

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF THE APPLICATION OF)
IDAHO POWER COMPANY FOR AUTHORITY) CASE NO. IPC-E-98-12
TO USE A PORTION OF THE 1997 REVENUE)
SHARING BALANCE TO FUND IDAHO)
POWER COMPANY'S 1997 AND 1998)
PAYMENTS TO THE NORTHWEST ENERGY) ORDER NO. 27959
EFFICIENCY ALLIANCE.)
_____)**

On February 12, 1999, the Industrial Customers of Idaho Power (ICIP) hand delivered to the Commission a Petition for Reconsideration of Order No. 27877. That Order, issued on January 21, 1999, found that Idaho Power Company's (Idaho Power; Company) 1997 expenditures related to the Northwest Energy Efficiency Alliance (NEEA) were prudent. The Commission ruled that the Company would be allowed to offset those expenditures against Idaho Power's 1997 revenue sharing balance. The Commission deferred judgment on the prudence and recovery of the Company's 1998 and 1999 NEEA expenditures.

As discussed below, the ICIP's Petition for Reconsideration of Order No. 27877 was delivered to the Commission after the statutory deadline for such filings (21 days from the issuance of the Order). Consequently, the ICIP's Petition cannot be considered by this Commission. Because the Petition was filed late, it is unnecessary for us to address the substance of the Petition itself.

BACKGROUND

Order No. 27877 (a final Order) was issued in this case on January 21, 1999. The deadline for filing petitions for reconsideration of that Order, therefore, was February 11, 1999. The ICIP's Petition for Reconsideration, however, was hand delivered to the Commission at the end of the day on February 12, 1999; the 22nd day after the issuance of Order No. 27877. Consequently, it was not timely filed pursuant to *Idaho Code* § 61-626 and Rule 331 of the Commission's Rules of Procedure as discussed below.

On February 18, 1999, the ICIP filed a Motion to Accept Petition for Reconsideration Out of Time. In its Motion, the ICIP declares that its Petition was filed a day late due to a "calendaring error." The ICIP asks the Commission to consider its Petition, in spite of its untimeliness, due to the importance of the issue involved, and by virtue of Rule 13 of the Commission's Rules of Procedure which provides that the Commission's rules "will be liberally

construed to secure just, speedy and economical determination of all issues presented to the Commission.” The rule also allows the Commission to deviate from its own rules when it finds that compliance with them is “impracticable, unnecessary or not in the public interest.”

In its Motion, the ICIP asserts that the error it committed is harmless because had the ICIP mailed the Petition for Reconsideration, rather than hand delivered it, it would have been received in a timely manner pursuant to Rule 331.04 of the Commission’s Rules of Procedure (the “Mailbox Rule”).

The ICIP further contends that no party will be prejudiced by the Commission’s consideration of its Petition for Reconsideration and that the Commission has a long history of accepting late filed pleadings and giving them full force and effect when no party is prejudiced. The ICIP refers to Order No. 19921 (which pertains to the late filing of a Memorandum in Support of a Petition for Reconsideration); Order No. 22531 (which the ICIP contends pertains to a late filed petition for reconsideration), and; Order No. 27502 (which pertains to a late filed petition for intervention).

On February 23, 1999, Idaho Power filed a Response to the ICIP’s Motion. The Company contends that prior to 1957 there was no deadline for the filing of a petition for reconsideration. *Idaho Code* § 61-626 providing such a deadline was enacted, the Company argues, as a result of a series of motor carrier cases that were appealed to the Idaho Supreme Court. The deadline initially established was 20 days but was changed in 1984 to 21 days by the Idaho Legislature. The one day addition, Idaho Power explains, was to conform the Commission’s appellate practices with Idaho appellate court practices wherein time periods are calculated in 7 day increments.

