

**ORIGINAL**

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IDAHO PUBLIC  
UTILITIES COMMISSION

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

JERRENE PHILLIPS,

Petitioner,

vs.

IDAHO POWER COMPANY,

Respondent.

Case No. IPC-E-07-01

**REPLY 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 Reply Memorandum in Support of Petitioner's Motion to Dismiss.

**I. INTRODUCTION AND STATEMENT OF FACTS**

Pursuant to the Notice of Scheduling Order No. 30300 issued by the Idaho Public Utilities Commission ("IPUC") on April 18, 2007, Petitioner hereby submits her Reply Memorandum in Support of her Motion to Dismiss. Respondent opposes Petitioner's Motion to Dismiss on the following grounds: (1) Petitioner was not denied the opportunity to implement conservation measures; (2) Respondent did not intentionally destroy the meter; (3) Rule 204's reference to Idaho Code § 61-642 does not render the Rule void; (4) Idaho Code and the Filed Rate Doctrine prevent

Respondent from settling this dispute for less than the actual amount owed; and (5) Respondent has offered to extend the repayment period to reduce Petitioner's hardships. The Petitioner will address each of the arguments as set forth by the Respondent.

The Petitioner disputes the following factual matters as set forth in the Respondent's statement of the case for the reasons that it has been unable to verify such due to the destruction of the meter in question:

1. The erroneous billing was due to a billing error versus a meter malfunction.
2. The meter was tested and accurately performed its role towards recording energy usage.

In addition, Respondent, in a footnote in its reply brief at page 4 also states that "a typical Idaho Power customer averages 1050 kWh of energy usage per month." That statement is not supported by any evidence in the record and is merely argument of counsel.

Finally, Respondent maintains that the meter was destroyed one to two weeks after being tested. Response Memorandum at p. 5. However, in responses to discovery, the Respondent verified that the meter was removed on March 26, 2006, and the meter was tested and destroyed two days later on March 28, 2006. *See* Exhibit "D" attached to the Affidavit of Stanley J. Tharp, Answer to Interrogatory No. 15, at p. 18, and Response to Request for Production No. 3, at p. 40-42. Thus, the evidence before the IPUC is that the meter was destroyed the same day that it was tested. The Petitioner does not dispute the remaining facts as set forth in Respondent's Memorandum.

## II. ANALYSIS

### A. Petitioner Was Denied The Opportunity To Implement Conservation Measures As A Result Of The Error.

Respondent maintains that “[a]ll customers have the opportunity to conserve energy at any given time.” Respondent’s Memorandum at pp. 3-4. Petitioner does not dispute that point; however, the Respondent fails to recognize that if a customer is being billed in an amount that does not raise any red flags, the customer has no incentive to implement conservation measures. However, when a customer’s monthly bills double, obviously a red flag is raised which would put a reasonable customer on notice to begin implementing conservation measures. In this case, had the Petitioner known of the correct amount of her usage, she would have instituted conservation measures to reduce the amount of her power consumption. Moreover, given Respondent’s mistake, the Petitioner was precluded from instituting conservation measures for the three-year period for which the Respondent is attempting to collect from the Petitioner. Additionally, a review of the Petitioner’s energy consumption since the new meter was installed and Respondent’s mistake was discovered, demonstrates that she has instituted conservation measures. *See* Affidavit of Jerrene Phillips.

### B. Idaho Power Did Intentionally Destroy The Meter.

The Respondent maintains that it did not purposefully or intentionally destroy the meter. However, that is exactly what it did, pursuant to its normal business practices. Respondent’s Memorandum at p. 5. Moreover, Respondent’s intentional destruction of the meter deprived the Petitioner from inspecting the meter to independently determine if, in fact, it was functioning properly.

