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IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO POWER COMPANY,

Appellant-Respondent,

v.

KIKI LESLIE A. TIDWELL,

Intervenor-Appellant,

and

IDAHO PUBLIC UTILITIES COMMISSION,

Respondent.

DOCKET NO. 45644-2018

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APPELLANT'S REPLY BRIEF

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Appeal from Idaho Public Utilities Commission  
Commissioner Eric Anderson, presiding

Samuel L. Linnet (ISB #9788)  
Linnet Law Office  
115 Second Avenue South  
Hailey, ID 83333  
**Attorney for Intervenor-Appellant Kiki  
Leslie A. Tidwell**

Donovan E. Walker (ISB #5921)  
Idaho Power Company  
1221 West Idaho (83702)  
P.O. Box 70  
Boise, ID 83707  
**Attorney for Respondent Idaho Power  
Company**

Lawrence G. Wasden  
Attorney General

Edith Pacillo (ISB #5430)  
Karl Klein (ISB #5156)  
Idaho Public Utilities Commission  
P.O. Box 83720  
Boise, ID 83720-0074  
**Attorneys for Respondent on Appeal  
Idaho Public Utilities Commission**

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## I. STATEMENT OF THE CASE

This is an appeal of a final order from the Idaho Public Utilities Commission (“IPUC”) denying Kiki Leslie A. Tidwell (“Ms. Tidwell”) reimbursement for intervenor costs. R. vol. I. pp. 180-182.

In her initial brief, Ms. Tidwell argued that the 1) IPUC failed to provide notice of a deadline affecting a substantial, legislatively enacted right to intervenor funding requests, 2) the IPUC acted arbitrarily, capriciously, and abused its discretion in denying Ms. Tidwell’s request for intervenor funding, and 3) the administrative rule used to deny Ms. Tidwell’s request for intervenor funding is unconstitutionally vague.

It is crucial to remember that the IPUC published no less than twelve notices and orders during the life-span of Case No. IPC-E-16-28. Those notices span almost a year. None of them remotely mention Rule 164, any of the triggering events in Rule 164, or the August 22, 2017 deadline for intervenor funding. Additionally, the IPUC failed to provide intervenor’s with notice that the last evidentiary hearing had been scheduled. The IPUC further admits that notice of the August 22, 2017 deadline for intervenor funding requests was not provided to intervenors. Respondent Br. at 15. And finally, the IPUC failed to address whether the August 8, 2017 evidentiary hearing was the “last evidentiary hearing in a proceeding or the deadline for submitting briefs, proposed orders, or statements of position,” as stated under Rule 164. *See* Appellant’s Br. at 13.

Ms. Tidwell’s arguments are fully explained in her initial brief. This reply brief clarifies and expands those arguments below. Ms. Tidwell also attempts to respond to many of the incorrect assumptions and arguments the IPUC puts forward in its brief. In its simplest form, this

case is a question of whether an agency can set a deadline without noticing it and whether the agency misinterpreted its own vague statute.

## **II. ISSUES PRESENTED**

Ms. Tidwell's first brief lays out the issues presented to this court. Those issues remain. For the purposes of replying to the IPUC's arguments and in an attempt to not simply reiterate Ms. Tidwell's arguments, the issues presented in this brief are as follows:

1. Whether Ms. Tidwell adequately raised her arguments before this court in her petition for reconsideration with the IPUC.
2. Whether adequate notice of the Rule 164 deadline was provided.
3. Whether the IPUC acted arbitrarily, capriciously, and in an abuse of discretion in denying Ms. Tidwell's petition for intervenor funding.
4. Whether Rule 164 is unconstitutionally vague.
5. Whether Ms. Tidwell is entitled to an award of attorney fees.

## **III. STANDARD OF REVIEW**

The standard of review for an appeal challenging a statutory interpretation and the application of an administrative rule is whether the adjudicatory body abused its discretion. *Idaho Fair Share v. Idaho Pub. Utils. 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). Further clarification of what is required to prove an abuse of discretion standard is straightforward. "When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific

choices; and (3) whether the court reached its decision by an exercise of reason." *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331,1333 (1989) (citing *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct.App.1987)). Interestingly, the IPUC's brief cites *Westby v. Shaefer*, 157 Idaho 616, 338 P.3d 1220 (2014), *Westby v. Shaefer* uses the standard of review as created in *Hedger* (abuse of discretion and the factors quoted above), but when the IPUC cites *Westby v. Shaefer* it cites a different standard of review. Respondent Br. at 8. From Ms. Tidwell's perspective, the IPUC is either misstating the appropriate standard of review or asking this court to apply a brand new standard of review.

