

DECISION MEMORANDUM

TO: COMMISSIONER KJELLANDER
COMMISSIONER RAPER
COMMISSIONER ANDERSON
COMMISSION SECRETARY
COMMISSION STAFF
LEGAL

FROM: STEPHEN GOODSON, POLICY ADVISOR

DATE: AUGUST 20, 2021

RUC-11-21-01

SUBJECT: NOTICE OF PROPOSED RULEMAKING – IDAPA 31.01.01

BACKGROUND

On January 16, 2020 Governor Little signed Executive Order No. 2020-01, “Zero-Based Regulation.” Executive Order No. 2020-01 requires each agency to review its rule chapters over a five-year period.

Executive Order 2020-01 also directed Division of Financial Management (DFM) to create a schedule under which each agency is to review its rule chapters. The Idaho Public Utilities Commission is scheduled to review IDAPA 31.01.01 – Rules of Procedure of the Idaho Public Utilities Commission—this year.

DFM’s memo directs each agency to fully analyze and perform a thorough and meaningful review of the rule and how it can be improved.

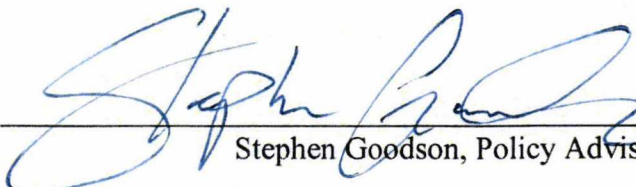
On June 29, 2021, Staff conducted a negotiated rulemaking session with stakeholders. Staff prepared a written summary of the negotiated meeting (attached) and submitted it to DFM on August 16, 2021.

STAFF RECOMMENDATIONS

Staff recommends the Commission direct Staff to submit the necessary forms to publish a Notice of Proposed Rulemaking in the Administrative Bulletin. Staff also recommends the Commission authorize Staff to conduct proposed rulemaking consistent with *Idaho Code* § 67-5221, Executive Order No. 2020-01, and DFM directives.

COMMISSION DECISION

Does the Commission wish to approve Staff’s recommendations? Anything else?



Stephen Goodson, Policy Advisor

NEGOTIATED RULEMAKING—WRITTEN SUMMARY

Pursuant to I.C. § 67-5220(3)(f), the Idaho Public Utilities Commission (IPUC) provides the following written summary of unresolved issues, key information considered, and conclusions reached during and as a result of the negotiated rulemaking in Case No. RUL-U-21-01.

Background

On January 16, 2020, Idaho Governor Brad Little issued Executive Order No. 2020-01 “Zero-Based Regulation.” The Executive Order directs agencies to review their administrative rules over a five-year period and gives the Division of Financial Management (DFM) authority to “develop a standardized process for the required retrospective analysis.” Executive Order No. 2020-01 directs an agency wishing to renew a rule chapter to take the following steps:

The agency must perform a retrospective analysis of the rule chapter to determine whether the benefits the rule intended to achieve are being realized, whether those benefits justify the costs of the rule, and whether there are less-restrictive alternatives to accomplish the benefits. This analysis should be guided by the legislative intent articulated in the statute or act giving the agency the authority to promulgate the rule.

...Agencies should start the new rulemaking from a zero-base and not seek to simply reauthorize their existing rule chapter without a critical and comprehensive review....

The Executive Order notes that the purpose for each finalized rule chapter is that it “reduce the overall regulatory burden, or remain neutral, as compared to the previous rule chapter.” In short, Executive Order No. 2020-01 directs each agency to look at its statutory authority to promulgate rules and cut down its rules to more cleanly and clearly achieve the statute-based purpose of those rules.

DFM published a schedule for agencies to review their rules over a five-year period. For 2021, the IPUC is scheduled to review its procedural rules, IDAPA 31.01.01.

Procedural overview

At its May 11, 2021 decision meeting, the Commission directed Commission Staff (Staff) to submit the necessary forms to publish a Notice of Negotiated Rulemaking in the Administrative Bulletin. The Commission authorized Staff to conduct negotiated rulemaking consistent with I.C. § 67-5220 and Executive Order No. 2020-01.

A Commission docket was subsequently opened, and the Notice of Negotiated Rulemaking was published in late May 2021. The Notice of Negotiated Rulemaking scheduled a public meeting for June 29, 2021 and explained how written comments could be submitted.

On June 21, 2021, the IPUC posted a track-changes Word document with proposed changes to the IPUC’s procedural rules.

