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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF SHERRY COLE'S FORMAL COMPLAINT AGAINST PACIFICORP, d/b/a ROCKY MOUNTAIN POWER COMPANY,	Supreme Court Docket No. 51148-2023
SHERRY COLE, Petitioner-Appellant, v. IDAHO PUBLIC UTILITIES COMMISSION and PACIFICORP, d/b/a ROCKYMOUNTAIN POWER COMPANY, Respondents.	Idaho Public Utilities Commission No. PAC-E-23-12

RESPONSE BRIEF OF RESPONDENT ON APPEAL – PACIFICORP, d/b/a ROCKY MOUNTAIN POWER COMPANY

Appeal from the Idaho Public Utilities Commission
Commissioner Eric Anderson, Presiding.

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Respondent PacifiCorp d/b/a Rocky Mountain Power ("PacifiCorp" or "Company"), by and through their counsel of record, Joe Dallas, hereby submit this *Response Brief of Respondent*, which responds to *Petitioner-Appellant's Brief* filed on February 14, 2024, by the Petitioner-Appellant Sherry Cole ("the appellant").[1] This brief is submitted in accordance with the standards set forth in Idaho Appellate Rule 35(b).[2]

I. STATEMENT OF THE CASE

This case is an appeal from a customer complaint made to the Idaho Public Utilities Commission ("Commission").[3] The appellant asserted that her electric meter, which measures her electrical energy usage, was mistakenly connected to her neighbor's meter and vice versa. The appellant argued that as a result of this cross-connection, she was being overbilled for her electricity use by PacifiCorp. Upon examining the evidence presented during the proceedings, the Commission found that there was insufficient evidence to prove a cross-connection between the meters and therefore dismissed the complaint. This finding was supported by substantial and competent evidence, which included the results of two distinct breaker tests carried out by PacifiCorp electrically verifying that the meters were correctly assigned, as well as an analysis by the Commission's regulatory staff, which found no irregularities in the appellant's electric bills over a five-year period to indicate that her meter was cross-connected.

PacifiCorp's interpretation of the issues presented in the appellant's brief includes: (1) whether the Idaho Supreme Court erred in permitting the Commission to participate as a party in this proceeding; and (2) whether the Commission erred by committing an unlawful regulatory

[1] In compliance with Idaho Appellate Rule 35(d), which states that "Counsel should minimize the use of terms such as 'appellant,' 'respondent,' and 'cross-appellant' in briefs and oral arguments," PacifiCorp will refer to the Appellant simply as 'appellant' and to the Public Utilities Commission as 'Commission' acknowledging it as the other respondent in this proceeding.

[2] References to the *Settled Agency Record* on Appeal in this appeal is referred to herein as "A.R.". References to the Appellant Brief is referred to herein as "A.B.".

[3] Idaho Code § 61-612 provides for the cause of action to file a complaint against a utility before the Commission.

taking when it made a factual determination that the appellant's electric meter had not been cross-connected with her neighbor's meter, leading to the dismissal of her complaint. This Court should dismiss the appellant's arguments because it is a standard practice in administrative law for the agency in question to participate as a party in an appeal concerning its own factual or legal determinations, and the precedents for regulatory takings cited do not apply to the facts of this case. Additionally, the regulatory takings arguments put forth by the appellant were not presented before the Commission and are being introduced for the first time on appeal. Consequently, instead of providing the appellant with the relief sought, this Court should affirm the Commission's factual determination, as supported by substantial and competent evidence.

II. ATTORNEY FEES ON APPEAL

PacifiCorp does not seek attorney fees for this appeal, while the appellant has requested reimbursement for "legal fees incurred." A.B. at 21. Idaho Appellate Rule 35(d) mandates that "if the appellant is claiming attorney fees on appeal, the appellant *must* indicate in the division of issues on appeal that they are claiming attorney fees and state the basis for the claim." (emphasis added). The appellant has failed to meet these stipulations; she has neither specified in the issues on appeal section of her brief that she is claiming attorney fees, nor has she cited any basis or legal authority justifying such a claim. A.B. at 9. Therefore, the Court should deny the appellant's request for attorney fees due to noncompliance with Idaho Appellate Rule 35(d) and the absence of necessary supporting legal authority.

