

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHERRY COLE,)	Supreme Court
)	Docket No. 51148-2023
Petitioner – Appellant,)	
)	
v.)	Idaho Public Utilities Commission No.
)	PAC-E-23-12
IDAHO PUBLIC UTILITIES COMMISSION)	
and PACIFICORP, d/b/a ROCKY MOUNTAIN)	
POWER COMPANY,)	
)	RESPONDENT BRIEF OF THE
Respondents.)	IDAHO PUBLIC UTILITIES
)	COMMISSION

Appeal from Idaho Public Utilities Commission
Commissioner Eric Anderson, Presiding

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Idaho Public Utilities Commission Orders

- Order No. 35856 1, 2, 4, 5, 8, 9, 10, 12
- Order No. 35903 1, 2, 5, 9, 10, 12

COMES NOW the Respondent on Appeal, the Idaho Public Utilities Commission (“Commission”) and submits this opposition to the brief filed by Petitioner-Appellant (“Cole Brief”) Sherry Cole (“Ms. Cole”), pro se. The Commission respectfully requests that the Court affirm the Commission’s Final Order No. 35856 and Reconsideration Order No. 35903.

I. STATEMENT OF THE CASE

This case comes before the Idaho Supreme Court (“Court”) due to Ms. Cole’s appeal of the factual findings of Commission Final Order No. 35856; in this order, the Commission found that Ms. Cole’s objection was unsubstantiated when she objected to the reversal of a bill credit by Rocky Mountain Power, a division of PacifiCorp (“Company”). Ms. Cole is also appealing the Commission’s denial of her Petition for Reconsideration; this was denied when the Commission noted that Ms. Cole failed to show how Final Order No. 35856 was “unreasonable, unlawful, erroneous or not in conformity with the law.” R. Vol I, at 65-67.

II. THE COURSE OF PROCEEDINGS

On March 16, 2023, Ms. Cole filed a formal complaint (“Complaint”) and requested that the Commission order the Company to compensate her for losses she claimed were incurred due to an allegedly cross-connected electric meter. *Id.* at 5. Ms. Cole alleged that she was overcharged for her neighbor’s higher power consumption due to the cross-connection. *Id.* The Commission issued a Summons and Complaint directing the Company to respond to Ms. Cole’s Complaint. *Id.* at 9.

On June 8, 2023, the Company filed its Answer and Motion to Dismiss (“Answer”). The Company noted that, while initially agreed with Ms. Cole regarding the alleged cross-connection,

that later, more accurate, testing led the Company to believe that no cross-connection had ever occurred. *Id.* at 17 and 19. The Company provided billing information to support its claim. *Id.* at 24-37.

On July 24, 2023, the Commission issued Final Order No. 35856 finding that Ms. Cole had not substantiated her claim that a cross-connection occurred. *Id.* at 41.

On July 28, 2023, Ms. Cole filed a document intended to be her Petition for Reconsideration. *Id.* at 47. On August 14, 2023, Commission Staff (“Staff”) filed an affidavit regarding Staff’s analysis of Ms. Cole’s bills spanning the timeframe Ms. Cole believed that the meters were cross-connected; Staff argued that Ms. Cole’s billing history showed that no cross-connection had taken place. *Id.* at 58.

On August 22, 2023, the Commission issued Reconsideration Order No. 35903 denying Ms. Cole’s request for reconsideration. *Id.* at 65-67. The Commission found that Ms. Cole had failed to show how Final Order No. 35856 was “unreasonable, unlawful, erroneous or not in conformity with the law.” *Id.* at 65-67.

On September 18, 2023, Ms. Cole filed a Notice of Appeal. *Id.* at 68.