Respondent maintains that the meter was “salvaged” within one to two weeks after being tested. Respondent’s Memorandum at p. 5. That statement is inconsistent with Respondent’s

discovery responses in this matter. In response to Interrogatory No. 15, the Respondent stated that the meter was removed from the Petitioner's residence on March 26, 2006, and was tested two days later on March 28, 2006. *See* Exhibit "D" attached to the Affidavit of Stanley J. Tharp at p. 18. Thereafter, in Response to Request for Production No. 3, the Respondent stated that the meter was disposed of on the same day it was tested, March 28, 2006. *See* Exhibit "D" attached to the Affidavit of Stanley J. Tharp at p. 32. Thus, the meter was not destroyed one or two weeks after it was tested, but rather, was destroyed the very day that it was tested. Obviously, this normal business practice of Respondent is not reasonable given the fact that there will be times when the validity and/or functioning of a meter comes into play after it has been removed and the company attempts to back-bill. The practice of destroying the primary evidence on the same day that it is tested is not a reasonable approach and is obviously to the disadvantage of the Petitioner as well as other customers of Respondent.

Respondent relies in part upon the holding in *Courtney v. Big O Tires, Inc.*, 139 Idaho 821, 87 P.3d 930 (2003). However, the decision in *Courtney* is distinguishable from the facts here. In *Courtney*, the Court stated: "[t]he merely negligent loss of evidence will not support that inference, nor would the intentional destruction of an item that the party had no reason to believe had any evidentiary significance at the time it was destroyed." Respondent's Memorandum at p. 5. First, in the facts here, there is no allegation of any negligent loss of evidence, as the Respondent has admitted that it intentionally destroyed the meter as part of its normal course of business. Second, once the evidence had been intentionally destroyed, according to *Courtney*, the parties must then look to determine whether the party had reason to believe that the destroyed item had any evidentiary significance. It is disturbing to Petitioner that Respondent claims that it had no idea the meter had any evidentiary significance, when the

primary basis for its defense is that the meter functioned properly. Moreover, it is of further significance that Respondent destroyed the meter on the very day it was tested. Obviously, the Respondent's normal business practice needs to be changed so that its customers are not prejudiced by the intentional destruction of evidence.

Interestingly, the Court in *Courtney* did note that under certain circumstances, a case may be dismissed for spoliation of evidence:

There may certainly be circumstances where a party's willful, intentional, and unjustifiable destruction of evidence that the party knows is material to pending or reasonably foreseeable litigation may so prejudice an opposing party that sanctions such as those listed in Rule 37(b) of the Idaho Rules of Civil Procedure are appropriate.

*Id.* at 824, 87 P.3d at 933. One of the sanctions listed in Rule 37(b) is dismissal of an action. In this case, Respondent's intentional destruction of the meter on the same day it was tested warrants the granting of Petitioner's motion to dismiss.

**C. Rule 204's Cross-Reference To Idaho Code § 61-642 For A Three-Year Back-Billing Period Is Erroneous.**

Respondent maintains that Utility Customer Relations Rule 204's reference to Idaho Code § 61-642 does not render the rule void. Respondent also claims that the Idaho legislature has empowered the Commission to supervise and regulate public utilities in the state of Idaho, and to that end, the Rules were adopted as a general legal authority for the IPUC.<sup>1</sup> Petitioner does not disagree with the position taken by the Respondent; however, when the Rules specifically cite to and rely upon a particular Idaho Code Section, the rule that is adopted in furtherance of that Code Section must be consistent with its terms. The adoption of a Rule

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<sup>1</sup> Respondent also cites to Idaho Code § 61-315, the significance of which will be addressed later on in this Reply Memorandum.

pursuant to a specific Idaho Code Section, which is totally inconsistent with the terms of that Section, is erroneous, void, and exceeds statutory authority.

Respondent further maintains that no Idaho statute specifically addresses the under-billing of customers. Once again, Petitioner does not disagree with that statement, and maintains that the IPUC does have permission to prescribe rules and regulations; however, those rules and regulations which specifically rely upon a particular Idaho Code Section cannot exceed or ignore the provisions of that Code Section. The IPUC must adopt rules and regulations consistent with the terms of the specific Idaho Code. In this case, the terms of Rule 204 are not consistent with the terms as set forth in Idaho Code § 61-642.

