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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Petitioner

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JERRENE PHILLIPS,

Petitioner,

vs.

IDAHO POWER COMPANY,

Respondent.

Case No. IPC-E-07-01

**MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION TO DISMISS**

COMES NOW, the Petitioner, JERRENE PHILLIPS, by and through her attorneys of record, Eberle, Berlin, Kading, Turnbow, McKlveen & Jones, Chartered, and hereby submits her Memorandum in Support of Petitioner's Motion to Dismiss.

I. INTRODUCTION

Pursuant to the Notice of Scheduling Order No. 30300 issued by the Idaho Public Utilities Commission on April 18, 2007, Petitioner hereby submits her Memorandum in Support of her Motion to Dismiss.

II. STATEMENT OF FACTS

In 1994, Petitioner had a home built which was located at 16625 Basin Way, Boise, Idaho 83714. During the construction of the home, Idaho Power installed and sealed the meters and the current transformers ("CTs") on January 24, 1994. See Exhibit "A" attached to the Affidavit

of Stanley J. Tharp (hereinafter "Tharp Affidavit"). Petitioner had no involvement with the installation of the meters and CTs. Affidavit of Jerrene Phillips at ¶ 2 (hereinafter "Phillips Affidavit"). In approximately March of 2006, Idaho Power allegedly changed the meter at Petitioner's residence without her knowledge. *See* Tharp Affidavit, Exhibit "A"; Phillips Affidavit, ¶ 2. Shortly thereafter, Petitioner noticed that her monthly bills were much higher than normal and contacted Idaho Power to do an energy audit. Petitioner is a single woman living at the residence and was concerned when her power bills significantly increased. From 1994 to 2006, Petitioner timely paid her bills in good faith on a monthly basis. *See* Phillips Affidavit at ¶¶ 2 and 5; *see also* Tharp Affidavit, Exhibit "D" - Response to Request for Production No. 2.

In July of 2006, an Idaho Power representative, Bill Homan, called Petitioner on the telephone and told her that Idaho Power had "initially installed a meter with a 20 multiplier and it should have been a 40 multiplier." Petitioner was later informed that as a result of the improper multiplier that she was going to be billed for three (3) years of back-billed energy consumption. *See* Phillips Affidavit at ¶ 2; *see also* Tharp Affidavit, Exhibits "C" and "D."

Idaho Power then sent Petitioner a bill for the three (3) years of alleged past energy consumption totaling \$6,306.34. Petitioner disputed that bill and made a good faith attempt to settle this matter with Idaho Power; however, it rejected that offer. *See* Tharp Affidavit, Exhibits "A" and "C;" *see also* Phillips Affidavit, ¶ 4.

Idaho Power has indicated that it is unwilling to negotiate with respect to the amount of its back-bill, and will settle for nothing less than the full amount. *See* Tharp Affidavit, Exhibit "C." Had Petitioner known of the increased consumption, she would have instituted conservation measures in order to reduce the amount of her power consumption. Idaho Power's mistake deprived her of the opportunity of instituting conservation measures for that three-year

period. *See* Phillips Affidavit. In fact, this is far more than an academic argument in Petitioner's case. There is proof through looking at her recent history of consumption. Since the new meter was installed she has clearly instituted conservation measures. The comparison of her energy usage was as follows:

April 2006	5520.00 KWH
April 2007	5160.00 KWH
May 2006	5360.00 KWH
May 2007	4080.00 KWH

As her consumption decreased, so did the cost of her power:

April, 2006	\$314.51
April 2007	\$244.88
May 2006	\$297.58
May 2007	\$198.38

During conversations and correspondence with Petitioner, Idaho Power admitted that it was their mistake with regards to the incorrect amount that it had been billing Petitioner for years. *See* Phillips Affidavit, Exhibit "C"; *see also* Tharp Affidavit, Exhibit "D" - Response to Request for Production No. 3.

After Petitioner filed a Formal Complaint, she requested the opportunity to have a professional inspect the meter to determine if it was wired incorrectly, equipped with a special register, and to confirm that it was working correctly. Idaho Power responded that it destroyed the meter on March 28, 2006. Idaho Power gave a similar response to the Petitioner's request to inspect the tag on the removed meter. It said the meter tag did not exist. *See* Tharp Affidavit, Exhibit "E" - Answer to Interrogatory No. 26.

