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IDAHO PUBLIC
UTILITIES COMMISSION

Attorney for Idaho Conservation League

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE)
APPLICATION OF IDAHO POWER)
COMPANY FOR AUTHORITY TO)
CONVERT SCHEDULE 54-FIXED COST)
ADJUSTMENT-FROM A PILOT)
SCHEDULE TO AN ONGOING,)
PERMANENT SCHEDULE)

CASE NO. IPC-E-11-19

PETITION FOR
RECONSIDERATION

COMES NOW, the Idaho Conservation League (“ICL”), pursuant to I.C. § 61-626 and IDAPA 31.01.01.331 - 332 with the following Petition for Reconsideration. The Commission, in Order 32505, denied in part ICL’s application for intevenor funding. ICL respectfully asks the Commission to reconsider this final Order. Below, ICL sets forth the grounds for this petition and the arguments to support our position. Accordingly, ICL does not request any further hearing or briefing on this matter. See IDAPA 31.01.01.331.02.

I. Grounds for Reconsideration

Idaho Code empowers the Commission to award intervention costs “to encourage participation at all stages of all proceedings . . . so that all affected customers receive full and fair representation in those proceedings.” I.C. § 61-617A. According to the Idaho Supreme Court: “It is the express policy of the statute to encourage participation in by [sic] intervenors by awarding all or a portion of the costs of intervention.” *Idaho Fair Share v. Idaho Public Utilities Comm'n*, 113 Idaho 959, 963, 751 P.2d 107, 110 (1988) (overruled on other grounds by *J.R. Simplot Co. Inc. v. Idaho State Tax Comm'n*, 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991)). The statute provides the Commission discretion as to whether and to what extent to grant any

award. I.C. § 61-617A. This discretion is reviewed for abuse. *Building Contractors Ass'n of Southwestern Idaho v. Idaho Public Utilities Comm'n*, 151 Idaho 10, 253 P.3d 684, 691 (2011)(BCA). Similar to the award of attorney fees under I.C. § 12-121, this review asks whether the Commission: (1) "perceived the issue as one of discretion;" (2) "acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it;" and (3) "reached its decision by the exercise of reason." *Bingham v. Montane Resource Associates*, 133 Idaho 420, 427, 987 P.2d 1035, 1042 (1999).

ICL respectfully asks the Commission to reconsider the exercise of discretion in this case. While the decision to award intervention costs is discretionary, the statute bounds this discretion by four factors the Commission shall consider. I.C. § 61-617A; IDAPA 31.01.01.165; BCA, 253 P.3d 691. The Commission found ICL materially contributed to the decision and differed materially from the testimony and exhibits of the Commission staff. Order 32505 at 8. ICL explained in our application how we addressed issues of concern to the general body of ratepayers. *ICL Application* at 3-4. Since the Commission granted a partial award ICL assumes this explanation was satisfactory. However, the Commission found ICL's requested amount unreasonable. Order 32505 at 8. ICL respectfully submits that important facts in this case, as well as the legal standards applicable to this exercise of discretion, work against this finding. Moreover, to the extent Order 32505 serves as precedent for future cost awards, ICL is concerned it discourages potential future intervenors' ability to fully and fairly participate in all proceedings before this Commission. Instead, ICL respectfully urges the Commission to uphold the stated policy of Idaho "to encourage participation in all stages of all proceedings before the Commission" by awarding larger portion of our request. I.C. § 61-617A.

