

MINUTES  
**SENATE STATE AFFAIRS COMMITTEE**

**DATE:** Friday, January 17, 2014

**TIME:** 8:00 A.M.

**PLACE:** Room WW55

**MEMBERS PRESENT:** Chairman McKenzie, Senators Davis, Fulcher, Hill, Winder, Lodge, Siddoway, Stennett, and Werk

**ABSENT/  
EXCUSED:**

**NOTE:** The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

**CONVENED:** **Chairman McKenzie** convened the Senate State Affairs Committee (Committee) meeting at 8:00 a.m. with a quorum present and announced that the first item on the agenda will be the rules from the Idaho Public Utilities Commission, presented by Paul Kjellander, Commissioner.

**IDAPA 31 - Idaho Public Utilities Commission**

**31.01.01 - Rules of Procedure of the Idaho Public Utilities Commission (IPUC) - page 32**

**DOCKET NO. 31-0101-1301** **Mr. Kjellander** stated that the first change under this docket occurs in Rule 18.02 to allow the Commission to streamline the process of removing inactive utilities and railroads from the assessment process by allowing the IPUC to administratively remove those companies from the list of entities subject to the annual regulatory fee. It avoids the need to go through the formal and sometimes lengthy process of opening a formal case.

Rule 19 adopts the process by which attorneys who are not members of the Idaho Bar can represent clients in proceedings at the IPUC by adopting, by reference, the appropriate Idaho Bar Commission Rule.

Language was added in Rule 39 that helps the public receive updates about cases they are interested in by utilizing a free subscription service available through the IPUC website.

Any other changes are of a housekeeping nature and represent minor clean up of language associated with various petitions and filings before the IPUC.

**DOCKET NO. 31-7103-1301** The changes made to this docket adopts, by reference, the latest federal railroad safety rules. **Mr. Kjellander** thanked the Committee and stood for questions.

**MOTION:** **Senator Werk** complimented Mr. Kjellander, thanked him for his service and moved, seconded by **Senator Stennett**, to accept **Docket No. 31-0101-1301** and **Docket No. 31-7103-1301**. The motion carried by **voice vote**.

**DOCKET NO. 52-0102-1301** **IDAPA 52 - Idaho State Lottery Commission**

**52-01-02 - Gaming Rules of the Idaho State Lottery Commission - page 82**  
**Amber French**, Deputy Director of the Enforcement Security Division (Division), brought this docket before the Committee. The proposed changes for this docket are due to the passing of **S 1127**. **S 1127** during the 2013 Legislative Session which contained statutory changes reflecting recommendations from the Attorney General's Office.

The rule changes beginning on page 93 added Rule 302.06 - Raffle Drawings. This rule protects the public from fraudulent raffles that can be perpetual in nature allowing an organization to avoid giving a prize away. The rule provides that an organization must be clear, transparent and accountable to the public for the drawing of the prize.

**MOTION:** **Senator Siddoway** moved, seconded by **Senator Lodge**, to accept **Docket No. 52-0102-1301**. The motion carried by **voice vote**.

**DOCKET NO. 34-0601-1301** **IDAPA 34 - Secretary of State, Uniform Commercial Code - page 49**  
**Jeff Harvey**, Uniform Commercial Code Supervisor, introduced the Rules Governing the Electronic Recording of Real Property which is a new chapter. The Electronic Recording Commission was created by the Legislature in 2007 when they adopted the Uniform Real Property Electronic Reporting Act. The Commission was required to develop standards to unify all forty-four counties in the reporting of real property records by electronic recording. To accomplish this goal, the Commission looked to other states, including Idaho's county representatives, legislators, and persons of interest and sought to create a standard with which everyone could agree. Information was requested from the Public Records Industry Association (PRIA) which is the recognized leader for public recording. **Mr. Harvey** walked the Committee through each section of the docket.

**Senator Davis** asked how many counties are currently participating or about to participate. **Mr. Harvey** responded that there are thirty-seven participating counties at this time. **Senator Davis** inquired if the PRIA standards, which are incorporated by reference into the rules, are the most current and best standards. **Mr. Harvey** deferred to Jim Morton, Ada County Recording Manager, to respond to that question.

**Mr. Morton** stated that their research showed that the 2007 PRIA standards are the most current. **Senator Davis** asked if both tif and pdf formats are available. Are the counties requesting one or the other or are they actually storing them in both formats? **Mr. Morton** answered that the systems have a native storage language in tif, but they have made pdf available if the counties wanted to use it. **Senator Davis** acknowledged the effectiveness of Ada County's digital recording system and thanked them.

**Senator Siddoway** asked for a brief list of the kind of documents that can be electronically recorded. **Mr. Morton** said that there are mortgages, title documents in general (95 percent are land documents exclusively), declaratory documents and judges' decrees.

