

DECISION MEMORANDUM

**TO: COMMISSIONER KEMPTON
COMMISSIONER SMITH
COMMISSIONER REDFORD
COMMISSION SECRETARY
COMMISSION STAFF
LEGAL**

**FROM: DON HOWELL
DEPUTY ATTORNEY GENERAL**

RUL-0-10-01

DATE: FEBRUARY 10, 2010

SUBJECT: STAFF RECOMMENDATIONS TO AMEND THE COMMISSION'S RULES OF PROCEDURE, DOCKET NO. 31-0101-1001

In this Decision Memorandum, the Staff is recommending that the Commission consider amending several of its Rules of Procedure, IDAPA 31.01.01. The reasons for the proposed changes can be broken down into several areas: (1) conform the Commission's testimony and transcript rules to changes in the Supreme Court's Appellate Rules; (2) change Rule 43 (Representation of Parties) to conform to recent Supreme Court opinions regarding the representation of partnerships and corporations; (3) make it easier to determine when telephone companies are no longer conducting business in Idaho; and (4) improve the clarity of rules and make other housekeeping changes. The Commission last updated its Rules of Procedure two years ago. To facilitate your review, the reasons for the substantive changes to the Commission's rules are discussed before each Rule in chronological order below. To facilitate the legislative review process, Staff further recommends that the Commission initiate a negotiated rulemaking and conduct a public workshop.

THE PROPOSED RULE CHANGES

Rule 0: Staff recommends that the Commission update the citations of legal authority contained in this rule. This rule was last updated in 2000. Since that time, the Commission has been granted additional authorities in: Stray Current and Remediation Act (61-801 *et seq.*); Utility Cost Reduction Bonds Act (61-1601 *et seq.*); Electric Transmission Facilities Act (61-1701 *et seq.*); the Broadband Tax Credit Act (63-3029I); and other statutes.

0. LEGAL AUTHORITY (RULE 0).

These rules are adopted under the general legal authority of the Public Utilities Law, Chapters 1 through 7, Title 61, Idaho Code,; Chapters 9, 8 through 10, and 13, 15 through 17, Title 61, Idaho Code,; Chapters 3 and 4, Title 62, Idaho Code,; the Telecommunications Act of 1988, as amended, Chapter 6, Title 62,; and Chapters 12, Title 62, Idaho Code, Chapter and 13, Title 62, Idaho Code,; and the particular authority of Sections 56-904, 61-304 through 61-309, 61-501, 61-502, 61-503 through 61-505, 61-507, 61-516, 61-538, 61-541, 61-601 through 61-607, 61-610 through 61-619, 61-6201 through 61-626, 61-803 through 61-806, 61-902 through 61-905, 61-909, 61-1003 through 61-1005, 61-1007, 61-1305, 61-1306, 61-1603 through 61-1607, 61-1703 through 61-1709, 62-304, 62-305, 62-424, 62-604, 62-605, 62-608 through 62-612, 62-610A through 62-610F, 62-614 through

62-616, 62-619, 62-622, 62-622A, 62-1201 through 62-1207, 62-1303, and 62-1304, 63-3029I, and 67-6528, Idaho Code. (4-5-00)()

Rule 5: Staff recommends that the Commission add a definition for the term “utility” as used in the Rules of Procedure.

005. DEFINITIONS (RULE 5).

Terms of art used throughout these rules are defined within the rules themselves. The term “utility” used in these rules includes every common carrier, pipeline corporation, gas corporation, electric corporation, telephone corporation, and water corporation as defined in Chapter 1, Title 61, Idaho Code, and Section 62-602, Idaho Code. (7-1-93)()

Rule 16: Currently Subsection 02 of Rule 16 requires utilities to designate a person for the receipt of service. The recommended changes to the title of the rule and new Subsection 03 sets out the designation requirement more clearly in its own subsection.

016. SERVICE BY COMMISSION – DESIGNATION OF AGENT (RULE 16).

The Commission Secretary serves all notices, orders, summonses, and complaints issued by the Commission or by the Secretary. (7-1-93)

01. Service of Orders and Notices. All notices and orders served by the Commission may be served by United States mail. Notices and orders may also be served by electronic mail in cases designated by the Commission. Unless otherwise provided by statute, these rules, order or notice, service of orders and notices is complete when a copy, properly addressed and stamped, is either deposited in the United States mail or transmitted electronically. All orders and notices shall be affixed with the Commission Secretary’s official service date on the first page. The Commission Secretary will serve all orders and notices in a proceeding on the representatives of each party designated pursuant to Rule 41 for that proceeding and upon other persons designated by these rules or by the Commission or any Commissioner. (3-16-04)

02. Service of Summonses and Complaints. The Commission Secretary will serve complaints against utilities upon the person designated for that purpose by the utility. All utilities must maintain on file with the Commission Secretary a designation of such a person. Summonses and complaints directed to regulated utilities or other persons shall be served by registered or certified mail. Writs of summons or subpoena and warrants of attachments directed to all other persons must be served by a person authorized to serve process by statute or by the Idaho Rules of Civil Procedure. (4-5-00)()

03. Designation of Agent for Service. All utilities shall designate a person as their agent to be served with summons and complaints. Utilities shall be responsible for maintaining on file with the Commission Secretary the current name, mailing address and e-mail address of the person designated as the agent to receive service. ()

Rule 19: The Idaho State Bar has proposed changing the rule number of the “Limited Admissions/Pro Hac Vice” rule. The four changes to this section are housekeeping changes to update the reference to the current Idaho Bar Commission rule number.

