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IDAHO PUBLIC
UTILITIES COMMISSION

IN THE SUPREME COURT OF THE STATE OF IDAHO

Samuel and Peggy Edwards, **Complainants-Appellants,** **vs.** **IDAHO PUBLIC UTILITIES COMMISSION and PACIFICORP, dba ROCKY MOUNTAIN POWER COMPANY,** **Respondents.**	**Reply to Respondents' Briefs** **Supreme Court Docket No. 51238-2023** **Public Utilities Commission No. PAC-E-23-05**

Appeal from the Idaho Public Utilities Commission, The Honorable Eric Anderson presiding.

Appellants, pro se

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Complainants-Appellants Samuel and Peggy Edwards ("the Appellants") submit a reply to Respondent's Brief of the Idaho Public Utilities Commision ("Commission") and Response Brief of Respondent on Appeal – PACIFICORP, d/b/a ROCKY MOUNTAIN POWER COMPANY ("Company").[1]

I. Nature of the Reply

This Reply does not attempt to restate the Arguments and Conclusions which have been raised in A.B. So, it seems appropriate to explain the nature, structure or methodology of this reply. Appellants have replied to Respondents' three similar counter-arguments. The Commission also asserts that the Appellants' three issues could be rephrased into a single issue: "whether the Edwards have failed to show that the Commission did not regularly pursue its authority to deny their petition for reconsideration." R.B.IPUC at 7. More on this in Section III, Legal Standard.

Acknowledging the Court's warning to pro se litigants[2], we begin.

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[1] References to the *Settled Agency Record* on Appeal in this appeal are referenced herein as "A.R.". References to the Appellants Brief are referred to herein as "A.B.". References to the Response Brief of the Company are referred to herein as "R.B.RMP", and references to the Respondent's Brief of the Commission are referred to herein as "R.B.IPUC".

[2] It is not for convenience or cost that Appellants present themselves as pro se litigants to this Court. Nevertheless, believing that certain issues of law would not otherwise be raised to this Court for review, Appellants acknowledge that "pro se civil litigants are not accorded special latitude… [and] are held to the same standards and rules as those represented by an attorney." Suitts v. Nix, 141 Idaho 706, 709, 117 P.3d 120, 123 (2005) (quoting Twin Falls County v. Coates, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003)). Moreover, "Pro se litigants are not accorded any special consideration simply because they are representing themselves and are not excused from adhering to procedural rules." Nelson, 144 Idaho at 718, 170 P.3d at 383 (citing Sammis v. Magnetek, Inc., 130 Idaho 342, 346, 941 P.2d 314, 318 (1997)).

II. Lingering Issues after Responses

A. Does the Commission determine whether Appellants have provided reason for termination of service?

B. Should this Court defer to the Commission's interpretation of ESRs within its Final Orders?

C. Must Appellants' constitutional argument be barred from consideration, given that it has been raised for first time on appeal to the Idaho Supreme Court?

III. Legal Standard

> 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 with emphasis added

The party appealing a Final Order has the burden to first show whether and how the Commission erred in regularly pursuing its authority. Also, the Supreme Court has asserted that when it reviews a lower tribunal's decision to grant or deny a motion for reconsideration, it uses "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) (quoted in Idaho Power and IPUC vs. Tidwell, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2018)). Acknowledging the Commission's request (R.B.IPUC at 9 footnote), the Appellants include the standard of review until this Court may rule:

> 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)

Besides the determining whether the Commission has regularly pursued its authority, I.C. 61-629 also requires this Court to include "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."

The Supreme Court must affirm the Final Orders of the Commission, unless it determines that the Commission has not regularly pursued its authority, including violation of some right of the appellant, as stated above. Upon the hearing this Court shall enter judgment either setting aside or setting aside in part the order of the Commission. In this case, 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)

IV. Argument

A. Final Orders Do Not Answer Whether Appellants Have Provided Proper Legal Grounds for Service Termination.

Both Responses argue that "a finding pertaining to the UCRRs was not necessary to resolve the claims raised in the complaint". R.B.RMP at 2 and R.B.IPUC at 11. The Commission further explained that tariffs "bind both the customer and public utility with the force of law upon filing and approval by the Commission." R.B.IPUC at 12. Yet, the Commission's specific reference to controlling law is dubious: "[the] provisions of the Company's tariff authorizing it to terminate service when a customer obstructs access to

an electric meter are found in ESR No. 6. (R. 21).” R.B.IPUC at 12. To clarify, ESR 6 sets forth the regulation affecting company installation, including circumstances required for the Customer to provide safe, unencumbered access. Further, the Commission found and the Company has also asserted that “removing metering devices” is not necessarily service termination, but is an essential element of meter replacement. See A.R. at 387 and R.B.RMP at 5. Rather, ESR 10 sets forth regulations affecting termination of service, and ESR 10.1 lists reasons the Company may terminate service without their permission after adequate notice.

The Company asserts (R.B.RMP at 3) that “the Commission only needed to establish that PacifiCorp had authority to install AMI meters and that the notice of disconnection of service was lawful…” and concludes (ibid at 4) that “this Court should find that the Commission made sufficient findings to dismiss the unsupported claims in the complaint related to the notice of disconnection of service.” Yet, authority to install AMI meters does not constitute a finding for service termination, and unsupported claims including the various criminal and tort offenses[3] of the Complaint are irrelevant to this appeal. Rather, Appellants have argued that Order 35904 is unreasonable because the Commission does not find whether Appellants have provided grounds for service termination, now clarified as per ESR 10.1.