Respondent next cites to Idaho Code § 61-315, which is significant. That Code Section provides in part that a public utility cannot subject a customer to any prejudice or disadvantage. Idaho Code § 61-315. That very language was addressed by the Iowa Court of Appeals in *Interstate Power Co. v. Waukon Manor, Inc.*, 447 N.W.2d 574 (Iowa App. 1989). There, the defendant owned and operated a nursing home. The plaintiff, a power company, installed a transformer with a meter multiplied by a factor of 30 versus the correct multiplier of 60. Eight years later a new transformer was installed and the clerical error was discovered. *Id.* The power company then went after the owner for the under-billed amount. The owner opposed the back billed amount based upon Iowa Code § 476.5 which, like Idaho Code § 61-315 provided that a public utility could not “subject any person to any unreasonable prejudice or disadvantage.” *Id.* In relying upon that language, the Court held, “[t]he provisions of Iowa Code Section 476.5 that ‘no such public utility shall subject any person to any unreasonable prejudice or disadvantage’ is an exception to absolute liability and absolute duty to assess the rate in question.” *Id.* at 575. Thus, the owner in *Interstate* was not required to repay the under-billed amount of charges.

Finally, Respondent goes on to claim that the adoption of Rule 204 into the administrative code is indicative that the Idaho legislature did not view the rule as exceeding the Commission's authority. Respondent's Memorandum at p. 7. However, adoption of a rule by the Idaho legislature does not render an invalid Rule valid. Acts of legislatures may be overturned when appropriate.

**D. Neither Idaho Code Nor The Filed Rate Doctrine Prevent Respondent From Settling The Dispute.**

Respondent maintains that it is required to follow the Rules when sending corrected billings to customers. In support of that, it cites to Idaho Code § 61-642 and concludes that "it is Idaho Power's practice to accept for payment nothing less than the full back-billed amount resulting from a billing error when **accurate meter data exists.**" (Emphasis added). Respondent's Memorandum at p. 8. The Petitioner agrees that one of the issue before the IPUC, is whether accurate meter data exists; however, the Petitioner was precluded from independently verifying that fact because the Respondent destroyed the meter in question.

Respondent maintains that Idaho Code § 61-313 and the Filed Rate Doctrine as adopted by *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), precludes it from settling the dispute for less than the full amount. Respondent's Memorandum at p. 8. Respondent's reliance upon Idaho Code § 61-313 is not persuasive for two reasons: (1) Idaho Power has admitted to providing preferential treatment to customers in the past, and (2) the specific language pertains to rates and not disputes.

The purpose of the Filed Rate Doctrine was recognized by the *AT&T* court as follows: "its strict application is necessary to prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts, the very evil the filing requirement seeks to prevent." (citing *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116

(1990). In the facts before this Court, there is no issue that the Respondent is offering rebates or discounts, or was intentionally misquoting rates. Thus, the purpose of the Filed Rate Doctrine does not preclude the Respondent from settling a disputed bill.

Respondent argues that charging different rates to the same classes of customers in settling disputes **where accurate meter data exists** has the same effect as undercutting the Filed Rate Doctrine. Once again, Respondent's position assumes that accurate meter data exists. That fact is disputed as the Petitioner has not been able to independently verify such due to Respondent's intentional and purposeful destruction of evidence.

**E. Respondent Has Offered To Extend The Repayment Period.**

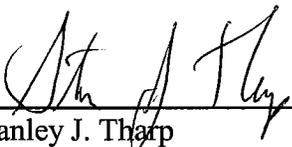
The final position taken by the Respondent is that it has offered to extend the repayment period for the amount of its back bill. Petitioner admits that Respondent has offered to extend the repayment period; however, Petitioner still submits that repayment of any amount, for any period of time, will still cause an unreasonable financial hardship.

**III. CONCLUSION**

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

DATED this 11<sup>th</sup> day of July, 2007.

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

By:   
Stanley J. Tharp  
Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11<sup>th</sup> day of July, 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