The case before this court requires an abuse of discretion of standard. This standard has been upheld in numerous cases concerning questions of law from administrative bodies, including cases involving the IPUC. *Idaho Fair Share v. Idaho Public Utilities Comm'n*, 120 Idaho 849, 820 P.2d 1206 (19 88) ("The decision of the adjudicating body awarding fees will not be overturned absent an abuse of discretion.") (citing *Hellar v. Cenarrusa*, 106 Idaho 571, 682 P.2d 524 (1984)); *Building Contractors Assn. of Southwestern Idaho v. Idaho Public Utilities Commn.*, 151 Idaho 10, 253 P.3d 684, (2011) ("Building Contractors has not shown that the Commission abused its discretion in denying the requested intervenor expenses."). Clearly, appeals to the Idaho Supreme Court for questions about petitioners for intervenor funding require an abuse of discretion standard of review.

#### IV. ARGUMENT

##### A. Ms. Tidwell Adequately Raised the Arguments in Her Appeal with the IPUC.

The issues put forward by Ms. Tidwell in her petition for intervenor funding and petition for reconsideration are the same issues that Ms. Tidwell is arguing now. *See R. vol. I at 178-179.* Ms. Tidwell was *pro se* during the time she prepared and submitted both her petition for

intervenor funding and petition for reconsideration. Legal counsel is far more adept at explaining legal arguments and using the correct vernacular and legal maxims. However, the arguments presented by Ms. Tidwell as a *pro se* litigant in front of the IPUC were sufficient to put the IPUC on notice of Ms. Tidwell's arguments, as contained in her initial briefing.

Ms. Tidwell's petition for intervenor funding and her petition for reconsideration allege that proper notice of the Rule 164 deadline was not provided and that the IPUC failed to properly interpret the Rule 164. R. Vol. I, p. 178-179. While subsequent briefing has broken those allegations down into more specific arguments, the main thrust of those arguments remain the same: the IPUC failed to provide notice of a deadline and it abused its discretion in denying Ms. Tidwell's petition for intervenor funding. The current arguments that the IPUC acted inconsistently and that Rule 164 is unconstitutionally vague are under the umbrella of Ms. Tidwell's original argument regarding the correct interpretation of Rule 164 and its application to her case.

It is clear that the IPUC would rather not address Ms. Tidwell's arguments directly and instead find a way to ignore their legislatively mandated duties and the requirements of notice and reasoned decision making required of agencies. The IPUC had a full and fair opportunity to correct its mistakes when Ms. Tidwell filed her petition for intervenor funding and her petition for reconsideration. Yet, even though the IPUC had the funds required under Idaho Code § 61-617A to reimburse Ms. Tidwell her intervenor expenses, the IPUC instead decided to double-down on its erroneous and illegal actions.



**B. The IPUC failed to properly notice the August 22, 2017 deadline for intervenor funding requests.**

The crux of Ms. Tidwell's argument is that the IPUC failed to notice the August 22, 2017 deadline for intervenor funding request. The entire administrative record is devoid of a reference to an August 22, 2017 intervenor funding request deadline. Tellingly, the IPUC admits that it did not notice the August 22, 2017 deadline. Respondent Br. at 15. Then, the IPUC argues that Rule 164 speaks for itself. As explained more in Ms. Tidwell's void for vagueness doctrine argument, Rule 164 does a lot of things, but speak for itself is not one of them. Not only does Rule 164 have a clause allowing for an order to waive any requirements under Rule 164, the rule itself contains two separate clauses with a contingency that must be interpreted to determine which clause applies. Regardless of Rule 164's vagueness, this important fact remains: notice of the August 22, 2017 deadline was not given, and the IPUC freely admits so.

The fact that the transcript contains a one-sentence proclamation by Commissioner Anderson is similarly undisputed, but that announcement does not equate to adequate notice of a deadline. First, the idea that Ms. Tidwell had notice because the transcript was available upon request is absurd. *See* Respondent Br. at 4, n.2. Without knowing about Commissioner Anderson's statement, Ms. Tidwell had no way to know where to look in the administrative record for the August 22, 2017 deadline or that she would need to request the transcript. Additionally, the cost of requesting a transcript to search for a one sentence statement that you do not know exists is prohibitive and similarly ludicrous; it is also one of the reasons this appeal only contains a short section of transcript.

Finally, Rule 16 of IDAPA requires that all notices be served by U.S. Mail or electronically. IDAPA 31.01.01.016. The IPUC admits that notice of the August 22, 2017

deadline was not provided. Respondent Br. at 15. Then, the IPUC tries to argue that notice was not required because the IPUC did not issue an order pertaining to Rule 164. *Id.* at 14-15. The IPUC misinterprets Rule 16, which only provides that orders and notices be served by mail or email. IDAPA 31.01.01.016. Rule 16 does not require an order to trigger the notice requirements, as claimed by IPUC. Respondent Br. at 14.