Consequently, Idaho Power argues, the Idaho Legislature was not performing a futile exercise as suggested by the ICIP in establishing a firm deadline for the filing of petitions for reconsideration. Idaho Power argues that, contrary to the ICIP’s assertions, the Commission’s Rule 13 providing for deviations from other rules does not and cannot apply to a statute. Idaho Power argues that the Commission would be violating the spirit and intent as well as the letter of the law if it were to simply to ignore the 21-day period established by the Legislature whenever it deemed, in its discretion, that it was desirable to do so.

Finally, the Company reasons that the ICIP’s reliance on the Mailbox Rule, and its argument that a one day late hand filing is a harmless error, ignores the intent of the rule. Idaho Power notes that if the petition is mailed within three days of the expiration of the 21-day petition deadline, the Commission has provided a detailed procedure requiring that the party filing the

petition personally notify the Commission Secretary and all other parties that the petition has been mailed.

Finally, on February 24, 1999, the ICIP filed a Response to Idaho Power's Response. The ICIP contends that *Idaho Code* § 61-626 simply grants parties the "right" to file a petition for reconsideration within 21 days but does not prohibit the Commission from accepting petitions beyond that deadline.

FINDINGS

Idaho Code § 61-626 outlines the procedure that must be followed when petitioning for reconsideration of a Commission's final Order. That statute provides, in part:

61-626. Reconsideration—Procedure—Order not stayed—Change of original order.—(1) After an order has been made by the commission, any corporation, public utility or person interested therein shall have the right, within twenty-one (21) days after the date of said order, to petition for reconsideration in respect to any matter determined therein. Within seven (7) days after any corporation, public utility or person has petitioned for reconsideration, any other corporation, public utility, or person may cross-petition for reconsideration in response to any issues raised in any petition for reconsideration.

Rule 331 of the Commission's Rules of Procedure (IDAPA 31.01.01.331) was promulgated in response to *Idaho Code* § 61-626. Subpart 01 of Rule 331 provides:

01. Petition for Reconsideration. Within twenty-one (21) days after the service date of issuance of any final order or rule, any person interested in a final order or rule of the Commission may petition for reconsideration. Petitions for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or rule is unreasonable, unlawful, erroneous or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted.

Consistent with *Idaho Code* § 61-626, subpart 04 of Rule 331 explains when a petition for reconsideration is considered to be filed with the Commission:

04. Timely Filing—Mailbox Rules. A petition for reconsideration is timely within the meaning of section 61-626, Idaho Code, if it is filed with the Commission or postmarked no later than twenty-one (21) days after the date of service of the final order. Whenever a petition for reconsideration is not personally filed with the Commission Secretary within twenty-one (21) days of the date of service of the final order or is not mailed at least three (3) days before that date, on the day the petition for reconsideration is mailed, the

petitioner should notify the Commission Secretary and all other parties by telephone that the petition for reconsideration has been mailed.

We find that the ICIP has misconstrued both *Idaho Code* § 61-626 and Rule 331 of the Commission's Rules of Procedure as well as prior orders issued by this Commission. Because the Idaho Legislature has enacted a statute specifically establishing the reconsideration petition deadline, our analysis must begin there. The ICIP is correct that *Idaho Code* § 61-626 provides parties the "right" to file petitions for reconsideration of Commission orders. That right, however, must be exercised within 21 days of the issuance of the order. The statutory deadline is clear, concise and capable of only one interpretation. The ICIP's Petition was not submitted within the time allowed by *Idaho Code* and we will not consider it. Consequently, our analysis could end here. Several additional points, however, are worth noting.

First, in its Motion asking us to accept its late-filed petition, the ICIP contends that the Commission has previously allowed late-filed petitions for reconsideration referring to Order No. 22531. In fact, the ICIP is mistaken. That Order pertains to a late-filed petition for intervention, not reconsideration.

Second, both the ICIP and Idaho Power cite in support of their positions the case of *Washington Water Power v. Kootenai, etc.*, 99 Idaho 875, 591 P.2d 122 (1979) involving an appeal from a case in which the Commission had conducted a "rehearing" and issued an order on rehearing with a provision stating that any interested party could petition for a rehearing of the order on rehearing. The Washington Water Company did exactly that (within the required deadline) but the Commission issued an order declaring that Water Power had failed to timely petition for rehearing. Noting this apparent inconsistency, the Court ruled that the Commission could not declare the petition untimely if it, in fact, had conducted a rehearing once and had invited petitions for rehearing a second time.

