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IDAHO PUBLIC
UTILITIES COMMISSION

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

JERENE PHILLIPS,)	CASE NO. IPC-E-07-1
)	
Petitioner,)	
)	
IDAHO POWER COMPANY,)	IDAHO POWER COMPANY'S
)	RESPONSE TO PETITIONER'S
)	MOTION TO DISMISS
Respondent.)	
)	
_____)	

COMES NOW Idaho Power Company ("Idaho Power" or the "Company") and pursuant to Notice of Scheduling Order No. 30300, hereby submits this Response to the Motion to Dismiss filed on June 7, 2007 by Jerene Phillips ("Ms. Phillips"), the Petitioner in the above-entitled matter.

STATEMENT OF THE CASE

Jerene Phillips is an Idaho Power customer and has taken continuous service at 16625 Basin Way in Boise since it was constructed in 1994. Given the service

requirements of her all-electric home, the construction plan called for a Current Transformer (CT) installation, thus requiring a meter multiplier (a.k.a. meter constant) to calculate the actual kWhs for billing. On March 26, 2006, during a periodic test Idaho Power visually inspected the CT wiring and exchanged the meter at Ms. Phillips' address for testing as part of a planned maintenance meter exchange. When processing the exchange order, the new meter information and the correct multiplier of 40 were entered into the billing software system.

Idaho Power sent the old meter to its Meter Test Facility and determined on March 28, 2006, that it accurately performed its role towards recording energy usage. After Ms. Phillips called Idaho Power on June 13, 2006 regarding the high energy use on her bill, Idaho Power scheduled an appointment with Ms. Phillips on June 22 at the premises to help determine why her energy usage had doubled. On June 23, it was determined an error had occurred when a multiplier of 20 rather than 40 had been erroneously inputted into Idaho Power's billing system in 1994 when Ms. Phillips' service was initially established. As a result, Ms. Phillips was charged for only half of her electric usage during the subsequent twelve (12) years.

Later that same day on June 23, the Company advised Ms. Phillips of the error and that an Idaho Power employee would return to the premises to verify that the multiplier of 40 was correct before a corrected billing would be sent. Idaho Power confirmed that the CT is the correct size, is installed correctly and is still installed at the premises.

On July 12, 2006, an Idaho Power representative called Ms. Phillips to explain that the under-billed usage for the three-year period between April 2003 and March

2006 would be included on her August 8 bill. The representative also explained that future billings would increase and payment arrangement options were available to pay the re-billed amount.

Ms. Phillips contested the amount of the corrected billing and attempts to settle the matter were not successful. Idaho Power representatives have visited with Ms. Phillips several times to help her better understand her power consumption. The Company also conducted an energy audit of her home and installed a survey meter that records 15-minute intervals to better identify areas in which energy savings can be achieved. Idaho Power visited the residence several times to confirm the amount of energy the premises is using and provide information promoting energy saving opportunities.

On January 11, 2007, Jerene Phillips filed a Complaint for which the Commission issued a Summons to Idaho Power on January 17, 2007. The Company filed a timely answer to the Complaint on February 7, 2007. Following informal settlement discussions on April 11, 2007, the Commission issued a Notice of Scheduling in Order No. 30300. This Response is filed in answer to the Petitioner's June 7 Motion to Dismiss.

ARGUMENT

A. Petitioner Was Not Denied The Opportunity To Implement Conservation Measures As A Result Of The Billing Error.

Jerene Phillips had the same opportunity to implement conservation measures to reduce her power consumption as she would have had if Idaho Power had correctly billed her account. All customers have the opportunity to conserve energy at any given

time and have been frequently encouraged to do so by Idaho Power and the Idaho Public Utilities Commission. While the Petitioner may be more motivated to conserve now that she is being billed the full amount, the energy consumed and amounts paid over the last twelve years were not insignificant. Given that Ms. Phillips consumed roughly six times the energy of the average household¹ during the three (3) years of the re-bill period, she received a price signal sufficient to promote conservation even when billed at half her usage.

B. Idaho Power Did Not Intentionally Destroy Evidence When It Retired The 30-Year Old Meter In The Normal Course Of Business Prior To Discovery Of The Billing Error.

The Petitioner argues that she was deprived of the opportunity to develop meter-related evidence and that the spoliation of evidence doctrine prevents Idaho Power from meeting its burden of proof. Spoliation of evidence occurs when a party intentionally destroys, mutilates, alters, or conceals evidence. If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible. *Black's Law Dictionary* (8th ed., 2004). This evidentiary doctrine, which is a form of admission inferred by conduct, is not supported by the facts present in this case.