For all of the foregoing reasons, the record of this case unequivocally proves that Ms. Tidwell and every other intervenor did not receive notice of the August 22, 2017 deadline for intervenor funding requests.

**C. The IPUC abused its discretion because 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,” as required under Rule 164.**

The August 8, 2017 evidentiary hearing should not have started the 14-day period for petitions for intervenor funding because it was not the last event to occur under Rule 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.**

IDAPA 31.01.01.164 (emphasis added).

The IPUC admitted that there was no order setting a due date for petitions for intervenor funding requests. Respondent Br. at 14-15. Thus, the two deadline options contemplated by the rule apply. Either intervenor funding requests were due 14 days after the last evidentiary hearing or 14 days after the deadline for submitting briefs, proposed

orders, or statements of position. Because there was no order stating otherwise, whichever event is last is the triggering event.

In Ms. Tidwell's case, the last applicable event was the deadline for submitting briefs, proposed orders, or statements of position because that deadline was November 16, 2017, which is after August 8, 2017. *See* Appellant's Br. at 13-14. Additionally, Rule 255 allows any party to file briefs, proposed orders, or statements of position. IDAPA 31.01.01.255.

Ms. Tidwell met the Rule 164 deadline even though she did not receive proper notice and the IPUC misinterpreted its own poorly written rule because her petition for intervenor funding was received on September 20, 2017, before the last chance to file petitions for reconsideration and before the case before the IPUC had formally ended. While the IPUC would like to ignore the last three words of Rule 164 ("whichever is last."), it is not afforded such discretion unless it drafts an order consistent with the rule. The IPUC did not draft an order, and so we are left with language of Rule 164 which gave Ms. Tidwell until 14 days after November 2, 2017 to submit her request.

For the foregoing reasons, the deadline for intervenor funding requests was at least as late as November 16, 2017, and the IPUC's purported August 22, 2017 deadline was decided arbitrarily, capriciously, and in an abuse of discretion.

**D. Rule 164 is unconstitutionally vague.**

The vagueness of Rule 164 should be apparent in the context of the arguments put forth by both sides. The void for vagueness doctrine applies to statutes that do not sufficiently warn a person of common intelligence as to the proscribed conduct required. *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).

While Ms. Tidwell contends and maintains that her interpretation of Rule 164 is the correct interpretation, it was not one that was arrived at easily. And, it was not until after the IPUC erroneously set the intervenor funding request deadline that Ms. Tidwell became aware of such deadline. R. vol. I, p. 179. She was, exactly as the doctrine requires, unaware of the proscribed conduct that was required of her based solely on reading the rule. Rule 164 simply does not alert an intervenor as to what is expected of them.

The IPUC argues that Rule 164 speaks for itself. Respondent Br. at 15. Rule 164 does a lot of things, but speak for itself is not one of them. Not only does Rule 164 have a clause allowing for an order to waive any timing requirements under Rule 164, the rule itself contains two separate clauses with a contingency that must be interpreted to determine which clause applies. IDAPA 31.01.01.164. A lawyer, let alone a layperson, would have a difficult time properly interpreting Rule 164. For the above reasons, and those laid out in Ms. Tidwell's initial brief, Rule 164 is void for vagueness.

**E. The Commission's Order denying Ms. Tidwell's Intervenor-Funding Request was also Unreasonable, Unlawful, Erroneous or Not in Conformity with the law.**

Should this court decide to deviate from prior case law regarding the standard of review in appeals from the IPUC, the IPUC still cannot make a valid argument that its order was not unreasonable, unlawful, and erroneous. While the standard of review may change, the lack of notice and the requirements of Rule 164 do not. As a result, Ms. Tidwell's arguments, as laid out above and in her initial briefing, remain the same and show that the IPUC acted unreasonably, unlawfully, and erroneously in its application of Rule 164 as well as its interpretation of the rule.

**F. Ms. Tidwell Is Entitled to Attorney Fees.**

1. Ms. Tidwell satisfies elements of the Idaho's Private Attorney General Doctrine.

Idaho's private attorney general doctrine applies to cases against the IPUC because courts have previously applied the doctrine to cases against the IPUC. In *Owner-Operator*, even though the court ultimately declined to award attorney fees to appellant, they did so because the appellant's request failed to meet the required substantive elements of the doctrine, not because the doctrine did not apply to the IPUC. *Owner-Operator Independent Drivers Ass'n v. Idaho PUC*, 125 Idaho 401, 407, 871 P.2d 818, 824 (1994).