III. STATEMENT OF FACTS

1. The Complaint.

Ms. Cole alleged that the Company cross-connected her meter with her neighbor’s resulting in Ms. Cole being charged for her neighbor’s higher power consumption. R. Vol I, p. 5. Ms. Cole stated that the Company’s initial inspection supported Ms. Cole’s cross-connection allegation. *Id.* Ms. Cole stated that Company then told her a workman would be out to fix the issue. *Id.* In January

2023, the Company dispatched a technician. Ms. Cole alleged that this technician then fixed a cross-connection in the meters. *Id.* Ms. Cole represented she was provided a written report dated January 25, 2023. *Id.* Ms. Cole also stated that a \$1,620.08 credit was subsequently applied to her account. Regarding her issue with the Company, Ms. Cole stated that “[w]e were good at this point.” *Id.*

However, Ms. Cole explained that when she received her bill for February, the \$1,620.08 credit had been reversed. *Id.* Upon inquiry, Ms. Cole stated that the Company told her that her meter had never been cross-connected which is why the credit was reversed. *Id.* Ms. Cole stated that the Company offered her a \$450 credit as a sign of goodwill. *Id.* Ms. Cole requested that the Commission order the Company to reinstate the \$1,620.08 credit. *Id.* at 6.

2. The Company’s Answer.

The Company admitted that its own technician did not initially utilize the proper process to accurately evaluate Ms. Cole’s meter. The Company stated that this led to an erroneous belief and representation that Ms. Cole’s electric meter had been cross-connected with her neighbor’s. *Id.* at 17. The Company explained that the previous technician should have performed a breaker test. *Id.* The Company explained that a breaker test:

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.

Id. at 18. The Company stated that once the breaker test was performed, the results revealed that Ms. Cole’s meter was working properly and was not cross-connected. *Id.* at 19. The Company represented it conducted a second breaker test and confirmed there was no cross-connection. *Id.* The Company stated that it offered Ms. Cole a \$450 credit for any inconvenience due to its initial misunderstanding. *Id.* at 21. However, the Company maintained that Ms. Cole had not identified any legal authority that would require the Company to provide Ms. Cole with any compensation. *Id.* at 22. The Company’s Answer also contained billing information contextualizing its claims. *Id.* at 24-37.

3. Final Order No. 35856.

On July 24, 2023, the Commission issued Final Order No. 35856. *Id.* at 39. After reviewing the record, the Commission dismissed Ms. Cole’s Complaint finding that Ms. Cole had “not provided anything in the record to substantiate that she was overcharged.” *Id.* at 41.

4. Petition For Reconsideration.

Ms. Cole asked that the Commission reconsider its decision to dismiss the Complaint. *Id.* at 47. Ms. Cole largely restated the narrative of her Complaint and disputed certain exhibits from the Answer. *Id.* at 48-49. Ms. Cole requested that the Commission order reimbursement of the money she claimed to have been overcharged for the alleged cross-connection. *Id.* at 50.

Ms. Cole also attached the Company’s letter that initially, but incorrectly, informed her that her meter was cross-connected, and that she would be granted a credit of \$1,262.52¹ applied

¹ The January 25, 2023, letter stated that her credit would be \$1,262.52. The “Adjustments” portion of Ms. Cole’s second attached bill lists a “+1,621.08” number which appears to be where Ms. Cole arrived at her \$1,620.08 request for compensation. R. Vol I, p. 56.

to her next bill. *Id.* at 52. Ms. Cole also provided two billing statements that showed a credit initially being applied to her account balance. *Id.* at 54-56.

5. Staff's Affidavit.

On August 14, 2023, Staff filed the Affidavit of Jon Kruck (“Affidavit”), which represented that Staff reviewed five years of Ms. Cole’s utility bills, both before and after the period when Ms. Cole alleged there was a meter cross-connection. *Id.* at 58. Staff did not believe the data from these utility bills supported a finding that Ms. Cole’s meter was ever cross-connected. *Id.* Staff compared the months after the alleged cross-connection with the same months from the previous years (the period Ms. Cole stated that her meter was cross-connected with her neighbor’s meter). Staff could see no material change in consumption which would indicate that there was ever a cross-connection. *Id.* at 59. Staff also correlated this data with the average monthly temperature for each comparable month in each year. This comparison increased Staff’s confidence that the immaterial differences in price when comparing one month to the same month from another year could be explained by temperature fluctuations in the average monthly temperature. *Id.* Accordingly, Staff concluded that the billing data did not support a finding that the meters in question were cross-connected. *Id.* at 58-59.