019. INCORPORATED BY REFERENCE – IDAHO BAR COMMISSION RULE (RULE 19).

Rule 43 incorporates by reference Idaho Bar Commission Rule 2227 (Limited Admission/Pro Hac Vice) effective _____, 2010. Bar Rule 2227 is promulgated by the Idaho State Bar and adopted by order of the Idaho Supreme Court. Bar Rule 2227 may be obtained from the Idaho State Bar, PO Box

895, Boise, ID 83701, or online at www2.state.id.us/isb/ www.isb.idaho.gov under the "Rules" icon. Bar Rule 2227 is also available for inspection and copying at the Idaho State Law Library or at the offices of the Idaho Public Utilities Commission. (3-16-04)()

Rule 20: Staff recommends that the Commission consider adding a new rule regarding the discontinuance of telecommunications services in Idaho. This rule would require that a telephone corporation intending to discontinue service notify the Commission of this fact. This would allow the Commission Staff to keep better track of companies operating in Idaho and would allow the fiscal division to more easily update its assessment records.

020. (RESERVED). DISCONTINUANCE OF TELECOMMUNICATIONS SERVICE (RULE 20).

A telephone corporation that intends to discontinue service in Idaho shall file a notice with the Commission of the date that it intends to cease operations. The telephone corporation proposing to discontinue service shall also publish a notice of such discontinuance in a legal newspaper circulated in its service area pursuant to Section 62-612, Idaho Code. If the telephone corporation held any customer deposits, the telephone corporation shall indicate in the notice how the deposits are to be returned to customers. ()

Rule 43: Staff is recommending that the Commission update Rule 43 to conform to a recent Idaho Supreme Court opinion. The existing Rule 43 governs the representation of parties at PUC proceedings. The existing rule generally follows the contours set out by our Supreme Court in *Idaho State Bar Association v. Idaho PUC*, 102 Idaho 672, 637 P.2d 1168 (1981). In that opinion, the Court indicated that it had no objection to the Commission's procedural rules regarding representation to the extent they allow representation of a sole proprietorship by the owner, or representation of a partnership by the partners, or representation of a corporation or non-profit organization by the officers of those entities. . . . It is well settled that in proceedings before a regulatory body such as the Commission, that third persons unconnected with the entity in acting in a representative capacity in such proceedings would necessarily be engaged in the activities commonly associated with the practice of law.

Id. at 676, 637 P.2d at 1172. The Court also recognized that many proceedings before the Commission "often involve matters more administrative than judicial in nature, [consequently] some relaxation of the traditional rule against the practice of law by lay persons is appropriate." *Id.* In 1985, the Court had an occasion to revisit the issue of representing another entity before a public agency. In *Kyle v. Beco Corporation*, 109 Idaho 267, 707 P.2d 378 (1985), the Court was asked to invalidate an Industrial Commission practice (subsequently a rule) which restricted the representation of a corporation to Idaho licensed attorneys. In the underlying administrative proceeding, an Industrial Commission referee denied the president and sole shareholder of Beco Corporation the opportunity to cross-examine witnesses and present a closing argument in a worker's compensation proceeding. In affirming the Industrial Commission's decision, the Court stated that the general rule among this and other states has been that representation of another person before a public agency or service commission constitutes the unauthorized practice of law, where the proceedings before those tribunals are held for purposes of adjudicating the legal rights or duties of a party. *Id.* at 271, 707 P.2d at 382 (emphasis added).

In dissent, Justice Bakes voiced surprise that the majority cited the *Idaho State Bar* case as its lead authority to support its holding. He noted that the Court in the *State Bar* opinion relaxed the traditional rule of representation in administrative proceedings before the PUC. Justice Bakes urged

Beco to seek rehearing so that “sole owner and officer of a small family-held corporation” could represent his business in the Industrial Commission proceeding. *Kyle v. Beco*, 109 Idaho at 272-73, 707 P.2d at 383-84 (J. Bakes, Dissenting). The Court subsequently denied rehearing. More recently in *Indian Springs v. Indian Springs Land Investment*, the Court again had an opportunity to review the question of who may represent a business entity. 147 Idaho 737, 215 P.3d 457 (2009) (rehearing denied). In *Indian Springs*, non-attorney principals sought to represent a limited liability company, a partnership, and two trusts in a civil action filed in Idaho District Court. After reviewing the issue of representation, the Court stated that the law in Idaho is that a business entity, such as a corporation, limited liability company, or partnership must be represented by a licensed attorney before an administrative body or a judicial body. . . . It is fairly well-established that a trustee’s duties in connection with his or her office do not include the right to present an argument *pro se* in the courts. *Id.* at 744-45, 215 P.3d at 464-65 (emphasis added). The Court did not reference or acknowledge the *Idaho State Bar* case.

