protecting its own economic interests, it cannot claim it is a public interest litigant. *Id.* at 726, 947 P.2d at 399. In this case, Ms. Tidwell seeks compensation for her attorney fees as an intervenor in a Commission case. Her only expressed interest in the underlying case is a private pecuniary interest related to her real property. R. Vol. I at 43-46; 164; 178-179. Thus, no public benefit exists.

Finally, the third element of the private attorney general doctrine – regarding the number of people standing to benefit from the decision – is not met in this case. In *Owner-Operator*, the Court found that the number of people standing to benefit was insufficient to justify an award of attorney fees. 125 Idaho at 408, 871 P.2d at 825. In *Owner-Operator*, a class action suit was brought against the Commission on behalf of "tens of thousands of motor carriers" operating in Idaho. Plaintiff's Brief, 1993 WL 13141746 at 36 (Idaho). If the Court found that the tens of thousands of motor carriers were "insufficient to justify an award of attorney's fees," then Ms. Tidwell's claim solely on her own behalf cannot meet this prong of the private attorney general doctrine to justify an award of attorney fees on appeal. For these reasons, Ms. Tidwell's request for attorney fees under the private attorney general doctrine must be denied.

2. Ms. Tidwell Is Not Entitled to Attorney Fees on Appeal Under Idaho Code § 12-117.

Idaho Code § 12–117 allows a prevailing party to recover reasonable attorney's fees against a "state agency" if the nonprevailing party acted without a reasonable basis in law or fact. This statute cannot be used to award fees against the Commission, because the Commission is not a "state agency" under the statute. Notably, Idaho Code § 12-117(5)(d) specifies that "[f]or purposes

of this section: . . . (d) "State agency" means any agency as defined in section 67-5201, Idaho Code." In turn, Idaho Code § 67–5201(1) specifically excludes agencies of the legislative branch from the "state agency" definition. This Court has long held that the Idaho Public Utilities Commission is a legislative agency not falling within the "state agency" definition in Idaho Code § 67–5201(1). *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 819, 828 P.2d 841, 848 (1992); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Idaho Pub. Utilities Comm'n*, 125 Idaho 401, 407–08, 871 P.2d 818, 824–25 (1994). Despite these long-standing decisions, when the Legislature amended Idaho Code § 12-117 in 2010, it did not change the definition or scope of "state agency" found in Section 12-117(5)(d). When the Legislature amends a statute it is presumed to have full knowledge of existing judicial decisions and case law. *Hook v. Horner*, 95 Idaho 657, 661, 517 P.2d 554, 558 (1973); *Ultrawall v. Washington Mut. Bank*, 135 Idaho 832, 836, 25 P.3d 855, 859 (2010). And when it amended Section 12-117, it presumably knew that the statute did not apply to the Commission. The Legislature nevertheless declined to change it to include the Commission.

Even if Idaho Code § 12-117 applied, the Commission has acted with a reasonable basis in law and in fact. The Commission followed the plain language of Rule 164 in denying Ms. Tidwell's late intervenor-funding request. Thus, the Commission had a reasonable basis in law for its decision and for defending the decision on appeal. The Commission also had a reasonable basis in fact for rejecting Ms. Tidwell's request. Those facts were set forth in Ms. Tidwell's funding request and petition for reconsideration, which the Commission considered in its decisions below. R. Vol. I, p. 76; 181. The Commission appropriately concluded that the facts that Ms.

Tidwell provided did not excuse her late filing and provided its reasons in its orders. The Commission thus had a reasonable basis in fact for the decision below and for defending its decision on appeal. The Court thus should not award attorney fees under Idaho Code § 12-117.

3. Ms. Tidwell Cannot Use This Forum to Obtain Intervenor Funding.

Ms. Tidwell requests this Court to award her intervenor costs as part of her appeal. Appellant's Br. at 19-20. Such an award is not available. Even assuming, for the purposes of this argument only, that Ms. Tidwell has satisfied the criteria for awarding intervenor funding as set forth in Idaho Code § 61-617A, this Court cannot award such funding in the first instance. Idaho Code § 61-617A states, "The *Commission* may order...." (Emphasis added). This Court may only review the Commission's substantive decisions on intervenor funding under an abuse of discretion standard. *Building Contractors Ass'n of Sw. Idaho v. Idaho Pub. Util. Comm'n,* 151 Idaho 10, 18, 253 P.3d 684, 692 (2011). Here, the Commission made no substantive decision on the merits of Ms. Tidwell's intervenor-funding request, or the reasonableness of her requested attorney fees, so there is no decision for this Court to review. Additionally, other parties and intervenors in the underlying case must be afforded the opportunity to oppose intervenor funding. IDAPA 31.01.01.164. This has not occurred. An appeal to this Court is not a substitute for the procedure set forth in Idaho Code § 61-617A and Rule 164. The Court cannot award attorney fees on this basis.

4. Ms. Tidwell Is Not Entitled to Attorney Fees Under Idaho Appellate Rule 40.

Appellate Rule 40 provides the procedure for allowing *costs* on appeal to the prevailing party. It is not a basis for attorney fees. If the Court gives Ms. Tidwell the benefit of the doubt

and considers her request under Appellate Rule 41, not Appellate Rule 40, the request must still be rejected. This Court has repeatedly held that a reference to Rule 41 is not sufficient by itself to properly request an award of attorney fees on appeal. *Bream v. Benscoter,* 139 Idaho 364, 79 P.3d 723 (2003). The requesting party must point to a statute or contractual provision authorizing such award. *State ex rel. Wasden v. Daicel Chem. Indus., Ltd.,* 141 Idaho 102, 109, 106 P.3d 428, 435 (2005). Because none of the other bases cited by Ms. Tidwell have merit as a basis for attorney fees on appeal, the Court should reject this basis as well.

V. CONCLUSION

Ms. Tidwell's petition for reconsideration did not establish that the Commission's order on her petition for reconsideration was unreasonable, unlawful, erroneous, or not in conformity with the law, as argued in Section IV.A, above The remainder of Ms. Tidwell's arguments were not raised below and should not be considered on appeal. Even if they are considered, the Commission still prevails. Ms. Tidwell is not entitled to attorney fees on appeal.

The Commission requests that the Court deny Ms. Tidwell's appeal and affirm Order No. 33928.

RESPECTFULLY submitted this 9th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2018, I served a true and correct copy of the foregoing document by the method indicated below, and addressed to each of the following:

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