

amount owed under the rates effective at the time the energy was consumed. The Company responds that: (1) Rule 204's reference to *Idaho Code* § 61-642 does not render the rule void; (2) Ms. Phillips was not denied the opportunity to conserve, and although her price signal to conserve was not as great as if she were billed the full amount it was still significant enough to encourage conservation; (3) Idaho Power did not intentionally destroy evidence when it retired the meter in the normal course of business prior to the discovery of the billing error (spoliation of evidence); (4) *Idaho Code* § 61-313 and the filed rate doctrine prevents the Company from settling a disputed bill for less than the actual amount owed under the rates effective at the time the energy was consumed; and (5) the Company has offered to extend the repayment period to reduce Ms. Phillips' financial hardship.

With this Order we dismiss Ms. Phillips' Complaint and order the Company to make a reasonable payment arrangement for the past-due amount. The Company followed authorized practice and complied with Rule 204 requiring a rebilling. Rule 204 is not void or invalid because of its reference to *Idaho Code* § 61-642. Idaho Power did not destroy or dispose of the meter in bad faith or with the intent to deprive anyone from independently examining it and consequently, the doctrine of spoliation has no application in this case. *Idaho Code* §§ 6-313, 61-315, and the filed rate doctrine prohibits any reduction in the rebilled amount because the actual usage is known, and the tariffed rate must be applied.

PROCEDURAL HISTORY

In August 2006, Jerrene Phillips made an informal complaint to the Commission against Idaho Power disputing a \$6,306.34 back-billed amount for a three-year period between April 2003 and March 2006. Attempts to resolve the informal complaint were not successful, and on January 11, 2007, Ms. Phillips, through counsel, filed a formal complaint against Idaho Power Company with the Commission. IDAPA 31.01.01.024. On January 17, 2007, the Commission issued a Summons to Idaho Power directing it to answer the complaint. On February 7, 2007, the Company filed a timely answer to the complaint.

The parties met for informal settlement discussions on April 11, 2007, and were not able to settle the issues. The parties agreed that this matter was appropriate for a decision on written submissions without a formal hearing, and submitted a proposed discovery and briefing schedule to the Commission. On April 18, 2007, the Commission issued a Notice of Scheduling

adopting the parties' proposed procedural schedule for submitting this case for decision. Order No. 30300.

Pursuant to the procedural schedule, on June 7, 2007, Ms. Phillips filed a Motion to Dismiss Idaho Power's back billing along with a memorandum supporting her Motion and claims. The Company filed a response on June 28, 2007, and Ms. Phillips filed a reply to Idaho Power's response on July 11, 2007. This matter is now fully submitted for decision.

FINDINGS OF FACT¹

Ms. Phillips is an Idaho Power customer and has taken continuous service at her home in Boise since it was constructed in 1994. Given the service requirements of her all-electric home, the construction plans called for a Current Transformer (CT) installation. Because of the CT, a meter multiplier, or meter constant, was necessary in order to calculate the actual kWhs for billing.

On March 26, 2006, the meter at Ms. Phillips home was exchanged as part of a planned maintenance meter exchange. The new meter, as well as the correct meter multiplier (40), was installed and entered into the billing system at that time. The old meter was sent to Idaho Power's Meter Test Facility where it was determined on March 28, 2006, that it worked properly and accurately performed its role of recording energy usage. On June 13, 2006, Ms. Phillips called Idaho Power regarding the high energy use on her bill, and the Company scheduled an appointment with her on June 22 at her home to help determine why her energy usage had doubled. On June 23, 2006, it was determined that an error had occurred when a multiplier of 20 rather than 40 had been erroneously entered into the billing system in 1994 when Ms. Phillips' service was initially established. As a result, Ms. Phillips had been charged for only half of her electric usage during the first 12 years of service.