III. ANALYSIS

A. **Under The Principles Of Equity, Idaho Power Should Be Precluded From Back Billing As It Denied Petitioner The Opportunity To Implement Conservation Measures.**

Equitable principles apply in administrative proceedings. *See Duggan v. Potlatch Forests, Inc.*, 92 Idaho 262, 441 P.2d 172 (1968) (the fundamental equitable principle embedded in our constitutions are “applicable in proceedings before administrative bodies.”). *Id.* at 264, 441 P.2d at 174; *Martinez v. Colorado Dept. of Human Services*, 97 P.3d 152, 159 (Colo. Ct. App. 2003) *reh’g denied; cert. denied* (“we may not infer that the General Assembly has abrogated otherwise applicable common law or equitable remedies.”). *Accord, Applications of Intermountain Gas Co.*, 77 Idaho 188, 202, 289 P.2d 933, 942 (1955) (“the Public Utilities Commission is a fact finding and administrative body, exercising great discretionary powers. . . .”); *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979) (once it is clear that the Commission has jurisdiction, it is allowed “all power necessary to effectuate its purpose.”). As an administrative body with broad powers, the Idaho Public Utilities Commission (hereinafter “the Commission”) is thus bound to apply basic equitable principles.

Applying fundamental equity to the facts and circumstances here, Idaho Power should not be permitted to back-bill the Petitioner for three (3) years of energy consumption when she was denied the opportunity to institute conservation measures. Petitioner testified in her Affidavit that had she known the true amount of her power bills, she would have definitely instituted conservation measures to cut down on her power usage. A comparison of her energy conservation measures were as follows:

April 2006	5520.00 KWH
April 2007	5160.00 KWH
May 2006	5360.00 KWH
May 2007	4080.00 KWH

Additionally, a review of Idaho Power's billing records subsequent to the installation of the meter will demonstrate that the Petitioner has in fact significantly reduced her power consumption. Her April 2007 bill was \$69.63 less than the year before, and in May of this year she had a bill that almost \$100 less than the same month of 2006. In addition, Idaho Power admits in its letter to Petitioner dated November 13, 2006, that the Petitioner could have implemented conservation measures to reduce consumption over the three-year period. *See Phillips Affidavit, Exhibit "C."*

Petitioner's ability to implement conservation measures is a matter of common sense. For example, by analogy, a homeowner who operates a gas insert fireplace, which may be used primarily for aesthetic purposes, and has an extremely high energy bill for the month of January, has the opportunity to turn off the gas fireplace, and reduce energy consumption. In this case, the Petitioner was denied that opportunity and under the principals of equity, Idaho Power should be precluded from seeking reimbursement.

The Petitioner was denied the opportunity to implement conservation measures for a period of three (3) years. Idaho Power's attempt to collect those amounts is patently unjust given the fact that it admitted that the mistake was its own, and the Petitioner neither caused nor contributed in any manner.

B. Idaho Power Fails To Meet Its Burden That It Is Entitled To Back-Bill Petitioner Since They Have Destroyed The Meter And Meter Tag In Question.

Idaho Power maintains that it is entitled to back-bill the Petitioner pursuant to Utility Customer Relations Rule 204 and Idaho Code § 61-642. *See Tharp Affidavit, Exhibit "C"*.

Once Idaho Power removed the meter, it had an obligation to preserve that evidence and allow the Petitioner the opportunity to have it inspected. However, Idaho Power has precluded the Petitioner from doing so as it destroyed the meter and the meter tag on March 28, 2006. *See Tharp*

Affidavit, Exhibit "D." Idaho Power admits that a meter is wired to equal one-half times the ratio of the current transformers applied. *See* Tharp Affidavit, Exhibit "D," Response to Interrogatory No. 8. If it was wired differently, or incorrectly, then the correct meter reading would be affected. However, the Petitioner was precluded from determining that due to the destruction of the evidence. In addition, in Idaho Power's Response to Interrogatory No. 4, it admits that "form S3 meters can be purchased with special registers that reverse the effect of specifically applied current transformer ratios; such meters are considered direct read meters and would have a multiplier of 1 in the billing system. Meter No. 62128615 was not equipped with this special register." *See* Tharp Affidavit, Exhibit "D". Once again, Petitioner is precluded from determining if the meter was equipped with a special register due to its destruction.¹

In addition, Idaho Power admits that it has in the past adjusted a back-billed amount to compromise a disputed bill under circumstances where accurate meter data did not exist. *See* Tharp Affidavit, Exhibit "E" - Response to Interrogatory No. 27. Once again, the Petitioner was precluded from determining whether the meter was keeping accurate data, as she was not allowed to inspect the meter. There are thus a number of unknown issues surrounding the meter, which will never be known given the fact that Idaho Power destroyed the evidence. *See* Tharp Affidavit, Exhibit "D" - Responses to Request for Production Nos. 3 and 4.