Based upon *Kyle* and *Indian Springs*, Staff recommends that the Commission refine the requirements of its Rule 43. In administrative proceedings (e.g., tariff advices, tariff schedules, price lists, interconnection agreements), Staff believes that these type of administrative filings may be made by “a natural person *pro se*, a partner in a partnership, an employee or officer of a corporation, or an attorney.” However, in quasi-judicial proceedings “for the purpose of adjudicating the legal rights or duties of a party,” a partnership, corporation, governmental agency, non-profit organization, or other entity must be represented by a licensed attorney.

043. REPRESENTATION OF PARTIES AT PROCEEDINGS (RULE 43).

Recognizing that Proceedings before the Commission are sometimes administrative in nature or quasi-judicial in nature, appearances and.
(3-16-04)()

01. Administrative Proceedings. Administrative proceedings before the Commission include matters such as the filing of tariff schedules, tariff advices, price lists, certificates to provide local exchange service, interconnection agreements, written comments in modified procedure, or written comments provided at a customer hearing. These filings may be made by a natural person *pro se*, a partner in a partnership, an employee or officer of a corporation, or a licensed attorney. ()

02. Quasi-Judicial Proceedings. The representation of parties at quasi-judicial proceedings for the purpose of adjudicating the legal rights or duties of a party is restricted as set out below. Quasi-judicial proceedings before the Commission include matters such as formal complaints, petitions, motions, applications for modified procedure or technical/evidentiary hearings. Representation of parties at these types of proceedings shall be as follows:()

01a. Natural Person. A natural person must may represent himself or herself or be represented by a duly authorized employee, or an licensed attorney.
(3-16-04)()

02b. Partnership. A partnership or corporation must shall be represented by a partner, duly authorized employee, or an licensed attorney. (7-1-93)()

03. Corporation. A corporation must be represented by an officer, duly authorized employee, or an attorney. (7-1-93)

04c. Other Entity. A municipal corporation,; a state, federal, tribal, or local government agency,; or entity, an unincorporated association,; or a non-profit organization, or other entity must shall be represented by an officer, a duly authorized employee or an licensed attorney. (7-1-93)()

053. Attorney Representation. Only an active member of the Idaho State Bar may represent a party as an attorney except as provided by Idaho Bar Commission Rule 2227 (Limited Admission/Pro Hac Vice). The Commission adopts by incorporation Bar Rule 2227 as modified below. (3-16-04)

a. Given the administrative nature of many proceedings, limited admission by out-of-state attorneys will not be necessary in conjunction with administrative filings such as tariff schedules, tariff advices, price lists, certificates to provide local exchange service, and interconnection agreements. Out-of-state attorneys representing the same party in one (1) or more quasi-judicial cases proceedings (such as formal complaints, motions, petitions, and applications that request modified procedure or an evidentiary hearing), must request limited admission at least one (1) time per calendar year. (3-16-04)()

b. An attorney applying for limited admission to appear before the Commission in a representative capacity shall file a written motion with the Commission Secretary and serve a copy on all parties. The motion shall be substantially in the form set out in Bar Rule 2227(1) with references to the Commission instead of the court. (3-16-04)()

c. A copy of the written motion shall be submitted to the Idaho State Bar accompanied by the fee prescribed by in Bar Rule 2227(j). (3-16-04)()

Rules 231 and 286: The Commission Staff is recommending changes to these two rules based upon recent amendments to the Idaho Appellate Rules. In particular, the Idaho Supreme Court no longer requires that transcripts be submitted in "ASCII" format. Consequently, Staff is recommending that this computer format be deleted from Rule 231.05. *See* I.A.R. 24(a) (deleting the language about a computer searchable disk in ASCII format).

In addition, the recently amended Appellate Rules now allow for "compressed transcripts." As recommended below, Staff proposes that any party may request a compressed transcript with no more than four pages of regular transcript on each page. I.A.R. 26(m) and (p).

231. PREPARED TESTIMONY AND EXHIBITS (RULE 231).

01. Prepared Testimony May Be Required. Order, notice or rule may require a party or parties to submit prepared testimony and exhibits to be presented at hearing. (7-1-93)

02. Format for Prepared Testimony. (7-1-93)

a. Prepared testimony and exhibits must be accompanied by a cover sheet showing the case caption and case title, the person testifying, the party for whom the testimony is offered, and the nature of the testimony (direct, rebuttal, etc.). (7-1-93)

b. The first page of prepared testimony should contain testimony only (i.e., it should begin with the first question to the witness and not repeat the information on the cover page). (7-1-93)