On June 23, 2006, the Company advised Ms. Phillips of the error and that an Idaho Power employee would return to her home to verify that the multiplier of 40 was correct before a corrected billing would be sent. Idaho Power then confirmed that the CT was the correct size, was installed correctly, and was still installed at the residence.

¹ The facts of this case are essentially undisputed. Ms. Phillips agreed with the facts as set forth in Idaho Power's Statement of the Case in its response to Ms. Phillips' Motion to Dismiss disputing only the two following factual matters: (1) The erroneous billing was due to a billing error versus a meter malfunction; and (2) the meter was tested and accurately performed its role towards recording energy usage. The two matters are disputed because Ms. Phillips was "unable to verify these statements due to the destruction of the meter in question." Reply Memorandum of Petitioner at p. 2.

On July 12, 2006, an Idaho Power representative contacted 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 that payment options were available to pay the rebilled amount. Ms. Phillips contested the amount of the corrected billing. Idaho Power representatives have visited Ms. Phillips' home several times to confirm the amount of energy her home is using, to help her better understand her power consumption, and to provide information promoting energy-saving opportunities. Additionally, the Company conducted an energy audit of her home and installed a survey meter that records 15-minute intervals to better identify areas where energy savings can be achieved.

On January 11, 2007, Ms. Phillips filed a formal complaint against Idaho Power regarding the corrected billing amount of \$6,306.34. Pursuant to the procedural schedule both parties submitted legal memoranda supporting their arguments.

DISCUSSION/CONCLUSIONS

I. Rule 204's reference to Idaho Code § 61-642 does not render it void as it pertains to back billing for undercharged amounts.

Whenever a billing for utility service was inaccurately prepared, the utility must prepare a corrected billing. IDAPA 31.21.01.204.01 (Rule 204). "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)." IDAPA 31.21.204.02.

Ms. Phillips argues that Rule 204's reference to *Idaho Code* § 61-642 as authority for allowing a three-year back billing period is erroneous, and makes Rule 204 void for exceeding statutory authority. Although Ms. Phillips is correct in pointing out that the Commission has no authority other than that given to it by the Legislature, she is incorrect in both her assertion that Rule 204's reference to *Idaho Code* § 61-642 is a statement of the legislative authority by which the Commission enacted the rule and that the reference to *Idaho Code* § 61-642 renders Rule 204 invalid. In her reply, Ms. Phillips, while agreeing with Idaho Power's position that the Commission has the general legal authority to adopt the Utility Customer Relations Rules, maintains that the terms of Rule 204 are not consistent with the terms as set forth in *Idaho Code* § 61-642, and thus Rule 204 is erroneous, void, and exceeds statutory authority.

As pointed out by Idaho Power, the Utility Customer Relations Rules (IDAPA 31.21.01.000 *et seq.*) contain a specific statement of legal authority by which those rules were adopted. “These rules are adopted under the general legal authority of the Public Utilities Law, Chapters 1 through 7, Idaho Code, and the specific legal authority of Sections 61-301, 61-302, 61-303, 61-315, 61-503, 61-507, and 61-520, Idaho Code.” IDAPA 31.21.01.000 (Rule 0). Additionally, as the Company states, Rule 204’s cross-reference to *Idaho Code* § 61-642 is not a statement of authority, but rather is meant to demonstrate and refer to the symmetrical nature of Rule 204 and the statute. The rule provides a similar three-year time limitation upon rebilling as the statute imposes upon complaints regarding excessive or discriminatory charges, in essence making the time period for undercharges the same as that set forth for overcharges by the statute. The rule’s reference to statute is not a statement of authority, is not inconsistent with either the Commission’s authority to promulgate that particular rule, or with the terms of the statute and rule itself, and does not render Rule 204 void and invalid.