The meter at issue was purchased in 1976 and had gone through one periodic maintenance cycle prior to being installed at the Petitioner's residence in 1994. The meter remained at Petitioner's residence until it was replaced on March 26, 2006, as part of a planned maintenance meter exchange. When the meter was tested at the Meter Test Facility on March 28, 2006, Idaho Power verified that the meter accurately performed its role toward recording energy usage. Although it functioned properly, the

¹ A typical Idaho Power customer averages 1050 kWh of energy usage per month.

30+ year old meter was retired during the normal course of business based on purchase year and model criteria. To the extent that multiplier tags for the meter ever existed, the tags would have been disposed of with the meter in question.

Idaho Power did not purposefully destroy evidence by salvaging the meter. Per the Company's normal business practice, the meter was salvaged within one to two weeks after being tested – more than two months before the billing error was discovered in June 2006. Thus, at the time the meter was salvaged in the ordinary course of business, Idaho Power did not know the billing error existed or that the meter would be evidence in a subsequent case. Because the meter passed its test, the Company had no reason to suspect a problem until Ms. Phillips contacted the Company on June 13, 2006.

The Idaho Supreme Court addressed the applicability of the spoliation doctrine in *Courtney v. Big O Tires, Inc.*, 139 Idaho 821, 87 P.3d 930 (2003). The Court explained:

Whether or not the conduct constitutes an admission depends on the party's knowledge or intent that can be inferred from that conduct. For the loss or destruction of evidence to constitute an admission, the circumstances must indicate that the evidence was lost or destroyed because the party responsible for such loss or destruction did not want the evidence available for use by an adverse party in pending or reasonably foreseeable litigation. The 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.*

Id. at 933 (emphasis added). In short, the Court recognized that no admission with regard to the evidence can be inferred where the respondent did not have reason to know of the item's evidentiary value at the time it was destroyed. As explained above,

Idaho Power salvaged the 30+ year old meter in the ordinary course of business without knowledge of the meter's evidentiary significance. Because the Company did not act in bad faith, the spoliation doctrine does not apply.

C. Utility Customer Relations Rule 204's Reference To Idaho Code § 61-642 Does Not Render The Rule Void.

Pages 8-10 of the Petitioner's Memorandum in Support of its Motion to Dismiss describe a "fundamental disconnect" between Utility Customer Relations Rule (UCRR) 204 and *Idaho Code* § 61-642. The Petitioner argues that UCRR 204's cross-reference to *Idaho Code* § 61-642 as the authority for allowing a three-year back billing period is erroneous such that the rule is void for exceeding the Commission's statutory authority.

As evidenced by *Idaho Code* § 61-501, the Idaho Legislature empowered the Commission "to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions" of the public utilities law. To that end, the Utility Customer Relations Rules (IDAPA 3121.01 et seq) were adopted under the general legal authority of the Public Utilities Law, Chapters 1 through 7 of the *Idaho Code*, and the specific legal authority of *Idaho Code* Sections 61-301, 61-302, 61-303, 61-315, 61-503, 61-507, and 61-520. See UCRR 0.

No Idaho statute needs to specifically address the under billing of customers because the Idaho Legislature purposely authorized the Commission to prescribe rules and regulations to govern public utilities that perform a service or furnish a commodity. *Idaho Code* § 61-507. Under authority established by the Legislature, the Commission conducted a rulemaking to effectively legislate a back bill requirement/limitation while fulfilling its statutory mandates. Commission rules promulgated within the authority

conferred by law, and in accordance with the Administrative Procedure Act (APA), have the full force and effect of law and must be regarded as such.

Although the Petitioner claims the promulgation of UCRR 204 exceeds the Commission's delegated authority, Petitioner makes no explanation of how UCRR 204 is contrary to the "spirit and intent" of the Public Utilities Laws described in Idaho Code § 61-501 or otherwise outside the Commission's substantive rulemaking authority over the actions of Idaho's regulated utilities. It should also be noted that UCRR 204 was submitted to the Idaho Legislature for review and final approval. The adoption of UCRR 204 and codification into the Administrative Code indicates that the Idaho Legislature did not view UCRR 204 as exceeding the Commission's authority or otherwise failing to meet the legislative intent of the Public Utilities Laws.

Idaho Power believes the cross-reference to *Idaho Code* § 61-642 is meant to demonstrate the symmetrical nature of UCRR 204.02 and the statute. The cross-reference denotes the reciprocal time limits on customers to file complaints against utilities (*Idaho Code* § 61-642) and for utilities to seek payment from customers (UCRR 204.02). Thus, the cross-reference to *Idaho Code* § 61-642 does not limit the Commission's authority on this matter, but rather informs and explains it.