Under the law in Idaho, destruction of the evidence has a significant impact. That doctrine is known as spoliation of evidence. *In Bromley v. Garey*, 132 Idaho 807, 979 P.2d 1165 (1999), the

¹ It is also very interesting that the Petitioner testified that a representative of Idaho Power called her on the telephone and personally admitted that "Idaho Power had installed a meter with a 20 multiplier when it should have installed a 40 multiplier." (Phillips Affidavit, ¶ 3).

court ruled that a party may be entitled to a spoliation inference based on the alleged destruction of evidence. The court noted:

The evidentiary doctrine of spoliation recognizes it is unlikely that a party will destroy favorable evidence. Thus, the doctrine of spoliation provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party.

Id. at 812, 979 P.2d at 1170; *see also Stuart v. State*, 127 Idaho 806, 907 P.2d 783 (1995).

Whereas, spoliation of evidence should be a factor taken into consideration by the Commission.

There is also a decision from the Fourth Judicial District for Ada County dated February 21, 1997, by the Honorable Judge Eismann in *March v. Ford Motor Co.*, Case No. CV OC 95-05974 (February 21, 1997).² Tharp Affidavit, Exhibit "F." The facts in that case were that the plaintiff took delivery of a vehicle that he purchased from a local Ford dealer. Approximately a year later, the vehicle caught fire and burned. ITT Hartford insured the plaintiff's vehicle, paid for the plaintiff's loss and took control of the truck. Shortly thereafter, ITT had it destroyed. Plaintiff then commenced a products liability action, and the defendants moved to dismiss because ITT Hartford had destroyed the vehicle. In addressing the motion to dismiss, the court recognized that although Idaho appellate courts have not addressed this issue, various courts have held that a trial court has an inherent power to impose sanctions, including dismissal of the lawsuit, where the plaintiff has destroyed key evidence. In evaluating the sanctions, the court considered three factors: (1) the degree of culpability in the destruction of the evidence; (2) prejudice to the opposing party; and (3) what sanction is appropriate. The court concluded that the appropriate sanction in that particular case arising out of the destruction of evidence was dismissal of the lawsuit, because the truck's

² Judge Eismann is currently a Justice on the Idaho Supreme Court.

absence served to deprive the defendants of the opportunity to develop evidence refuting liability.

Id.

As in *Ford Motor Co.*, the Petitioner here was deprived of the opportunity to develop evidence regarding the meter which has caused her prejudice. Moreover, if back billing is appropriate, then Idaho Power clearly has the burden of proving its right to back-bill pursuant to the terms of IDAPA and as established by the Commission; however, Idaho Power cannot meet its burden of proof due to the spoliation of evidence doctrine as it has destroyed all the critical evidence at issue.

C. IDAPA 31.21.01.204 Does Not Support Idaho Power's Conduct.

Idaho Power maintains that its company billing practices are governed by the Commission and its Rules, specifically, Utility Customer Relations Rule 204 and 313, which the Commission propagated pursuant to the legislative authority vested in it by Idaho Code § 61-507. *See* ¶ 4 of Idaho Power's Answer; Tharp Affidavit, Exhibit "C." The provisions of applicable statutes are crucial, because the law is clear that the Commission's jurisdiction is dependent on enabling statutes. *See Afton Energy, Inc. v. Idaho Power Co.*, 111 Idaho 925, 928, 729 P.2d 400, 403 (1986); *Washington Water Power Co., supra*, 99 Idaho at 879, 591 P.2d at 126 (the Idaho Public Utilities Commission has no authority other than that given to it by the legislature). Furthermore, an administrative regulation cannot exceed the bounds of authority originally granted by the legislature. *Curtis v. Canyon County Highway District No. 4*, 122 Idaho 73, 82-83, 831 P.2d 541, 550-51 (1992) (overruled on other grounds). Thus, Idaho Power cannot use a Commission regulation to justify billing practices when the regulation exceeds statutory boundaries. There is a fundamental disconnect between the rule relied upon and Idaho Code § 61-642.

The rule in question provides in part:

01. Errors in Preparations – Malfunctions – Failure to Bill.

Whenever the billing for utility service was not accurately determined because a meter malfunctioned or failed, bills were estimated, or bills were inaccurately prepared, the utility shall prepare a corrected bill. If the utility has failed to bill a customer, for service, the utility shall prepare a bill for the period during which no bill was provided.

02. Corrections. If the time when the malfunction or error began or the time when the utility began to fail to bill for service cannot be reasonably determined to have occurred within a specific billing period, the corrected billings shall not exceed the most recent six months before the discovery of the malfunction or error or failure to bill. If the time when the malfunction or error or failure to bill began can be reasonably determined, the corrected billings shall go back to that time, but not to exceed the time provided by Section 61-642, Idaho Code, (three (3) years).

03. Refunds and Additional Payments. The utility shall prepare a corrected billing indicating the refund due to the customer or the amount due the utility. A customer who has been underbilled or who has not been billed shall be given the opportunity to make payment arrangements under Rule 313 on the amount due. At the customer's option, the term of the payment arrangement may extend for the length of time the underbilling accrued or the customer was not billed. The utility shall promptly refund amounts overpaid by the customer unless the customer consents to a credit against future bills, except overbillings not exceeding \$15 may be credited to future bills.