II. Argument

In denying the majority of ICL's request, the Order provides two interrelated reasons. The

Order emphasizes that I.C. § 61-617A limits awards to “legal fees, witness fees and reproduction costs.” Order 32505 at 7-8. The Order also states that a “case concluded by written comments filed in Modified Procedure, following one meeting of the parties” should not incur as much costs as ICL did. *Id.* ICL respectfully submits these statements leave out substantial and important efforts that preceded this conclusion. As explained below, the Commission’s rules require ICL to be represented by an attorney in this proceeding. Further, based on the original Order in this case, ICL expected a technical hearing and retained expert assistance to fully and fairly represent our interests. This technical assistance directly influenced ICL’s later acquiescence to Modified Procedure and informed the comments the Commission found to contribute to the decision. Based on the procedural history of this case, and the Commission’s rules of procedure, ICL reasonably incurred legal and witness fees. Accordingly, awarding a larger portion of our intervention costs is consistent with the applicable legal standards and an exercise in reasoned discretion. *Bingham*, 987 P.2d at 1042.

A. Legal Fees

While this case concluded through Modified Procedure, it began as a much different case. On November 2, 2011, the Commission issued Order 32389 notifying the public of the Application and establishing a deadline for intervention. This Order did not mention the Modified Procedure rules; rather it stated “persons intending to participate at the hearing must file a Petition to Intervene 14 days from the service date of the Order.” *Id.* at 3. Pursuant to this Order ICL prepared to intervene and participate in the expected hearing. The Commission granted ICL’s Petition to Intervene on November 29, 2011. Order 32402.

The Commission’s rules require ICL, a non-profit corporation under I.C. §§ 30-3-1 – 30-3-134, to be represented by an attorney for any “petitions, motions, applications for modified procedure or technical/evidentiary hearings.” IDAPA 31.01.01.43.02. The rules define an

“intervention” as a “petition.” IDAPA 31.01.01.053.05. During this stage of the proceedings, ICL prepared for the technical hearing described in the Order by reviewing the prefiled testimony, contracting with a technical expert, reviewing discovery, and researching the issues. On January 27, 2012, eleven weeks after the Order, the parties met to establish a case schedule. The parties agreed to Modified Procedure, and the Commission adopted this recommendation on February 14, 2012. Order 32454. Assuming the Commission must issue an order to change the established procedure, for the initial 15 weeks of this case the Commission’s rules mandated that an attorney represent ICL.

After the Commission adopted Modified Procedure, ICL, as an official party, elected to be represented by an attorney, as the rules allow. IDAPA 31.01.01.43. This was reasonable since both the PUC Staff and Idaho Power elected to continue to be represented by attorneys. Attorney representation, combined with utilizing expert assistance discussed below, facilitated ICL’s full participation in all stages including submitting extensive comments that “materially contributed to the Commission’s decision[.]” Order 32505 at 8.

ICL respectfully submits the Commission exceeded its discretion by reducing ICL’s award to 7% of its request. Responding to ICL’s request for funding, the Commission stated, “a case concluded by written comments filed in a Modified Procedure, following one meeting of the parties, should not reasonably result in a request for funding of \$10,000.” Order 32505 at 8. The Commission then compared ICL’s request to another party who choose to represent their interests in a different manner. *Id.* But this reasoning does not consider that this case initially required ICL to be represented by an attorney under Idaho law and this Commission’s rules, which are legal standards applicable to the exercise of discretion. *Bingham*, 987 P.2d at 1042. Further, the Commission should focus on the quality of the information, rather than the procedural posture of the case, when exercising the discretion to award intervention costs. *Id.* ICL respectfully urges the Commission to reconsider the exercise of discretion in this case and award a greater portion our

fee request. By doing so the Commission will uphold “the policy of the state to encourage participation at all stages of all proceedings . . . so that all affected customers receive full and fair representation[.]” I.C. § 61-617A; *Idaho Fair Share*, 751 P.2d at 110.

B. Expert witness

ICL also reasonably incurred witness fees to prepare for the hearing originally planned in this case. Based on Order 32389 describing an expected technical hearing, ICL retained an expert witness, Dr Carl Linvill, to assist in reviewing the case, developing our initial position on the issues, and prepare for the hearing. On January 27, 2012, the parties meet to discuss the case. While ICL cannot disclose the contents of this meeting, we note that several technical experts from both the Staff and Idaho Power participated. ICL’s ability to consult our expert at this stage allowed us to effectively participate in this meeting and directly influenced our agreement to forgo a hearing and recommend proceeding by Modified Procedure.