D. The Idaho Code And Filed Rate Doctrine Prevent Idaho Power From Settling A Disputed Bill For Less Than The Actual Amount Owed Under The Rates Effective At The Time The Energy Was Consumed.

Idaho Power is required to follow the Utility Customer Relations Rules and utility tariffs on file with the Idaho Public Utilities Commission. Idaho Power attempts to consistently interpret and adhere to Corrected Billings section of Rule G -- Billings and UCRR 204.02 – Corrections, when sending corrected billings to customers.

UCRR 204.02 does not leave the amount of the back bill to the utility's discretion; it states that if the time when the "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)." (Emphasis added). Thus, 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.

Idaho Code § 61-313 provides that no public utility shall "collect or receive a greater or less or different compensation" for any service rendered to the public than the charges applicable to such service as specified in its tariffs on file with the Commission and in effect at the time. This concept, known as the "filed rate doctrine," was described by the United States Supreme Court as an obligation on the part of the utility to only collect the rates set out in its tariffs and schedules despite a quoted charge of a lesser or greater amount. Regardless of the utility's motive or intent in quoting or charging a rate that is greater or lesser than the filed rate, the policy of non-discriminatory rates is violated when similarly situated customers are allowed to pay different rates for the same services. *AT&T v. Central Office Telephone*, 524 U.S. 214 at 223, 118 S.Ct.1956 at 1963 (1998); Order No. 28329.

Idaho Power believes that quoting a rate less than the filed rate for settlement purposes would defeat the non-discriminatory policy set forth in Idaho and federal utility law. Although the Petitioner draws a distinction on pages 10-11 of her Memorandum between charging different rates to the same class of customers and settling disputes, it is Idaho Power's position that settling a disputed bill where accurate meter data exists such that the amount in dispute can be determined with certainty has the effect of

undercutting the filed rate doctrine. Consequently, Idaho Power does not settle disputed bills based on accurate meter data for less than the amount owed.

Idaho Power Company has, on occasion, adjusted a back-billed amount in compromise of a disputed bill in circumstances where accurate meter data did not exist. These situations typically involve a meter that fails to register or an unavailable meter reading for a specific date on which a change in premises occupants is to be processed. The Company determines the service delivered and the energy consumed in these situations on the basis of the best available data and creates estimated and/or prorated billings. Because actual usage cannot be determined with certainty and the customer may have information concerning usage the Company is not privy to, Idaho Power is willing to revisit these estimated and/or prorated billings when the usages upon which the billings are based are disputed by the customers.

Finally, the Company is also prevented from settling a disputed bill for less than the actual amount owed by *Idaho Code* § 61-315's prohibition against offering preferential rates or treatment to any customer. The practice of rebilling the full underpaid amount back three (3) years was upheld by Commission Order Nos. 28212 and 28298 after an incorrect multiplier insufficiently billed customers for actual usage. The Commission explained that the customers' requested relief from paying the back billed amount constituted preferential treatment prohibited by *Idaho Code* § 61-315.

E. Idaho Power Has Offered To Extend The Repayment Period For The \$6,306.34 Owed To Reduce Petitioner's Hardship.

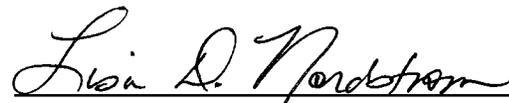
Although the Company may not reduce the amount owed as explained above, Idaho Power previously offered (and continues to offer) to discuss extending the

repayment period beyond thirty-six (36) months within the parameters set by UCRR 204.03. It was (and is) Idaho Power's hope that spreading the \$6,306.34 over a longer time period would help minimize the Petitioner's potential hardship in repaying the back billed amount.

Conclusion

Idaho Power respectfully requests that Petitioner's Motion to Dismiss Idaho Power's re-billed amount be denied and that, pursuant to the provisions of the Commission's Utility Customer Relations Rules 204.03 and 313, Ms. Phillips be ordered to pay Idaho Power Company \$6,306.34 for electrical service received for the three (3) year period between April 2003 and March 2006.

Respectfully submitted this 28th day of June 2007.



LISA D. NORDSTROM
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June 2007, I served a true and correct copy of the within and foregoing document upon the following party by the methods indicated below and addressed to the following:

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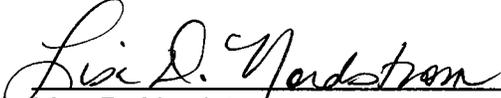
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