(text box: 1)BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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| IN THE MATTER OF THE APPLICATION OF UNITED WATER IDAHO INC.  FOR AUTHO­RITY TO REVISE AND INCREASE RATES CHARGED FOR WATER SERVICE. | )  )  )  )  ) | CASE NO. UWI-W-96-3  ORDER NO.  26611 |

Re:  Motion Requesting Disqualification

On August 23, 1996, Sharon Ullman, an Intervenor in Case No. UWI-W-96-3, filed a Motion with the Commission requesting disqualification of Dean J.  Miller as United Water Idaho’s legal counsel.  Noting that Mr. Miller served on the Commission as a Commissioner during United Water’s two previous rate cases, BOI-W-93-1 and BOI-W-93-3, Ms. Ullman contends that Mr. Miller’s participation in this case is in clear violation of Rule 1.12 of the Idaho Rules of Professional Conduct of the Idaho State Bar Association.  Rule 1.12 reads in pertinent part as follows:

Rule 1.12—Former Judges, or arbitrator or law clerks.

(A)  . . . . A lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer. . . unless all parties to the proceeding consent after disclosure.

Ms. Ullman notes that Mr. Miller failed to disclose in United Water’s Application or Supplemental Application his previous role on the Commission, and contends that Mr. Miller has a conflict of interest in representing United Water.  As an Intervenor, Ms. Ullman states that she does not consent to have Mr Miller represent United Water.

On August 30, 1996, United Water filed its reply to Ms. Ullman’s Motion.  The Company admits that its attorney Dean J. Miller was a member of the Idaho Public Utilities Commission from March 1987 to February 1995, during which time United Water’s previous two rate cases were considered by the Commission.  The Company contends that neither Rule 1.12 of the Idaho Rules of Professional Conduct nor Rule 48 of the Commission’s Rules of Procedure preclude Mr. Miller from representing United Water in this proceeding.  Rule 48 of the Commission’s Rules provides in relevant part:

No former employee of the Commission or member of the Attorney General’s Staff may appear in a representative capacity or as an expert witness on behalf of other parties in a formal proceeding in which he or she previously took an act of part.

The Company in its reply provides the following argument:

Ms. Ullman appears to contend that because United Water’s attorney participated in former rate cases as a decision maker, participation in the current case is  precluded.  Neither Rule 1.12 nor Rule 48 can be stretched far enough to reach the result Ms. Ullman requests.  Simply put, the current case is not the same matter or proceeding as the prior proceedings in which United Water’s attorney participated.  Case No. BOI-W-93-1 was concluded by a final Order on reconsideration on August 13, 1993.  Case No. BOI-W-93-3 was concluded by a final Order on reconsideration on October 14, 1994.  (Footnotes omitted)

. . .

Further, United’s attorney hereby affirmatively states that he did not acquire any confidential or secret information in the course of his participation in prior proceedings that could be in anyway used to the detriment of any party to the current proceeding or to the advantage of United.  While United’s attorney, during the course of his service on the Idaho Public Utilities Commission, did acquire a general knowledge of rate making principles and of public utility law as it applies to water utilities, the fact that United’s attorney has general knowledge in a specialized area is not grounds for disqualification.  The obvious purpose of both Rule 1.12 and Rule 48 is to preclude a person who was a former decision maker from gaining special advantage in a subsequent proceeding to the disadvantage of other parties.

. . .

United Water denies that there is any requirement that its attorney disclose his previous role as a member of the Idaho Public Utilities Commission and contends that the prior employment of United Water’s attorney is a matter of public knowledge.  United Water further denies that any conflict of interest exists.  Accordingly, United contends that there is no requirement that Ms. Ullman consent to United Water’s selection of counsel to represent it in this proceeding.  United Water waives oral argument and requests that the Commission expeditiously enter its Order denying the Motion to Disqualify.

On September 3, 1996, Ms. Ullman filed a request for oral argument.  In support of her request, Ms. Ullman states:

As a member of the Public Utilities Commission during United Water Idaho’s last two rate cases, BOI-W-93-1 and BOI-W-93-3, Mr. Miller was involved in decision meetings that were closed to members of the public and the parties of record, including me.  Mr. Miller, therefore, had access to information, discussion and arguments that are not public record, giving him a distinct advantage in UWI’s current rate case.

Noting Mr. Miller’s contention that this case is “not the same matter or proceeding as the cases that were fully concluded two and three years previously”, Ms. Ullman agrees that Mr. Miller is correct, and this is not the SAME case as the two previous cases; however, Ms. Ullman contends that it could be convincingly argued that it is substantially “the same matter” that was before the Commission in the two previous cases.

While acknowledging that she does not believe the current Commission will be swayed by Mr. Miller’s participation in the case, Ms. Ullman states, however, that Mr. Miller was privy to information regarding the previous two rate cases, relevant to this case, to which intervenors do not have access.  Ms. Ullman contends that Mr. Miller accordingly has a conflict of interest in this case and United Water has a distinctly unfair advantage over the intervenors in this case.  Ms. Ullman contends that United Water obviously believed it would be advantageous to have Mr. Miller represent them or they would have chosen a different attorney.  Ms. Ullman requests that the Commission allow her the opportunity to present oral argument or alternatively immediately disqualify and prohibit Mr. Miller from serving as the legal representative of United Water Idaho in this case.