III. ARGUMENT

A. The Idaho Supreme Court did not err in permitting the Commission to be a party to this proceeding.

The appellant suggests that the Idaho Supreme Court erred by overruling her objection to the order amending title filed on November 7, 2023. A.B. at 9. Specifically, the appellant implies

that this Court was mistaken in denying her request to exclude the Commission from participating in this proceeding. A.B. at 17-20. She further suggests that this Court ruling "shows a profound lack of understanding of the constitutional principles that work to protect the citizenry and restrict government action." A.B. at 19. Despite the wide range of spurious arguments presented claiming that it is inappropriate for the Commission to be involved in this proceeding, none hold merit. The contention of the appellant runs counter to both statutory mandates and well-established legal precedent.

Idaho Code Title 61, Chapter 6 outlines the procedure for appealing decisions made by the Commission. Specifically, Idaho Code § 61-630 clearly states that the Commission has the right to appear and be heard in any appeal under this chapter: "The commission and any party to the proceeding, whether served with notice of appeal or not, *shall have the right* to appear and be heard on any appeal taken hereunder." (emphasis added). Accordingly, the Commission is statutorily entitled to participate as a party in this proceeding because the appellant initiated an appeal of the Commission's decision pursuant to Idaho Code § 61-627. A.R. at 69.

The involvement of the Commission as a party in appeals of its factual and legal determinations has been consistent in past cases before this Court. For example, in *Industrial Customers of Idaho Power v. Idaho Public Utilities Commission,* 134 Idaho 285, 288, 1 P.3d 768, 789 (2000), electric utility customers sought judicial review of the Commission's decision to reduce the amortization period for the utility's recovery of deferred demand-side management expenditures. The Commission's role as a respondent is evident from the case title, and it filed a response brief in this Idaho Supreme Court proceeding on March 23, 1999. The practice of allowing an agency to be a party in an appeal of its actions is also common practice in federal cases, and indeed there are numerous examples before the United States Supreme Court. *See e.g., West Virginia v. EPA*, 597 U.S. 697, 142 S. Ct. 2228 (2022); *EPA v. EME Homer City Generation,*

L.P., 572 U.S. 489, 134 S. Ct. 1584 (2014); *California v. FERC*, 495 U.S. 490, 110 S. Ct. 2024 (1990).

Accordingly, the Court should affirm its decision permitting the Commission to participate as a party in this proceeding, as it is consistent with statutory provisions and established legal precedent.

B. The Court should dismiss the regulatory takings arguments presented by the appellant, as they are being introduced for the first time on appeal.

It is a well-established principle in Idaho that "in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for an assignment of error." *Proesch v. Canyon Cty. Bd. of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002). Indeed, "[t]he longstanding rule of this Court is that [it] will not consider issues that are presented for the first time on appeal." *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). This precedent has been affirmed in several cases involving appeals from administrative agencies: In *Viveros v. State Dep't of Health & Welfare*, 126 Idaho 714, 716, 889 P.2d 1104, 1106 (1995), it was noted that "[n]o facts, theories or argumentation were presented to the hearing officer on these issues. These issues will not be heard for the first time on appeal." Additionally, in *Proesch*, 137 Idaho at 122, 44 P.3d at 1177, the Court held that "the Appellants did not preserve this issue before the Board but have raised it for the first time on appeal. Consequently, it will not be determined by this Court."

This longstanding rule also extends to constitutional arguments raised for the first time on appeal. In *Sanchez*, the Court declined to consider the constitutionality of a statute that required the award of attorney fees upon the dismissal of frivolous habeas corpus petitions because the issue was not argued in the lower court proceedings. *Sanchez*, 120 Idaho at 322, 815 P.2d at 1062

("Sanchez did not challenge the constitutionality of I.C. § 12-122 until the appeal to this Court. Under these circumstances, we will not consider the issue.").