II. *The doctrine of spoliation of evidence does not apply to the facts of this case.*

The evidentiary 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. *Courtney v. Big O Tires, Inc.*, 139 Idaho 821, 824, 87 P.3d 930, 933 (2003)(quoting *Bromley v. Garey*, 132 Idaho 807, 812, 979 P.2d 1165, 1170 (1999)(citations omitted)). In *Courtney* the Idaho Supreme Court further explained this doctrine stating, “The merely negligent loss of evidence will not support that inference, nor would the intentional destruction of an item that a party had no reason to believe had any evidentiary significance at the time it was destroyed.” *Courtney*, 139 Idaho 821, 824, 87 P.3d 930, 933.

It is clear from the facts of this case that Idaho Power did not intentionally destroy or dispose of the meter with the knowledge that it had any evidentiary significance in this dispute. Consequently, even an inference under the doctrine of spoliation would not arise, much less the more extreme remedy of dismissal of the Company’s claim for the back-billed amount that is sought by Ms. Phillips.

The meter was originally purchased in 1976, and had gone through one periodic maintenance cycle prior to being installed at Ms. Phillips’ residence. The meter was removed on March 26, 2006, as part of a planned maintenance meter exchange. The meter was tested at the Company’s meter test facility on March 28, 2006, and found to be working properly. Because it

had reached the end of its service life, having 30 years in service, it was retired based on purchase year and model criteria pursuant to the normal course of the Company's business.

Ms. Phillips first contacted Idaho Power in June 2006 regarding the increase in her bill. This is the first time that the Company could have known that there may be problem with Ms. Phillips' bill. There were no previous complaints regarding the meter, and no indication that there was any reason to retain the meter outside of the normal course of business. It was not until Ms. Phillips' initial complaint in June that the Company could have possibly known that the meter may have some potential evidentiary value. It is not an unreasonable business practice that a meter which is tested and found to be working properly and is at the end of its useful life would be decommissioned, destroyed, or otherwise disposed of after it is tested. Idaho Power did not destroy or dispose of the meter in bad faith or with the intent to deprive anyone from independently examining it. It disposed of the meter in the ordinary course of business. Consequently, the doctrine of spoliation has no application in this case.

III. Idaho Code §§ 61-313, 61-315, and the filed rate doctrine preclude any reduction to Ms. Phillips' back-billed amount.

The filed rate doctrine is a basic principle of utility regulation that was embodied in *Idaho Code* §§ 61-313 and 61-315 shortly after the turn of the 20th Century when our Public Utility Laws were first adopted (1913). It also has a long history and precedent with the federal regulatory system and the United States Supreme Court. Simply put, the filed rate doctrine states that a utility may charge only the approved rates and charges it has on file with its regulatory body, i.e., its approved tariff on file with the Commission. It means the utility cannot charge more, and also that it cannot charge less than its filed rate.

Idaho Code § 61-313 provides that no public utility shall collect or receive greater or less or different compensation for any service rendered to the public than the rates and charges applicable to such service as specified in its tariffs on file with the Commission and in effect at the time. Additionally, *Idaho Code* § 61-313 specifically provides that no refund or remit of any rates or charges may be made, and no contract or agreement extended except as specified by tariff and as are regularly and uniformly extended to all corporations or persons.

The United States Supreme Court has described the filed rate doctrine as an obligation on the part of the utility to collect only the rates set out in its tariffs and schedules

despite a quoted charge of a lesser or greater amount. In discussing the filed rate doctrine as it pertains to common carriers, the U.S. Supreme Court stated that,

The classic statement of the “filed rate doctrine,” as it has come to be known, is explained in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 35 S.Ct. 494, 59 L.Ed. 853 (1915) . . . “Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.”

Maislin Industries, U.S., Inc., v. Primary Steel, Inc., 497 U.S. 116, 127, 110 S.Ct. 2759, 2766 (1990). The Court has also stated that 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, 118 S.Ct. 1956, 1963 (1998); *Brian Emerick v. Idaho Power Co.*, Idaho Public Utilities Commission Case No. IPC-E-00-03, Order No. 29329 at 4-5 (2000)(discussing the filed rate doctrine). Similarly, *Idaho Code* § 61-315 codifies this concept of non-discriminatory rates, and prohibits a utility from giving preferential treatment to any customer or customer class over another. Together, *Idaho Code* §§ 61-313 and 61-315 codify the concepts that make up the filed rate doctrine for the State of Idaho.