**MOTION:** **Senator Hill** moved, seconded by **Senator Lodge**, to accept **Docket No. 34-0601-1301**. The motion carried by **voice vote**.

**IDAPA 38 - Department of Administration**

**DOCKET NO. 38-0406-1301** **38.04.06 Rules Governing the Use of the Exterior of State Property in the Capitol Mall and Other State Facilities - page 58** and

**DOCKET NO. 38-0408-1301** **38-0408-1301 Rules Governing Use of the State Capitol Exterior - page 68**

**Ms. Teresa Luna**, Director, Department of Administration, stated that during the 2012 Legislative Session, **H 693** was passed with an emergency clause instructing the Department to promulgate three sets of rules within thirty days. Those rules were to address the use of 1) the exterior of the capitol, 2) the interior of the Capitol Mall properties, and 3) the exterior of all Capitol Mall properties. The rules were brought to the Legislature during the 2013 Legislative Session.

The rules for the interior of the Capitol buildings were approved as written and are now in place. The Legislature requested changes to the other two sets of rules dealing with the exterior of the Capitol and the exterior of the Capitol Mall properties. Those revisions are before the Committee today and the changes to both dockets are similar in nature and include the removal of the definitions of event and exhibit, and all references to those definitions throughout the document. The definition of public use was modified as requested. There was a rewrite of the public use seven-day duration limit; a rewrite of the liability and indemnification provisions to clarify their intent; removal of the limitation on hours and locations of public use; and removal of the restriction on sound amplification. Certain parts of these rules were initially adopted by the Department following the 2012 Legislative Session. Those approved by the Legislature in 2013 were then challenged in federal court.

The amendments before the Committee remove the need for the court to consider some of those challenges but not all of them. The Department's Deputy Attorney General has advised the Department not to make any additional modifications to these rules as they plan to appeal the judge's ruling once final judgment has been entered. Approval of the temporary rules as proposed is needed for the appellate court to consider and decide whether the district court's conclusion will stand. In the meantime, the Department has worked closely with Capitol Mall Security, Facilities and Idaho State Police to ensure that they are not attempting to enforce any of the provisions that the judge had issue with in his November ruling.

**Ms. Luna** explained that the Notice of Rule Making for the temporary and proposed rules was published in the May 2013 Administrative Bulletin with allowance for a three week comment period. No written comments were received. The pending rule before the Committee was then published in the July 2013 issue of the Administrative Bulletin. The changes in this Docket are those that were requested and agreed upon by the House and Senate. **Ms. Luna** respectfully requested the approval of the pending rules as written. The Department believes it is consistent with the First Amendment and otherwise reflects proper stewardship over the Capitol Mall properties.

**Senator Davis** asked if the decision of the court is the final decision and, if not, will it happen soon. Also, are the proposed modifications to the rules pending rules or temporary rules? **Ms. Luna** responded that a final judgement has not been entered and she deferred further explanation to Clay Smith, the Deputy Attorney General.

**Mr. Smith** responded that these are temporary rules. **Mr. Smith** concurred and stated that all the rules in these dockets are temporary rules. **Senator Davis** stated that the digital version he is looking at says they are pending rules. Is the version he is viewing incorrect? **Mr. Smith** answered in the affirmative.

**Senator Davis** requested the date that they became temporary rules. **Mr. Smith** said April 5, 2013. **Senator Davis** inquired if when the district court considered the constitutionality of the Administrative Rules before the court, did the court order also consider the temporary rules? **Mr. Smith** answered yes. As a result of the consequences of the 2013 Legislature's action and the adoption of the new temporary, proposed rules, there was an additional round of briefing that was directed to the temporary proposed rules. In April 2013, the disapproval of certain rules, which had been submitted to the 2013 Legislature, were also addressed. **Senator Davis** stated that the temporary rules have the force and effect of the law until the Legislature has the opportunity to review and consider them and to conclude the right to object to a temporary rule. What is the impact on the court's decision in the event the Committee was to reject the rules? **Mr. Smith** explained that if the Legislature rejects all or some of the proposed rules in those dockets, to the extent that the temporary rules modify existing rules, then the pre-existing rules would be reinstated and there would have to be some determination as to the validity of some of the old rules.

**Mr. Smith** further explained that there were certain rules that were modified by those temporary rules before the Committee today that amended the rules that were approved, or not disapproved, by the 2013 Legislature. Certain of those rules had been challenged initially. Because of the new proposed rules, and certain amendments to those rules, additional briefing was required. Those rules included the indemnification and liability provisions before the Committee. If those temporary rules that apply to the indemnification and liability provisions were not approved by the Legislature this session, then the parties would be required to resubmit those issues to the district court for determination. The district court addressed the seven day duration temporary rule that was adopted and became effective in April, 2013. If the Legislature were to disapprove the duration rule, then there would be no duration provision in the rules. It is rule specific as to what the impact would be by not approving the rules now before the Committee.