June 29, 2021 negotiated rulemaking meeting

The negotiated rulemaking meeting was attended by the following persons:

- **Idaho Power Company:** Lisa Nordstrom and Connie Aschenbrenner
- **Rocky Mountain Power / PacifiCorp:** Stephanie Barber-Renteria and Ted Weston
- **DFM:** Colby Cameron and Matthew Reiber
- **Commission Staff:** Matt Hunter, Stephen Goodson, Donn English, Jan Noriyuki, and Adam Rush

The table below summarizes the rule-by-rule discussion at the July 29, 2021 meeting. Regarding the “Resolution” column, Staff’s Commission-delegated authority allows Staff to consider stakeholder recommendations and resolve the recommendations to the extent necessary to prepare a new draft of IDAPA 31.01.01. The three-member Commission will review the first and second drafts of IDAPA 31.01.01—as well as this written summary, Executive Order 2020-01, and DFM’s related memorandums to agencies. The Commission will then determine where it agrees with Staff’s resolutions to stakeholder recommendations. The Commission may also choose to modify Staff’s proposed draft of IDAPA 31.01.01 as it thinks best.

Under the “Resolution” column, “Resolved” means Staff has reached a conclusion regarding the stakeholder recommendation. “Unresolved” means Staff has not yet reached a conclusion.

Stakeholder	Rule Number(s)	Stakeholder Recommendation	Resolution
DFM / Idaho Power Company	IDAPA 31.01.01.401	<p>DFM stated that Rule 401 is not necessary because I.C. § 67-5206 provides that the OAG rules automatically apply to an agency and need not be adopted. <i>See</i> IDAPA 04.11.01.050. DFM explained that contrary to Staff’s theory, Rule 401 was not accidentally left out of the 2019 rule revision but was in fact removed by DFM during the publication process.</p> <p>Idaho Power disagreed with DFM’s recommendation, arguing that Rule 401 provides clarity.</p>	Staff agrees with DFM’s recommendation.

DFM	All rules in the IPUC's procedural rules that are effectively the same as rules in the OAG's procedural rules (IDAPA 04.11.01)	DFM recommended the IPUC remove the language of each rule that was effectively the same as a rule in the OAG procedural rules and incorporate the OAG rule by reference. DFM noted that with the IPUC's current edits, the IPUC is unlikely to achieve a 20-percent word count reduction in the rule chapter. To achieve this goal, DFM recommended the IPUC incorporate by reference the OAG rules that are effectively the same as an IPUC rule.	<p>At the meeting, Staff noted that DFM's proposal would be cumbersome to implement because the IPUC's procedural rules differ considerably from the OAG's procedural rules. Staff also noted that DFM's proposal would require practitioners before the IPUC to continually reference two separate procedural rule chapters when determining the IPUC's procedure. It is Staff's opinion that this would not reduce the overall regulatory burden on utility companies.</p> <p>No stakeholder expressed support for adopting the Rules of the Attorney General, and Idaho Power Company and PacifiCorp expressed opposition to the proposal for the same reasons expressed by Staff.</p> <p>Regarding the 20-percent word count reduction goal, Staff notes that the IPUC eliminated 100 percent of the IPUC's two safety regulation chapters (IDAPA 31.11.01 and IDAPA 31.71.01) from IDAPA, instead adopting these rule chapters by order. If these word count reductions are added to the approximately 5 percent word count reduction anticipated in the IPUC's procedural rules, the IPUC is on track to cut more words than if 20 percent of the words had been cut from the IPUC's two safety regulation chapters and the IPUC's procedural rules.</p>
PacifiCorp / Idaho Power Company	IDAPA 31.01.01.133.02	Staff's proposed changes to sub-parts (a.) and (b.) could increase the complexity of getting tariffs reviewed and approved by the Commission. This could especially be an issue when timeframes are tight and a tariff needs to be approved as soon as possible.	Staff kept the original language in 31.01.01.133.02.
Idaho Power Company	IDAPA 31.01.01.125.01	As currently written, this rule requires the utility to keep copies of its application to change rates at its regional offices, and to notify	Staff kept the revised language.