This Commission has on at least two occasions dismissed complaints where an incorrect meter multiplier resulted in an under-billing of customers for actual usage. Case No. AVU-E-00-3, Order No. 28298; Case No. AVU-E-99-7, Order No. 28212. In Case No. AVU-E-99-7, Mountain Mart Exxon in Moscow, Idaho was rebilled for a three-year period under Rule 204 for \$13,180.82 due to an incorrect meter multiplier in bill preparation. Order No. 28212 at 1. In Case No. AVU-E-00-3, Ms. Lisa Kimball was rebilled for a three-year period under Rule 204 for \$1,502.79 due to an incorrect meter multiplier in bill preparation. Order No. 28298 at 1. The Commission upheld the practice in each case of rebilling the full amount for a three-year period under Rule 204. Order No. 28212 at 3, Order No. 28298 at 2. In both of these cases the Commission found that the requested relief was preferential treatment prohibited by *Idaho Code*

§ 61-315 and dismissed the complaints. Order No. 28212 at 3, Order No. 28298 at 2. With regard to Ms. Kimball's complaint the Commission stated,

We decline to cause a summons to issue in this matter or to require further process for what is otherwise a collection matter. All customers of Avista should be treated similarly. We are not insensitive to the fact that enforcement of the rules may result in personal hardship – indeed such hardship is claimed in this case by Ms. Kimball. In this case, however, as in all cases of similar nature, the Rule and law control. The relief requested by Ms. Kimball is preferential treatment prohibited by *Idaho Code* § 61-315.

Order No. 28298 at 2. Similarly, the Commission stated with regard to Mountain Mart Exxon's complaint, "We decline to involve ourselves further in what is otherwise a collection matter." Order No. 28212 at 3.

In the present case, Idaho Power maintains that it cannot compromise the amount of the rebilling without violating the filed rate doctrine, and treating Ms. Phillips in a discriminatory manner. Ms. Phillips maintains that Idaho Power has compromised rebilling amounts with other customers in the past, and that it is discriminatory not to do so with her in this case.

The inaccurately billed energy use in this case is the result of an incorrect meter multiplier. The meter itself was working properly; however, because the incorrect multiplier (20 instead of 40) was used, Ms. Phillips was billed for only half of her actual energy usage. This is a different situation than where there is, for example, a mechanical breakdown or malfunction in the meter where we do not know what the actual usage of energy was. In such a case, a rebilling may still occur, but it must be based upon some kind of estimating methodology to approximate actual usage. The Company admits that it has compromised the amount in settlement of such estimated rebillings where actual usage is unknown and an estimated bill prepared, and that because the actual usage was estimated and debatable there was no violation of the filed rate doctrine. However, Ms. Phillips' actual energy usage was not estimated, it is known. Ms. Phillips argues that because the meter is not available for her to independently verify that it was working properly and that it needed a meter multiplier for billing that the actual amount of usage is not known. However, a review of her billing history is consistent with Idaho Power's assertion that the meter was working properly and the multiplier was incorrect. Because actual usage is known the filed rate doctrine dictates that the tariffed rate be applied, nothing more and nothing less. Because of the filed rate doctrine the amount of the rebilling cannot be compromised.