Once the Commission adopted Modified Procedure, we limited our expert witness expenses because a technical hearing would not occur. But the expert assistance leading up to this point, and our continued consultation, directly enhanced ICL’s ability to fully and fairly participate in this case. After the January 27th meeting, ICL met with several technical experts from the PUC Staff and conferred with Idaho Power’s expert Mr. Cavanagh to further discuss the issues and possible resolutions. The PUC staff utilized five technical staff to inform their written comments. *Staff Comments* at 12. Likewise, ICL’s expert assistance heavily informed both our initial and reply comments. Although the procedural posture of the case changed, ICL’s initial expense directly influenced our ability to participate in all stages of the case. ICL respectfully urges the Commission to reconsider its exercise of discretion by considering the benefits of parties using expert assistance to resolve the issues, rather than the final procedural posture of the case.

The Commission has awarded expert fees in other cases based on work preformed during

discovery and settlement and without the party filing substantive comments. See Order 32426 at 35, (awarding IIPA \$12,891 for joining a stipulation after actively participating in discovery and settlement phases); Order 32432 at 19-20 (awarding IIPA \$18,000 because they “employed the services of legal council as well as a ratemaking expert” who participated in discovery and settlement phases); Order 32371 at 11 – 12 (awarding ICL \$3,625 and CAPAI \$10,885.16 for a case resolved by settlement because their involvement “required the investment of considerable time and resources to effectively participate . . .”). While these examples are general rate cases, they are analogous to the present case. This case began on a procedural path headed towards an evidentiary hearing. Order 32389. This case involved reviewing the testimony and discovery of other parties, as well as participating in potential settlement discussions. And unlike the three cases above, in this case ICL filed extensive written comments that stakeout a position opposite of the Staff. In largely denying ICL’s fee request, the Commission notes this case “concluded by written comments filed in Modified Procedure[.]” Order 32505 at 8. To deny ICL’s expert assistance costs based on a change in procedure, and without considering the ongoing need for technical expertise during all phases of the case, discourages full and fair participation at all stages of all proceedings. I.C. § 61-617A.

C. Modified Procedure in General

Order 32505 appears to limit the availability of intervenor funding in Modified Procedure cases. This conflicts with the “very broadly worded declaration of policy” to encourage participation “at all stages of all proceedings” and by using the discretion to grant awards in “any proceeding before the Commission.” *Idaho Fair Share*, 751 P.2d at 110. Despite this broad wording, Order 32505 appears to limit intervenor awards in a class of proceedings by stating: “Because Modified Procedure normally concludes without an evidentiary hearing, there are no witnesses, and may be no legal fees, to support an award of intervenor funding.” *Id.* ICL urges

the Commission to reconsider this statement, since it conflicts with the statute and creates a powerful incentive for parties to oppose Modified Procedure in all cases.

Order 32505 is confusing as to the standards the Commission will apply and the reasoning they will undertake when exercising discretion to award intervenor funding. The Order describes case IPC-E-08-23, wherein the Commission denied a request for intervenor funding in a case consisting of informal meetings and telephone calls. Order 32505 at 8. Unlike the award petitioner in IPC-E-08-23, ICL is a formal party to this case. More importantly, ICL appreciates the need to have a record upon which to determine if intervenors materially contributed to the decision and materially differed from staff. Modified Procedure can produce this record, as the Commission found it did here. *Id.* Requiring a written record upon which to determine material contribution and material difference is within the bounds of discretion. But to excise from the reach of the intervenor funding statute Modified Procedure cases because they do not conclude with an evidentiary hearing appears to be outside the bounds of discretion and inconsistent with I.C. § 61-617A.