6. Reconsideration Order No. 35903.

The Commission found that Ms. Cole’s Petition did not “meet the substantive requirements for a petition for reconsideration” as she “largely reiterate[d] information that was already in the Complaint. . . . [F]acts regarding the Company’s previous actions were already known by the Commission and factored into the Commission’s decision in Order No. 35856.” *Id.* at 66.

Accordingly, the Commission denied Ms. Cole’s Petition for Reconsideration for her failure to engage with the requirements for a reconsideration of her case.² *Id.* 65-67.

IV. ISSUES PRESENTED ON APPEAL

The Commission restates the issues on appeal as follows:

1. Whether the Commission regularly pursued its authority in dismissing Ms. Cole’s Complaint.
2. Whether Ms. Cole waived her remaining arguments on appeal by failing to raise them below.
3. Whether Ms. Cole is entitled to attorney fees on appeal.

V. STANDARD OF REVIEW

The Idaho Constitution grants the Court jurisdiction to review any order of the public utilities commission, and it grants the legislature the authority to “provide conditions of appeal, scope of appeal, and procedure on appeal from orders of the public utilities commission.” Idaho Const. art. V, § 9. “Pursuant to that authority, the legislature has enacted Idaho Code section 61–629 which limits the scope of review to determining whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho.” *Idaho Power Co.*

² The Idaho Public Utilities Commission Rules of Procedure provide that: “Petitions for reconsideration must specify (a) why the order or any issue decided in it is unreasonable, unlawful, erroneous or not in conformity with the law, and (b) the nature and quantity of evidence or argument the petitioner will offer if reconsideration is granted.” IDAPA 31.01.01.331.01.

v. Idaho Pub. Utilities Comm'n, 155 Idaho 780, 786, 316 P.3d 1278, 1284 (2013) (internal quotation omitted).³ Idaho Code § 61-629 provides in full:

No new or additional evidence may be introduced in the Supreme Court, but the appeal shall be heard on the record of the commission as certified by it. The review on appeal shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho. Upon the hearing the Supreme Court shall enter judgment, either affirming or setting aside or setting aside in part the order of the commission. In case the order of the commission is set aside or set aside in part, the commission, upon its own motion or upon motion of any of the parties, may alter or amend the order appealed from to meet the objections of the court in the manner prescribed in section 61-624, Idaho Code.

I.C. § 61-629.

As part of its review, the Court may consider whether the Commission “abused or exceeded its authority or made findings unsupported by substantial evidence.” *Intermountain Gas Co. v. Idaho Pub. Utilities Comm'n*, 97 Idaho 113, 127, 540 P.2d 775, 789 (1975). “The Commission’s findings of fact are to be sustained unless it appears that the clear weight of the evidence is against its conclusions or that the evidence is strong and persuasive that the Commission abused its discretion.” *In re Jay Hulet’s Complaint Regarding Idaho Power Co.’s Irrigation Buy-Back Program*, 138 Idaho 476, 478, 65 P.3d 498, 500 (2003).

³ In *Idaho Power Co. v. Tidwell*, 164 Idaho 571, 434 P.3d 175 (2018), the Court utilized the following standard of review: “When we review a [lower tribunal’s] decision to grant or deny a motion for reconsideration, we use the same standard of review the lower [tribunal] used in deciding the motion for reconsideration.” *Pandrea v. Barrett*, 160 Idaho 165, 171, 369 P.3d 943, 949 (2016) (quoting *Westby v. Schaefer*, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2014)).” The Commission has been unable to find any other instance of the Court utilizing this standard with respect to appeals from the Idaho Public Utilities Commission.

“The burden is on the party challenging the Commission’s findings to show that they are unsupported by the evidence.” *Id.*

The Court will not consider arguments raised for the first time on appeal:

It is a well settled rule that in an appeal from the commission matters may not be raised for the first time on appeal and that where the objections were not raised in the petition for rehearing, they will not be considered by this court. The rationale behind the rule is to afford IPUC the opportunity to rectify any mistake before presenting the issue to the Supreme Court.