A case that is far more insightful, is *Eagle Water Co. v. Idaho Public Utilities Commission*, 130 Idaho 314, 940 P.2d 1133 (1997) in which the Idaho Supreme Court affirmed a Commission Order amending Eagle Water Company's certificated area. United Water had petitioned for reconsideration of the Commission's original order in the underlying case. Eagle Water cross-petitioned for reconsideration. In its cross-petition, Eagle Water raised several issues outside the scope of United Water's petition. The Commission ruled that, as such, Eagle Water's cross-petition was essentially a petition for reconsideration and had not been filed within 21 days

of the Commission's final order (it was approximately 7 days late). Consequently, the Commission denied the cross-petition.

On appeal, the Idaho Supreme Court affirmed, ruling that the scope of a cross-petition for reconsideration is limited to issues raised in the original petition making Eagle Water's pleading essentially a petition for reconsideration which was untimely. The Court ruled:

In the present case, Eagle Water's cross-petition for reconsideration was not filed within 21 days of the IPUC order certificating certain areas to United. Therefore, Eagle Water's cross-petition for reconsideration was not timely as a petition for reconsideration and was necessarily limited in scope to those issues raised in United Water's petition for reconsideration.

130 Idaho at 316.

The Supreme Court concluded:

In the present case, IPUC specifically stated that it would not consider issues concerning the service area awarded to United raised in Eagle Water's cross-petition for reconsideration because the issues were beyond the permissible scope of a cross-petition for reconsideration and because Eagle Water did not file a timely petition for reconsideration. Therefore, we will not address these issues.

Id. at p. 317 (emphasis added).

The Idaho Supreme Court has left no doubt regarding the enforceability of the 21 day deadline for reconsideration and the consequences of a late filing. Moreover, as noted by Idaho Power, the 21 day deadline contained in *Idaho Code* § 61-626 dovetails with the Idaho Appellate Rules (IAR) which utilize 7 day increments in establishing deadlines. Rule 14 of the IAR provides that appeals from District Court decisions must be made within 42 days. On more than one occasion, the Idaho appellate courts have rejected an appeal on the basis that it was filed only one day late. For example, in *State v. Fuller*, 104 Idaho 891, 665 P.2d 190 (App., 1983) the Court of Appeals dismissed a criminal appeal that was filed on the 43rd day after the District Court's judgment. The Court held that "failure to file a timely notice of appeal is a jurisdictional defect which requires dismissal of the appeal." 104 Idaho at 891. *See also, State v. Payan*, 128 Idaho 866, 920 P.2d 82 (App., 1996).

The ICIP's argument that Rule 13 of the Commission's Rules of Procedure allows the Commission to deviate from the *Idaho Code* is equally without merit. Rule 13 provides that the Commission's rules [not statutes] are to be liberally construed to secure the "just, speedy and

economical” determination of issues. In fact, Rule 13 further states that “unless prohibited by statute, the Commission may permit deviation” from its rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest. In fact, the Commission is prohibited by statute in this case from allowing the ICIP more than the 21 days provided for in *Idaho Code* § 61-626.

Next, we find that the ICIP has misinterpreted Rule 331 of the Commission’s Rules of Procedure relying on the argument that the “Mailbox Rule” contained in subpart 04 of that rule permits the late filing of petitions for reconsideration. This is simply not true. The rule specifically states, consistent with *Idaho Code* § 61-626, that all petitions for reconsideration must either be hand delivered or “postmarked” within twenty-one (21) days after the issuance of a final order. In deference to out of town parties or those unable to physically travel to the Commission’s office, and recognizing that a petition for reconsideration that is mailed and postmarked on the 21st day will not actually reach the Commission until after that deadline, the Commission promulgated Rule 331 requiring that the petitioning party in such a case personally notify the Commission Secretary and all other parties that the petition has been mailed. The ICIP’s Petition for Reconsideration in this case was neither hand delivered nor postmarked by the 21st day after the issuance of Order No. 27877. In fact, the ICIP never notified anyone that it was filing a late Petition for Reconsideration. Rather, the ICIP simply filed a Motion asking the Commission to accept the late filing on February 18, 1999; one week after the petition was due. The Mailbox Rule contained in Rule 331 does not apply in this case.