Often Modified Procedure cases require interested persons to understand complex economic, engineering, and legal issues such as prudence reviews of Demand Side Management spending, amortizing transmission costs pursuant to FERC orders, or modifying service and performance reporting standards. *See* IPC-E-12-15; IPC-E-12-06; PAC-E-12-02. To fully and effectively participate in these proceedings, including deciding whether to intervene or request a hearing, interested persons must have the ability to retain expert legal and technical advice. Idaho law encourages this ability by creating the possibility to recoup these costs based on certain standards. Those standards are not based on the procedural posture of the case; rather they require gaining intervention status, which requires legal representation, and materially contributing to the Commission's decision, which often requires technical expertise. To the extent the reasoning in Order 32505 relies on the procedural posture of this case, ICL respectfully asks the Commission to

reconsider this exercise of discretion. *Bingham*, 987 P.2d at 1042.

III. Conclusion

The Commission has the discretion to award all or a portion of an intervenor's legal and witness fees. I.C. § 61-617A. A broadly worded statement of policy to "encourage participation in all stages of all proceedings before the commission so that effected customers receive full and fair representation in those proceedings" backs this power. *Id.*; *Idaho Fair Share*, 751 P.2d at 110. Based on Order 32389 ICL incurred legal and witness fees to intervene and prepare for the expected hearing. This expertise directly enhanced our ability to participate in all stages of this proceeding, including meeting with the technical and legal experts of the other parties and filing extensive written comments. This Commission found ICL materially contributed to the decision, materially differed from the Staff, and addressed issues of concern to the general body of ratepayers. Order 32505 at 8. In the past, the Commission has recognized that incurring these fees is a financial hardship for a non-profit organization. Order 32371 at 12. However, here the Commission found that 93% of ICL's costs were unreasonable based on a change in procedure without considering the legal mandate that an attorney represent ICL and that access to technical assistance enhanced the quality of information presented to the Commission. Order 32505 at 8. ICL respectfully asks this Commission to reconsider this exercise of discretion and award a larger portion of our costs.

DATED this 16th day of April 2012.

Respectfully submitted,



Benjamin J. Otto
Idaho Conservation League

EXHIBIT A

Expert Fees Carl Linvill PhD – \$3000

Attorney Fees for Benjamin J. Otto – Total: \$7,156.25

57.25 Hours at \$125 per hour

10/31/11	Review application and initial testimony	1.5
11/16/11	Prepare application to intervene, File same	.75
12/5/11	Meet with Linvill re possible expert assistance. Draft contract re same	1.75
12/9/11	Compile case documents, research and data send to Linvill	.75
12/16/11	Review Staff production request to Idaho Power	.25
1/16/12	Review Idaho Power responses to Staff production request	1.5
1/16/12	Research options for decoupling mechanisms	4.5
1/17/12	Research options for decoupling mechanisms	5.25
1/24/12	Review Linvill evaluation of the case and proposals	2.5
1/26/12	Meet with Linvill to discuss evaluation and develop ICL proposals	1.25
1/27/12	Meet with Parties re settlement	2.25
2/7/12	Draft comments	3.5
2/10/12	Meet with staff to discuss issues	1.5
2/27/12	Draft comments	3.25
2/29/12	Draft comments	3.75
3/1/12	Final draft of comments. File same	6
3/2/12	Review Staff comments	.75
3/3/12	Research re staff comments and implications for mechanism	2.5
3/8/12	Conference with Linvill re: reply comments	.5
3/12/12	Draft reply comments	6
3/13/12	Draft reply comments	3.25
3/15/12	Final draft of reply comments. File same	2.5
3/20/12	Prepare application for intervenor funding	1.5
Total Hours		57.25

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April 2012, I delivered true and correct copies of the foregoing PETITION FOR RECONSIDERATION OF THE IDAHO CONSERVATION LEAGUE to the following via the method of service noted:

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