Eagle Water Co. v. Idaho Pub. Utilities Comm’n, 130 Idaho 314, 316-17, 940 P.2d 1133, 1135-36 (1997) (internal citation and quotation omitted).

VI. ARGUMENT

1. The Commission regularly pursued its authority in dismissing Ms. Cole’s Complaint.

To the extent that Ms. Cole presents any arguments on appeal concerning any errors in the Commission’s orders, it appears that Ms. Cole contends that the orders were not supported by sufficient evidence:

The Decisions made by the Idaho Public Utilities Commission are in error due to ignoring the facts of the case and accepting perjured sworn statement of the commission investigator and false information provided by Rocky Mountain Power when the appellant, Sherry Cole’s submitted evidence predated Rocky Mountain Powers false claim.

Cole Brief at 10-11. Ms. Cole is incorrect.

In its Final Order No. 35856, the Commission stated: “Having reviewed the Complaint, Answer, and the Petitioner’s reply, we dismiss the Complaint. Other than her statements, the Petitioner has not provided anything in the record to substantiate that she was overcharged.” R.

Vol I, p. 41. At the time of the Commission’s decision, Ms. Cole had not submitted any evidence outside of her written statements in her Complaint to support her claims. *Id.* 5-6.

Upon reconsideration, Ms. Cole submitted evidence consisting of a letter from the Company indicating a modification had been made to her bill, and copies of her billing statements from January and February of 2023. *Id.* 47-57. Notably, prior to reconsideration the two billing statements had already been submitted by the Company in its Answer to the Complaint. *Id.* 24-31. Further, the letter from the Company indicating a modification was made to Ms. Cole’s bill pertained to an undisputed fact, as the Company did not contend that an initial modification had not been made, rather that the initial modification was in error. *Id.* 16-22. During the reconsideration proceedings, Staff submitted the affidavit of Utilities Compliance Investigator Jon Kruck, who performed an analysis of the monthly billing from February 27, 2018, through August 2, 2023. *Id.* 58-59.

In its Reconsideration Order No. 35903, the Commission reasoned:

The Petition largely reiterates information that was already in the Complaint—including information that shows that, at one point, the Company believed that the Petitioner’s meter was cross-connected and provided the Petitioner with a bill credit. After investigation, the Company determined that no cross-connection occurred and reversed the bill credit. Staff’s analysis corroborated the Company’s assertion that there was no cross-connection. These facts regarding the Company’s previous actions were already known by the Commission and factored into the Commission’s decision in Order No. 35856. The Petitioner has not presented sufficient evidence to show that her meter was cross-connected, or that she was overcharged for electric service.

Id. 66. Further, the Commission evaluated the evidence submitted and held that Ms. Cole failed to argue that Final Order No. 35856 was “unreasonable, unlawful, erroneous, or not in conformity

with the law” as required by the Public Utilities Commission’s Rules of Procedure, IDAPA 31.01.01.331.01; R. Vol I, p. 66.

The record shows that the Commission fully evaluated all evidence presented in the underlying record before making its determination—including the Company’s information concerning the breaker test and all evidence offered by Ms. Cole. To the extent that the Court may view the evidence in the record differently, “[t]he Court will not displace the Commission’s findings of fact when faced with conflicting evidence, even though the Court would have made a different choice had the matter been before it *de novo*.” *In re Jay Hulet’s Complaint*, 138 Idaho at 478 (internal quotation omitted).

The record shows that the Commission regularly pursued its authority in dismissing Ms. Cole’s Complaint. The Commission pursued its authority in the Commission’s Final Order No. 35856 (dismissing the Complaint for lack of evidence to support the claim). The Commission likewise pursued its authority in the Commission’s Reconsideration Order No. 35903 (dismissing Ms. Cole’s Petition for Reconsideration for lack of evidence and failure to meet the substantive requirements of the Public Utilities Commission’s Rules of Procedure).

For those reasons, the Commission’s Final Order No. 35856 and Reconsideration Order No. 35903 should be affirmed.