Like the appellant in *Sanchez*, the appellant in the present case also neglected to bring forth any of these constitutional arguments related to the Commission's factual finding concerning her electric meter during her initial complaint or in her motion for reconsideration. Specifically, her initial complaint and motion for reconsideration did not include any contentions regarding how a Commission's factual determination regarding her electric meter and dismissal of her complaint could result in a regulatory taking. A.R. 5-6, 12-13, 47-51. Consequently, the Court should find that the appellant did not raise this issue before the Commission and, therefore, these arguments will not be considered for the first time on appeal.

C. The Commission's factual determination regarding the appellant's electric meter and the subsequent dismissal of the complaint did not amount to a regulatory taking.

If the Court elects to consider the regulatory taking argument on appeal, it should conclude that the argument lacks legal merit. The appellant contends that a state entity, in its role as a factfinder, making a factual determination that results in a party's failure to prevail in a civil action, amounts to an unconstitutional regulatory taking under the Fifth and Fourteenth Amendments of the United States Constitution. A.B. at 10-17. However, takings typically involve more direct government actions against property rights rather than procedural results that emerge in the normal course of civil litigation from factual determinations made by the trier of fact.

The Takings Clause of the Fifth Amendment, which is applied to the states through the Fourteenth Amendment, protects against the taking of private property for public use without just compensation, as established in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 241, 17 S. Ct. 581, 586 (1897). This clause is traditionally understood to cover physical takings, where the government seizes or occupies property, and regulatory takings, where a government regulation

so limits the use of private property that it effectively strips the owner of all or most of its economic value or utility. *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 537, 125 S. Ct. 2074, 2080 (2005).[4]

In the context of this case, there is no basis for a claim of a taking. The Commission did not physically take any property from the appellant, nor did it deprive the appellant of the economic value or utility of their property. As stipulated by Idaho Code §§ 61-601 to 61-642, the Commission, acting as the trier of fact, merely evaluated the evidence presented during the complaint proceeding and concluded that there was insufficient evidence to support the appellant's claim that her electric meter had been cross-connected. A.R. at 41, 65-67. As a result, the Commission dismissed the appellant's complaint against PacifiCorp, as her claim of being overcharged for electricity was predicated on the unsupported assertion that her meter had been cross-connected. A.R. at 41, 65-67. The appellant has not presented any legal precedent to support the notion that the Takings Clause guarantees that any person in a civil action against another entity is entitled to have the state, as the trier of fact, rule in their favor, or that it absolves such individual from their burden of proof to convince the trier of fact. Therefore, the Court should dismiss the appellant's regulatory taking argument as it lacks legal foundation.

Furthermore, the appellant alleges that PacifiCorp committed a regulatory taking. A.B. at 21. According to Idaho Appellate Rule 35(a)(6), the Appellant's Brief must include "citations to authorities, statutes, and parts of the transcript and record relied upon." The appellant has not provided any legal authority to demonstrate how the Fifth Amendment of the United States

[4] A *regulatory taking* occurs when government regulates private property to such a degree that government effectively condemns the property but does not divest the affected property owner of title to the property. The U.S. Supreme Court has been unable to develop a single test to determine whether a particular regulation effects a taking. Instead, the Court has recognized that with very few exceptions, determining whether a regulatory taking has occurred is an ad hoc, factual inquiry that depends largely upon the particular circumstances of each case. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-124, 98 S. Ct. 2646, 2659 (1978) (acknowledging that the Court has been unable to develop any set formula for deciding when justice and fairness require government to compensate an owner for economic injuries sustained as a result of regulation).

Constitution applies to PacifiCorp as a private, non-state entity, particularly given the procedural posture of this case. PacifiCorp is not aware of any precedent that would support such an application and believes that, in accordance with Idaho Appellate Rule 35(a)(6), considerations of due process, and the fact this issue is raise for the first time on appeal, this Court should not entertain these unsupported arguments in the current appeal.

D. The Commission's factual determination regarding the appellant's electric meter and the subsequent dismissal of the complaint was supported by substantial and competent evidence.

Although not necessary to address the appellant's issues on appeals, the Court may choose to affirm the Commission's finding that the appellant's meter was not cross-connected with her neighbor's meter. The appropriate standard of review for the Commission's factual determination is as follows: "Where the Commission's findings are supported by substantial, competent evidence, this Court *must* affirm those findings and the Commission's decision." *Indus. Customers of Idaho Power*, 134 Idaho at 288, 1 P.3d at 789 (emphasis added).