**Senator Davis** stated that he thinks that if 1) the Committee approves the rules so that the court can strike them down, the effect is the same as the court striking them down; or 2) the Committee rejects them, they are in effect, struck down. Either way, significant portions of these particular administrative rules will not have the force and effect of law until after an appellate court's consideration and possible reversal. Is that correct? **Mr. Smith** responded that "no" it is not correct and explained why.

**Senator Davis** said he thought Mr. Smith agreed with him, not disagreed. 1) If there was a provision in the administrative rules, we need to approve the rules in order to preserve the State's right to appeal at least those administrative rules that the district court has found unlawful. 2) You are encouraging the Committee to approve those rules to preserve a meaningful appeal of issues that was before the court. In the event that the Committee approves the rules that the court has found problematic, our approval of the rules are still stayed by the decision of the court. 3) If the Committee finds value in the position of the court as to some of the administrative rules before them today, and rejects them, then similarly, they are not enforceable? **Mr. Smith** concurred with points 1 and 2 but in regard to 3, stated that if the temporary rules, for example the indemnification and liability provisions, are not approved, then we would revert back to the old formulation of those rules. Those rules have not been invalidated.

**Mr. Smith** responded to Senator Davis' request to show the rules the court has problems with:

- Page 64, Section 201 - Public Use Duration was invalidated by the district court. Senator Davis asked if there was judicial precedent that accommodates/allows for a government agency to put a time on duration. Mr. Smith answered "no".
- Page 64 - Section 203 - State Events and Exhibits were invalidated by the court.
- Page 66, Sections 400.01 and 400.03 - Liability and Indemnification.

**Senator Davis** referred to the Section 400 series – the assumption was that it is not the position of the Department to create strict liability for sponsoring an event. If that is true, 400.01 and 400.03 is saying they are liable for anything that they have done instead of a third party. He assumes the Department does not have a problem with that.

**Senator Davis** referred to Section 201. Would a study of the Ninth Circuit decision which considered the City of Boise ordinances reveal a similar duration provision and, if so, was it part of the court's decision? **Mr. Smith** answered that there is no Ninth Circuit decision dealing with this issue involving any local or state ordinance. Regarding Section 201, the only concern is the district court's November 2013 decision.

**Senator Davis** recalled a U.S. Supreme Court decision that basically suggested you don't have a First Amendment right to camp on government property which could infer to grant some governmental right to put limits on duration. Is that the only precedent out there today? **Mr. Smith** agreed. The Supreme court case dealt with park service regulations for a park across from the White House. The reasoning in that decision was relied upon in the various Occupy Movement cases to indicate that states or governments can have the ability to avoid monopolization of public property by people or groups. One can derive from that analysis the reasonable occupation limits under Section 201, which the district court invalidated.

**Senator Stennett** provided a quick synopsis in lay terms of the discussions regarding the constitutionality of the rules. Is the Department currently enforcing the rules that the Committee is reviewing? **Ms. Luna** answered that the Department is not enforcing any of the rules that the judge called into question in November although they are in the docket. **Senator Stennett** asked if those portions have been appealed. **Ms. Luna** said they cannot appeal until there is a final judgement. **Senator Stennett** outlined the actions concerning the rules that the Department brought to the Committee: There was a preliminary injunction; they came back with rejected rules; and came back again with amended rules. There was a ruling on April 5th and one in November which deemed portions of the rules unconstitutional and those are the rules that are before the Committee. **Ms. Luna** clarified that there was never an injunction prior to the judge's ruling. The Department was asked to promulgate rules during the 2012 Session to manage the properties. Those were brought to the Legislature during the 2013 Session and the Legislature asked for revisions. The rules before the Committee today are the rules that incorporated those revisions and upon which the judge based his ruling.

**Ms. Luna** explained that on April 5th the rules were posted as Temporary and Proposed Rules and were published in that format in the May 2013 bulletin. Then they were published as Temporary Pending Rules in July 2013.

**ADJOURNED:** **Chairman McKenzie** stated that the meeting would be continued on Monday and would allow additional questions from the Committee as well as testimony from the citizens who are there to have their voices heard.

**Senator Werk** asked Ms. Luna for a cogent presentation of all of these issues for the meeting on Monday morning, i.e. where the rules came from including an explanation of how the Department was asked or required to promulgate rules. He requested an exact history of what has happened and why.

There being no further business, **Chairman McKenzie** adjourned the meeting at 8:55 a.m.

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Senator McKenzie  
Chair

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Twyla Melton  
Secretary