2. Ms. Cole has waived her remaining arguments on appeal by not raising them below.

For the first time on appeal, Ms. Cole presents arguments concerning regulatory takings and violations of the Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United

States. Cole Brief at 12-19.⁴ Ms. Cole waived those arguments by not raising them before the Commission, and those arguments are not properly before the Court. While Idaho Code § 61-629 does allow the Court to consider “whether the order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho,” section 61-629 provides the “scope” of the review for issues properly raised before the Court, not an open door for all constitutional issues to be argued for the first time on appeal. As set forth above, the Court will not consider arguments raised for the first time on appeal:

It is a well settled rule that in an appeal from the commission matters may not be raised for the first time on appeal and that where the objections were not raised in the petition for rehearing, they will not be considered by this court. The rationale behind the rule is to afford IPUC the opportunity to rectify any mistake before presenting the issue to the Supreme Court.

Eagle Water Co., 130 Idaho at 316-17 (internal citation and quotation omitted).

The purpose of an application for the rehearing provided by statute, and it must be presumed to have a useful purpose, is to afford an opportunity to the parties to bring to the attention of the Commission, in an orderly manner, any question theretofore determined in the matter, and thereby afford the Commission an opportunity to rectify any mistake made by it before presenting the same to the Supreme Court.

Key Transp., Inc. v. Trans Magic Airlines Corp., 96 Idaho 110, 113, 524 P.2d 1338, 1341 (1974)

(internal citations and quotations omitted).

⁴ There is one area Ms. Cole discusses in her brief related to regulatory takings that warrants clarification. Due to the Commission deciding in the Company’s favor in the underlying case, Ms. Cole alleges without evidence that improper conduct between the Company and the Commission resulted in a Public Private Partnership. Cole Brief at 10. To partially illustrate the foundations of this claim, Ms. Cole states that the Commission’s attorney is also listed as the Company’s attorney in the Court’s i-Court system. *Id.* at 9. The source of this mistake is unclear, but the i-Court information depicting this mistake was furnished to the Court’s staff by Ms. Cole—not the Commission or the Company. It is worth mentioning that the Company and the Commission are represented by separate and unrelated counsel.

In this case, the Commission by its orders denied Ms. Cole’s Complaint and Petition for Reconsideration on July 24, 2023, and August 22, 2023, respectively. Ms. Cole appealed to the Court on September 18, 2023. After a close review of the record, the Commission notes that only on appeal did Ms. Cole argue that a regulatory taking had occurred. Ms. Cole fails to show where this argument was made in her Complaint or Petition for Reconsideration; Ms. Cole’s brief fails to cite to where this was argued in the underlying record—before her Notice of Appeal was filed. Instead, Ms. Cole’s brief raises new claims on appeal.

3. Ms. Cole is not entitled to attorney fees.

In her brief, Ms. Cole states that: “Appellant is seeking the return of all her money legally owed by Rockey [sic] Mountain power, Legal fees incurred and damages.” Cole Brief at 21. Ms. Cole does not provide any argument or authority to support her claim for attorney fees as required by Idaho Appellate Rule 35. Additionally, the Court has previously held that pro se litigants are not entitled to attorney fees. *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009). For those reasons, Ms. Cole is not entitled to the attorney fees.

VII. CONCLUSION

The record shows that: (1) the Commission regularly pursued its authority in dismissing Ms. Cole’s Complaint; (2) Ms. Cole waived her remaining arguments on appeal by failing to raise them below; and (3) Ms. Cole is not entitled to attorney fees on appeal as she is not an attorney. The Commission requests that the Court affirm the Commission’s Final Order No. 35856 and Reconsideration Order No. 35903.

The Commission does not believe that oral argument is necessary in this case. Should the Court determine otherwise, the Commission stands ready to participate in any scheduled oral argument.

Respectfully submitted this 13th day of March 2024.



Michael Duval
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Idaho Public Utilities Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of March, 2024, one true and correct copy of *Respondent Brief of the Idaho Public Utilities Commission*, in Supreme Court Docket No. 51148-2023, was served via iCourt electronic service to the following:

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