The Commission's factual determination that the appellant's meter was not cross-connected with her neighbor's meter is supported by substantial and competent evidence. Specifically, the Commission reviewed evidence that the Company preformed two separate breaker tests[5] to electrically verify that the appellant's meter was indeed correctly assigned. A.R. at 40, 63. Additionally, the Commission took into account evidence presented in the form of an affidavit by its regulatory staff, which concluded that there was no evidence in the appellant's electric bills to support the claim of a crossed meter. A.R. at 65. As explained by the Commission:

[5] A breaker test is a procedure performed to determine whether there is a cross-connection or misalignment in the electrical wiring between meters. It involves temporarily disconnecting the electrical supply to each meter and observing any impact on neighboring meters to identify potential cross-connections. The main service disconnect breaker is utilized, if available, to turn off the electrical supply downstream from a specific meter, allowing an individual to assess what is served (or not served) by that meter. This helps in identifying any cross-connections or misalignments in the electrical wiring between meters. A.R. at 18.

> In this Affidavit, Staff noted that it had reviewed the Petitioner's utility bills from the Company and did not believe the data supported a finding that the Petitioner's meter was cross-connected with her neighbor's meter. Staff examined the Petitioner's bills from the time that she stated the allegedly cross-connected meters were fixed and compared that time period with the same time period from previous years. Staff stated that her bills from this period were very comparable with the commensurate period for each previous year going back to 2018. Staff also correlated this data with the average monthly temperature for each year. This increased Staff's confidence that the minor differences in the prices for each month can largely be explained by normal temperature fluctuations. Accordingly, Staff stated that the data does not support a finding the meters in question were ever cross-connected. A.R. at 65.[6]

The appellant's primary evidence supporting her claim that her meter was cross-connected was the initial credit issued to her account by PacifiCorp prior to any breaker tests being conducted to electrically verify the presence of a cross-connection or misalignment. A.R. at 65-66. PacifiCorp clarified the reason for this credit and the subsequent corrections following the breaker test performed in its answer to the appellant's complaint. A.R. at 18-21. The Company further outlined that these actions were consistent with Electric Service Regulation No. 7(a), which specifically anticipates the occurrence of billing errors during operations and outlines the appropriate procedures to follow once an error is discovered. A.R. at 21. PacifiCorp acknowledges that utility bills represent a significant fixed expense for its customers and has expressed regret for the initial billing mistake in this instance. A.R. at 21. As a gesture of goodwill and to compensate for any inconvenience caused by the initial credit and its later reversal, the Company issued a $450 credit to the appellant in line with its internal customer service policies. A.R. at 20.

The Commission duly assessed and weighed all the evidence submitted, which included the breaker tests, the regulatory staff's affidavit, and the initial billing error. A.R. at 41, 65-67. It appropriately concluded that the appellant "has not presented sufficient evidence to show that her

[6]The appellant alleges that the affidavit was perjured but fails to provide any evidence within the administrative record to substantiate this claim. A.B. at 7.

meter was cross-connected, or that she was overcharged for electric service." A.R. at 66. Consequently, the appellant's complaint was dismissed because her claim of being overcharged for electricity hinged on the factual assertion that her meter was cross-connected—an assertion that was not substantiated. Given the Commission's role as the trier of fact and its careful consideration of the evidence presented in the proceeding, this Court should affirm that the Commission's factual determination was supported by substantial and competent evidence and affirm its decision to dismiss the appellant's complaint.

IV. CONCLUSION

Based on the reasons detailed above, this Court should deny the relief sought by the appellant, which includes the request for attorney fees. Furthermore, PacifiCorp maintains that the appellant's arguments lack merit, are being raised for the first time on appeal, and that this Court can resolve this appeal without the need for oral argument. Nonetheless, should the Court determine otherwise, PacifiCorp stands ready to participate in any scheduled oral argument.

Respectfully submitted this 13th day of March, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 2024, one true and correct electronic copy of *Response Brief of Respondent on Appeal* was served via iCourt electronic service, pursuant to the Idaho Rules for Electronic Filing and Service, and email on the following:

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