As argued in Ms. Tidwell's opening brief, her appeal satisfies the requirements of Idaho's private attorney general doctrine. Appellant's Br. at 17-18. Contrary to the IPUC's arguments, the issues presented by Ms. Tidwell do not only stand to benefit her pecuniary interest. Ms. Tidwell is seeking to hold the IPUC accountable to all potential intervenors and require the IPUC provide adequate notice of intervenor deadlines. Since every Idahoan has the opportunity to be an intervenor, the ruling of this court will affect every single Idahoan.

2. Ms. Tidwell is entitled to attorney fees under Idaho Code 12-117.

Agencies, as defined by Idaho Code § 67-5201(1), does not exclude legislative agencies, and therefore the statute forms a basis for an award of attorney fees. While the IPUC is a legislatively created agency, Idaho Code § 67-5201(1) excludes the "legislative branch," not agencies created by the legislature. Additionally, Ms. Tidwell does not seek attorney fees from the IPUC or legislative branch. She seeks approval by the IPUC to award attorney fees from Idaho Power Company, as explained in Idaho Code § 61-617A. The budget for intervenor funding comes from the Idaho Power Company, not the legislature. Accordingly, fees under

Idaho Code § 12-117 are appropriate because the award of fees is actually an award of fees from the Idaho Power Company.

3. This forum is appropriate for awarding intervenor funding because the IPUC did not otherwise object to Ms. Tidwell's petition under the statutory factors.

Attorney fees for intervenor's are allowed under Idaho Code § 61-617A. This provision of Idaho code expressly allows for an award of attorney fees to intervenors. Ms. Tidwell originally applied to the IPUC for an award of attorney fees under Idaho Code § 61-617A. R. vol. I, pp. 164-165. That request was not denied for failure to satisfy the requirements under the statute, but rather because the IPUC erroneously decided that Ms. Tidwell did not apply in time. R. vol. I, pp. 175-177. The IPUC contends that this means they did not make a substantive decision on Ms. Tidwell's application. Respondent Br. at 24. However, this argument is actually a thinly veiled attempt at getting a second chance to deny Ms. Tidwell her funding request.

Ms. Tidwell applied for intervenor funding in accordance with the statute, and the IPUC was given a chance to approve or deny it based on the factors in Idaho Code § 61-617A. In fact, the IPUC was required to make its decision on those factors alone, not Rule 164. Idaho Code § 61-617A ("The determination of the commission with regard to the payment of these expenses shall be based on the following considerations..."). The IPUC did not object to any of the substance of Ms. Tidwell's application, nor did any other intervenors object to Ms. Tidwell's petition for intervenor funding. The IPUC does not need, nor are they allowed, to take a second opportunity to deny Ms. Tidwell's application. As a result, Ms. Tidwell believes that if this court agrees that her intervenor funding request was timely or if the IPUC's decision to deny her request based on timing only was an abuse of discretion, then this court may award Ms. Tidwell attorney fees in accordance with the Idaho Code § 61-617A.

In the event Ms. Tidwell prevails on her arguments in this appeal, Ms. Tidwell respectfully ask that this court award attorney fees accordingly, including the cost of this appeal.


4. Ms. Tidwell is entitled to an award of attorney fees under Idaho Appellate Rule 40 and 41.

Idaho Appellate Rule 40 and Rule 41 are a basis for an award of costs and attorney fees. Idaho Code § 61-617A is a statutory provision authorizing an award of attorney fees, which also provides the basis for this appeal. As a result, an award of attorney fees and costs under Idaho Appellate Rule 40 and 41 is appropriate.

#### V. CONCLUSION

The IPUC abused its discretion in denying Ms. Tidwell's petition for intervenor funding and setting an unnoticed and erroneous deadline under Rule 164. Additionally, Rule 164 is void for vagueness. Ms. Tidwell respectfully asks for an award of attorney fees and costs as allowed by Idaho Code § 61-617A. Ms. Tidwell also respectfully requests reasonable attorney fees and costs on appeal.

DATED this 29 day of May, 2018.



Samuel L. Linnet  
Attorney for Appellant/Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 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"/> E-Mail <input checked="" type="checkbox"/> Fedex	Donovan E. Walker Idaho Power Company PO Box 70 Boise, Idaho 83707-0070 dwalker@idahopower.com dockets@idahopower.com
<input checked="" type="checkbox"/> E-Mail <input checked="" type="checkbox"/> Fedex	Edith Pacillo Karl Klein Idaho Public Utilities Commission 472 W. Washington Street Boise, Idaho 83702 edith.pacillo@puc.idaho.gov karl.klein@puc.idaho.gov



Samuel L. Linnet  
Attorney for Ms. Tidwell