Ms. Phillips makes the additional arguments that (1) payment of the back-billed amount constitutes a financial hardship; (2) she was denied the opportunity to conserve or reduce her usage; and (3) under equitable principles she should not be required to pay the back-billed amount. First of all, even if we assume the validity of the three statements above, it would not make any difference in the analysis and application of the principles in the filed rate doctrine. The United States Supreme Court, as well as this Commission, has recognized that “This rule is undeniably strict and it obviously may work hardship in some cases . . . [however,] Deviation from it is not permitted upon any pretext.” *Maislin Industries, U.S., Inc., v. Primary Steel, Inc.*, 497 U.S. 116, 127, 110 S.Ct. 2759, 2766 (1990); *Brian Emerick v. Idaho Power Co.*, Idaho Public Utilities Commission Case No. IPC-E-00-3, Order No. 29329 at 4-5 (2000).

Ms. Phillips’ actual energy usage is known, and the inaccuracy in her billing was the result of application of the wrong meter multiplier. Idaho Power properly followed Rule 204 and issued a rebilling limited to the prior three years of use. The incorrect multiplier was in place for Ms. Phillips’ service for 12 years, during which she was billed for, and paid for, only one-half of her actual energy usage. Although it is likely little consolation to Ms. Phillips, our rules currently limit the amount of the under-billed usage that the Company may rebill and collect to only 3 of those 12 years. The filed rate doctrine as set forth by the United States Supreme Court and codified in *Idaho Code* §§ 61-313 and 61-615 prohibits the reduction or alteration of the rebilled amount. The relief requested by Ms. Phillips would constitute prohibited preferential treatment.

Rule 204 provides that an under-billed customer, such as Ms. Phillips, must be given the opportunity to make payment arrangements under Rule 313. IDAPA 31.21.313.03. Rule 204 also provides that the term of the payment arrangements may extend for the length of time that the under-billing accrued, in this case three years. *Id.* Idaho Power has offered to extend the repayment period to some amount beyond the three years discussed in Rule 204 to ease any financial hardship. We direct the Company to offer Ms. Phillips reasonable payment arrangements, which may exceed three years, for the under-billed amount.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Idaho Power Company is an electric corporation pursuant to *Idaho Code* § 61-119, and a public utility pursuant to *Idaho Code* § 61-129. The Idaho Public Utilities Commission has jurisdiction over Idaho Power Company and this matter pursuant to Title 61, Idaho Code,

and specifically including *Idaho Code* §§ 61-119, 61-129, 61-301, 61-302, 61-303, 61-313, 61-315, 61-501, 61-502, 61-503, 61-507, 61-508, 61-520, 61-612, as well as the Commission's Rules of Procedure, IDAPA 31.01.01.000 *et seq.*

After examining the record in this case including the complaint, answer, memoranda and other pleadings, and pursuant to the procedural schedule in Order No. 30300, the Commission finds that an evidentiary hearing in this matter is not required. The relief requested by Ms. Phillips is preferential treatment prohibited by *Idaho Code* §§ 61-313 and 61-315.


ORDER

IT IS HEREBY ORDERED that the complaint of Ms. Jerrene Phillips against Idaho Power Company, Case No. IPC-E-07-01, is dismissed.

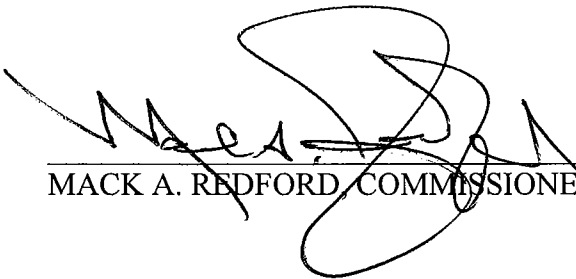
IT IS FURTHER ORDERED that Idaho Power Company make reasonable payment arrangements with Ms. Phillips, which may exceed the three-year repayment period set forth by Rule 204.03.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* § 61-626.


DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 17th
day of September 2007.


PAUL KJELLANDER, PRESIDENT


MARSHA H. SMITH, COMMISSIONER


MACK A. REDFORD, COMMISSIONER

ATTEST:


Jean D. Jewell
Commission Secretary

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