		<p>customers (via the customer notice) that the application is available at this location. Idaho Power proposed that this requirement be eliminated because there is almost no demand for applications at the regional office, and because the vast majority of people have access to the application online.</p>	
Idaho Power Company	IDAPA 31.01.01.125.03	<p>As currently written, this rule requires the customer notice of a rate change to “pertain only to the proposed rate change.” Idaho Power notes that this is problematic for the utility and confusing for the customer when multiple annual rate changes are happening at once. Example would be Idaho Power’s PCA and FCA. Idaho Power suggested this language be changed to allow the Company to provide customers with a complete and less-confusing perspective on rate changes.</p>	Staff revised per Idaho Power Company’s recommendation.
Idaho Power Company	IDAPA 31.01.01.016.03	<p>This rule requires all utilities to “designate a person as their agent to be served with summons and complaints,” and the utility “shall be responsible for maintaining on file with the Commission Secretary the current name, mailing address and email address of the person designated as the agent to receive service.” Staff proposed to cut this requirement in its initial draft. Idaho Power pointed out that this rule has value because when that designated agent</p>	Staff agrees with Idaho Power’s concerns and will keep the requirement.

		leaves employment or moves into a new role, the utility can quickly update that information with the Commission. This helps the utility avoid missing summons and complaints.	
Idaho Power Company	IDAPA 31.01.01.041.02	Under Rule 41.02, only two people may be designated as a party's representative for purposes of service or receipt of official documents. Idaho Power noted that it has been the practice for some time for the Commission to allow more than two representatives for the purpose of service, but no more than two could be designated to receive paper/hard copies. Idaho Power recommended the Commission modify this rule to reflect the Commission's current practices or increase the number of allowed representatives.	Staff agrees with Idaho Power's recommendation that this rule reflect the Commission's current practice. How exactly this recommendation will be incorporated into the next proposed draft of IDAPA 31.01.01 has not been resolved.
Idaho Power Company	IDAPA 31.01.01.043	Under the current rule, partnerships, corporations, associations, etc. must be represented by an attorney in "quasi-judicial proceedings" before the Commission. Staff proposed replacing the language of Rule 43 with the "Representation of Parties" language in the OAG's procedural rules. Idaho Power opposed this change, preferring the current language. Idaho Power noted that Staff's proposed language eliminates the distinction between "administrative proceedings" and "quasi-judicial proceedings" and allows (among other things)	Staff agrees with Idaho Power and will keep the current language of Rule 43.

		associations to be represented before the Commission by non-attorneys. Idaho Power noted that it would be preferable for associations to continue to be represented by attorneys, given the procedural and substantive complexity of the Commission's subject area.	
Idaho Power Company	IDAPA 31.01.01.061.04	Rule 61 was modified by Staff to allow for electronic filing; but Rule 61.04 authorizes the Commission Secretary to require an electronic filing to be filed in printed form. Idaho Power inquired what the standard would be for requiring a printed filing. Idaho Power expressed its preference that there be a standard.	Staff for now will keep the language as revised in the most current draft.
Idaho Power Company	IDAPA 31.01.01.063.02	Idaho Power recommended this rule be modified to allow service of discovery to be accomplished by providing parties access to cloud drives. Idaho Power noted that this is already a regular practice at the IPUC.	Staff agrees with Idaho Power. However, Staff has not determined how best to modify the rule to achieve the goal described by Idaho Power in this current rulemaking process
Idaho Power Company	IDAPA 31.01.01.067 and .233	Idaho Power noted that if Staff modified the "representation of parties" rule (Rule 43), these rules should also be modified because both rules require the attorney for the party to state in writing that the material is protected by law from public inspection.	Staff intends to keep the current language of Rule 43.
Idaho Power Company	IDAPA 31.01.01.076	Idaho Power suggested the Commission add to this rule (or a different rule) standards of behavior for public witnesses. Idaho Power noted that in recent years the	Staff understands and appreciates Idaho Power's concerns. Rule 244 was deleted, and Rule 47 was revised to encompass standards of behavior for public witnesses and already establishes standards of behavior at public hearings. Staff noted at the negotiated rulemaking meeting that

		behavior of the public at hearings has steadily deteriorated.	it is the Commission's prerogative to determine what degree of civility must be practiced at public hearings.
Idaho Power Company	IDAPA 31.01.01.165	Idaho Power inquired what Staff was seeking to achieve by completely removing Rule 165.	Staff explained at the negotiated rulemaking meeting that the Executive Order No. 2020-01 directs the Commission to "determine whether the benefits of the rule intended to achieve are being realized, whether those benefits justify the costs of the rule, and whether there are less restrictive alternatives to accomplish the benefits." Rule 165 restates I.C. § 61-617A.
Idaho Power Company	IDAPA 31.01.01.272	Idaho Power noted that Staff's modifications to this rule replace "enter into" with "sign." Idaho Power expressed concern that this could open the door to Commission Staff reaching an oral agreement with a party without prior notification of the Commission and all other parties.	Staff retained the original wording.