Commission Findings

The Commission has reviewed the Motions and related statements of the parties and finds the record to be sufficient for decision without oral argument.  Reference IDAPA 31.01.01.256.01.  We find the Motion to Disqualify filed by Ms. Ullman must be denied.  This Commission speaks through its written Orders and bases its Orders on the developed written record.  The proceedings and records in the cases cited by Ms. Ullman are closed.  The respective Orders are final and have been for some time.  Reference IDAPA 31.01.01.323 and Idaho Code § 61-625.  This case is not the same case, proceeding or matter that Mr. Miller participated in during his tenure as a Commissioner.  While we can appreciate Ms Ullman’s perception that Mr. Miller’s participation in deliberations of past cases may provide him with some advantage, we are unable to find that his experience violates either Rule 1.12 of the Idaho State Bar or our Rule 48.  We also know, as acknowledged by Ms. Ullman, that the Commission will not be swayed by Mr. Miller’s participation in the case simply because of his previous service on the Commission.  The Commission recognizes that this case is not a general rate proceeding and that some assumptions, including rates of return and cost of service are proposed to be carried forward from prior cases, including those cases in which Mr. Miller sat as a Commissioner.  The proposals of the parties in this proceeding, however, must be justified in this proceeding and our decision will be based on the record developed in this case.  The Commission’s prior Orders regarding United Water and its predecessor Boise Water Company remain in effect until changed, rescinded, altered or amended.  Reference IDAPA 31.01.01.326 and Idaho Code § 61-624.  The record of proceedings in this case continues to develop.  Ms. Ullman and all parties are encouraged to offer testimony, exhibits and arguments on the matters at issue in this case.

Re:  Motion to Compel

Also filed by Ms. Ullman on September 3, 1996, was a Motion to Compel UWI to comply with the requested September 5, 1996, due date of her production requests.  Reference IDAPA 31.01.01.221-240.  Alternatively, Ms. Ullman requests an extension of testimony file date and/or that the hearing date be rescheduled.  The Commission is advised that the Company on September 5 provided Ms. Ullman with a substantial response, albeit incomplete, and its assurance to employ its best efforts in furnishing supplemental information and completed responses.  Pursuant to agreement and accommodation, Ms. Ullman will be provided with a one week extension of her direct testimony prefile date from September 9 to September 16, 1996.  All other scheduling remains unchanged.

Commission Findings

Based on representations made and reflected above, it appears that the parties have reached an acceptable and amicable resolution of this matter of discovery.  The Commission finds no reason, therefore, to address the sufficiency, timeliness or reasonableness of specific responses.  We find the proposed extension of deadline for prefile of direct testimony by Ms. Ullman to be acceptable.  The Commission pursuant to statute and rules remains a forum for additional or continuing disputes regarding discovery.

Re:  Motion to Bifurcate

On September 5, 1996, a Stipulation/Motion signed by all parties to Case No. UWI-W-96-3 was filed with the Commission requesting leave to bifurcate the issues presented in this case into two separate dockets.  As proposed, the instant docket, Case No. UWI-W-96-3 will consider revenue requirement issues only and scheduling will proceed as contemplated in the Commission’s July 19, 1996 Notice.  A new docket is proposed for the purpose of considering hookup fees and related issues including rate design.  United Water advises the Commission and parties by letter filed with the Stipulation that it has not prepared a cost of service study and does not envision a full rate design proceeding in the new docket.  The Company recognizes that parties may propose adjustments to the general rate structure to in some manner recognize the limitations on hookup fees resulting from the Boise Water decision of the Supreme Court.  Building Contractors Association v. IPUC and Boise Water Corp., 128 Idaho 534, 916 P.2d 1259 (1996).  The parties request additional time to prepare thorough testimony and exhibits in the new docket.  The parties request that the Commission convene a prehearing conference as soon as practicable to establish scheduling in the new docket.

Commission Findings

The parties represent that additional time is required to develop and present testimony and exhibits on hookup fees and related issues including rate design.  We acknowledge the clarification submitted by United Water and do not expect a cost of service study and full rate design proceeding.  We find the issue of hookup fees to be severable from the revenue requirement issues of Case No. UWI-W-96-3.  We direct the Commission Secretary to initiate a new docket, Case No. UWI-W-96-4, for the purpose of addressing hookup fees and other related issues including rate design and to issue a Notice of Prehearing Conference in such docket to establish further scheduling.  We find it reasonable to designate all parties to this case as parties in Case No. UWI-W-96-4 also.

CONCLUSIONS OF LAW

The Commission has jurisdiction over United Water Idaho, Inc., a water utility, and the issues presented in Case No. UWI-W-96-3 pursuant to Title 61 of the Idaho Code and the Commission’s Rules of Procedure, IDAPA 31.01.01.000 et. seq.

O R D E R

In consideration of the foregoing and as more particularly described above, IT IS HEREBY ORDERED that the Motion of Ms. Ullman requesting disqualification of Dean J. Miller as United Water Idaho’s legal counsel is denied.

IT IS FURTHER ORDERED and Ms. Ullman is hereby granted an extension for prefile date of direct testimony in Case No. UWI-W-96-3 from September 9, 1996, to September 16, 1996.

IT IS FURTHER ORDERED AND THE COMMISSION does hereby grant the parties’ Motion to Bifurcate the revenue requirement and hookup fee issues.  The Commission Secretary is directed to establish a new docket in Case No. UWI-W-96-4 captioned IN THE MATTER OF THE CONNECTION FEES OF UNITED WATER IDAHO INC. AND OTHER RELATED ISSUES INCLUDING RATE DESIGN.

IT IS FURTHER ORDERED that all parties to Case No. UWI-W-96-3 are hereby made parties to Case No. UWI-W-96-4.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this                  day of September 1996.

                                                                                                                                      RALPH NELSON, PRESIDENT

                                                                                           MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Myrna J. Walters

Commission Secretary

vld/O:UWI-W-96-3.sw

**COMMENTS AND ANNOTATIONS**

Text Box 1:

**TEXT BOXES**

Office of the Secretary

Service Date

September 17, 1996