Finally, the ICIP has misconstrued prior Commission Orders allowing for late-filed pleadings. The ICIP is correct that the Commission has a history of leniency, as evidenced by Rule 13 of the Commission’s Rules of Procedure and prior Commission Orders with respect to pleadings such as petitions for intervention, supporting memorandums, briefs, discovery requests and responses, etc. There is an important distinction, however, between pleadings that are required to be filed during the course of a proceeding and petitions for reconsideration of a final order. This is because there are administrative and equitable reasons why there must be finality or closure to Commission cases.

For example, without finality to Commission Orders, nobody, including the Commission itself, could ever be certain of the Order’s ultimate force and effect if the potential for reconsideration lurks indefinitely. Thus, in order to give Commission Orders the finality that they deserve, the Idaho Legislature has provided a specific deadline by which reconsideration petitions

must be filed. It is no coincidence that similar statutory deadlines for other pleadings such as petitions to intervene, do not exist.

Moreover, if this Commission were to consider a Petition for Reconsideration filed one day late, then why not a Petition that was filed more than one day late? The ICIP asks us to leave open-ended the time frame in which petitions for reconsideration are to be filed and offers no logical point in time at which one could say that a petition was simply “too late.” Consequently, no party or person interested in rulings made by this Commission would ever be assured of their force and effect.

The ICIP suggests that the Commission could somehow base its decision to allow the ICIP’s late-filed Petition on the importance of this particular case, or the fact that the Petition was filed late due to a “calendar error,” or the fact that it was only one day late. Again, under the ICIP’s proposal, there is no objective standard available to the Commission to determine when a late-filed petition is somehow justified. Such a process would simply lead to confusion and claims of preferential treatment.

Based on the foregoing, we find that the ICIP’s Petition for Reconsideration of Order No. 27877 was untimely pursuant to *Idaho Code* § 61-626 and Rule 331 of the Commission’s Rules of Procedure and, for that reason, cannot be considered by this Commission.

Rule 65 of the Commission’s Rules of Procedure provides:

065. DEFECTIVE, INSUFFICIENT OR LATE PLEADINGS (Rule 65). Defective, insufficient or late pleadings may be returned or dismissed, except that applications under Rule 121 cannot be dismissed during the period of suspension of rates under Rule 123, but can only be returned for correction once the suspension period has begun.

Pursuant to Rule 65, the ICIP’s Petition for Reconsideration of Order No. 27877 is hereby returned to the ICIP.

ORDER

IT IS HEREBY ORDERED that the Motion to Accept Petition for Reconsideration Out of Time filed by the Industrial Customers of Idaho Power is denied as set forth above. The Petition for Reconsideration of Order No. 27877 filed by the Industrial Customers of Idaho Power in this case is late pursuant to *Idaho Code* § 61-626 and cannot be considered by this Commission. Pursuant to Rule 65 of the Commission’s Rules of Procedure, IDAPA 31.01.01.065, the Petition for Reconsideration is hereby returned to the ICIP.

THIS IS A FINAL ORDER denying the Industrial Customers of Idaho Power's Motion to Accept Petition for Reconsideration Out of Time. Pursuant to *Idaho Code* § 61-626, the Idaho Public Utilities Commission cannot consider the late-filed Petition for Reconsideration of Order No. 27877.


DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this *5th* day of March 1999.


DENNIS S. HANSEN, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


PAUL KJELLANDER, COMMISSIONER

ATTEST:


Myrna J. Walters
Commission Secretary

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