IDAPA Rule 31.21.01.204 (emphasis added).

Given the express reference in the above-quoted rule, it is necessary to look at the language of the cited statute. It states in its entirety:

Overcharge – Recovery of payment – If the public utility does not comply with the order for the payment or reparation within the time specified in such order, suit may be instituted in any court of competent jurisdiction, to recover the same. All complaints concerning excessive or discriminatory charges shall be filed with the commission within three (3) years from the time the cause of action accrues, and the petition for the enforcement of the order shall be filed in the court within one (1) year from the date of the order of the commission. The remedy in this section provided shall be

cumulative and in addition to any other remedy or remedies in this act provided in case of failure of a public utility to obey an order or decision of the commission.

Idaho Code § 61-642 (emphasis added).

Rule 204's cross-reference to the above-quoted statute as the authority for allowing for a three-year back-billing period is erroneous, and that makes the rule void for exceeding statutory authority. All the statute does is set forth a distinct statute of limitations for particular classes of customer claims, namely those premised on alleged excessive charges or use of discriminatory rates. The statute does nothing to authorize back-billing for three years. In fact, the clear thrust of the statute is to place a time limit on complaints *against* a utility, and it is completely silent as to actions *by* a utility. This is not an insignificant discrepancy. Given that Idaho Code § 61-642 says nothing to authorize back-billing, let alone for any particular period of time, it follows that reliance on IDAPA 204 is fundamentally flawed because it is premised on statutory authority that does not exist. Put another way, Idaho Power's contention that Rule 204 is controlling should be rejected because the rule misstates the substance of the statute to which it cross-references.

E. Idaho Power's Reliance Upon Idaho Code § 61-313 For The Proposition That It Cannot Settle A Disputed Bill Is Misplaced.

Idaho Power maintains that Idaho Code § 61-313 prohibits it from providing preferential treatment to customers. That interpretation misconstrues the purpose of the statute for two reasons: (1) Idaho Power has admitted to providing preferential treatment to customers in the past; and (2) the specific language of the Code Section pertains to rates and not disputes.

Idaho Power has allowed a customer to pay less than the full back-billed amount which resulted from a billing error. Tharp Affidavit, Exhibit "E," Response to Interrogatory No. 26. Finally, Idaho Power admits that it has adjusted back-billed amounts and compromised disputed bills when accurate meter data did not exist. See Tharp Affidavit, Exhibit "E," Response to

Interrogatory No. 27. Thus, there have been circumstances where Idaho Power has allowed a customer to pay less than the full amount of the back-billed amount, which is contrary to its position taken here.

In addition, Idaho Code § 61-313 provides that the public utility shall not grant any preference or advantage as to rates or services, or to subject any corporation or person to prejudice or disadvantage. A plain interpretation of that Code provides that Idaho Power cannot charge different rates to the same class of customers. But that is not an accurate description of what is happening in this case. In fact, Idaho Power's attempt to back-bill is prejudicial to the Petitioner as its mistake prevented her from taking conservation measures. Thus, the terms of Idaho Code § 61-313 support the granting of Petitioner's Motion.

F. Although Idaho Power Claims That Rule 204 Requires It To Back Bill For Three (3) Years, There Are Exemptions Under The Rule.

Idaho Power maintains that it is back-billing as required to do so under Rule 204; however, Idaho Power fails to mention Rule 9 which allows for an exemption under the Rules. Given the equitable nature of this matter, the Petitioner requests that the Commission exempt her from Rule 204 and not require her to pay the back-billed amounts.

Rule 9 provides in pertinent part: "if unusual or unreasonable hardships result from the application of any of these Rules, any utility or customer may apply to the Commission for, or the Commission on its own motion may order, a permanent or temporary exemption." *Id.* The Petitioner hereby requests, due to the unreasonable financial hardship of repaying over \$6,000, that the Commission permanently exempt her from repaying the back billed amount.

IV. CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that the IPUC dismiss Idaho Power's back billed amount on the grounds and reasons as stated above.

DATED this 7th day of June, 2007.

EBERLE, BERLIN, KADING, TURNBOW,
McKLVEEN & JONES, CHARTERED

By: 
Stanley J. Tharp
Attorneys for Petitioner

CERTIFICATE OF SERVICE

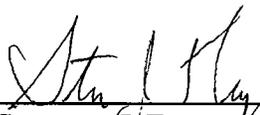
I HEREBY CERTIFY that on this 7th day of June, 2007, a true and correct copy of the foregoing document was served by first-class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally delivering to or leaving with a person in charge of the office as indicated below:

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STANLEY J. THARP