As Appellants argue on A.B. at 13-14, UCRR 301 allows “the applicant [to] file an informal or formal complaint with the Commission.” Standards of review “must be provided by statute.” Idaho Rules of Civil Procedure Rule 84[2]. So, the Commission

[3] The various criminal and tort offenses cited by the Company in reference to Complaint are not preserved for appeal, since “It is a well settled rule that in an appeal from the commission matters may not be raised for the first time on appeal”. *Key Transp., Inc. v. Trans Magic Airlines Corp*., 96 Idaho 110, 112-113, 524 P.2d 1338, 1340-41 (1974).

must specify the legal standard for involuntary service termination and the Commission's determination of how grounds for involuntary service termination are found. Otherwise, the Complaint has not been answered in regular pursuit of the Commission's authority (I.C. § 61-629) and, as argued in A.B. at 16-17, the Company is left with a conflict of interest related to the Complainant. Appellants therefore conclude that as the Commission has clarified that ESRs "bind both the customer and public utility with the force of law" and ESR 10.1 lists the reasons for service termination; so, the Commission, in regular pursuit of its authority should rescind Order 35904, per I.C. § 61-624, and state the legal standard and its determination concerning service termination if an AMI meter is refused. Otherwise, this Court should find that the Commission has not regularly pursued its authority in Final Orders responding to Appellants' Formal Complaint[4] about notified service termination.

B. Commission Interpretation of ESRs within Final Orders Is Not Reasonable and Avoids Regular Pursuit of Its Authority, so It Should Be Challenged.

The Respondents did not respond to the Appellants' argument that "the Company has never been denied access for purposes listed in the Electric Service Regulations of

[4] Both Respondents point out that the Complaint did not cite the "specific provision of statute, rule,… or other controlling law that the utility… has violated." IDAPA 31.01.01.54. See also R.B.IPUC at 9 and R.B.RMP at 2. Yet, IDAPA 31.01.01.066 directs that "pleadings will be liberally construed, and defects that do not affect parties' substantial rights will be disregarded". Therefore, the claim that Appellants have not "denied access to the meter" for purposes explicitly stated in ESR 6(2)(d) has been properly before the Commission for determination since the Formal Complaint. The Commission did not dismiss the Complaint on grounds of improper filing, per IDAPA 31.01.01.054. See A.R. at 169-171 and 386-390. Further, the precise provision of controlling law has remained a critical issue of these proceedings. See A.B. at 14-15. Without the specific provision, the Complaint yet "fully states the facts constituting the acts or omissions of the utility" (IDAPA 31.01.01.054.02) relevant to a single relief desired: that the Company be withheld from terminating service despite Appellants' objections to AMI meter installations.

Rocky Mountain Power (ESRs).” Compare A.B. at 17-22 with R.B.IPUC at 13-14 and R.B.RMP at 4-8. Instead, Respondents supplement the Appeal with the applicable standard of review for agency deference, and ask the Court to not consider the Appellants’ argument (R.B.IPUC at 13) and “give no weight to the appellants’ arguments”. R.B.RMP at 4.

The Company benefits substantively from the Commission’s expansive interpolation of the ESRs 6 & 7. Along with “other public utilities, such as Idaho Power Company and Avista Corporation”, the Company has achieved a very high percentage of voluntary AMI meter replacements[5] and various programmatic benefits, including “improved grid reliability benefits through enhanced information and billing options, such as time-of-use rates and demand response programs.” R.B.RMP at 7. However, the Company’s relevant discussion of agency deference (R.B.RMP at 4-8) must be viewed in context of what arguments were not discussed. For example, Appellants raised the following cogent and relevant arguments within A.B. at 17-22:

- Commission regulatory power: constructive interpolation of ESRs 6 & 7, particularly use of the phrase “*among other things*”, as well as tolerance of Company’s misleading language[6] in termination notices appear inconsistent with regulating the Company, per I.C. § 61-501. See A.B. at 19-21 for further discussion.

[5] Calculated at 99.812% from data provided in the Company’s “Answer and Motion to Dismiss”. A.R. at 144-145.
[6] Order 35849 is apparently the first documentation of the Commission’s “*among other things*” interpolation of ESR 6 and 7, because it is provided without previous reference. A.B. at 19. Yet, Company termination notices preceded Order 35849 (A.R. at 158 and A.B at 20).

- Transparency of regulations: Commission has power to establish new regulations (I.C. § 61-503), but Orders 35849 and 35904 are not sufficient public availability, since I.C. § 61-305[7] requires a utility's tariff to include all rules and regulations affecting service. See R.B.IPUC at 12 and A.B. at 18-20.

Also, the Commission responded that

> The Edwards failed to provide any citations to relevant legal authority supporting a conclusion that the Commission erred. In short, the Edwards failed to identify the legal standards applicable to the interpretation of utility tariffs. Nor did they provide cogent argument showing how, under these unidentified legal standards, the Commission erred such that they should prevail on appeal. R.B.IPUC at 13.

Therefore, the Appellants reply by reviewing in greater detail *Higginson v. Westergard* (1979) and apply the four-prong test to determine the appropriate level of deference to the agency interpretation, as recommended by the Company.

> A rule or regulation of a public administrative body or officer ordinarily has the force and effect of law and is an integral part of the statute under which it is made just as though it were prescribed in terms therein. *Howard v. Missman*, 81 Idaho 82, 337 P.2d 592 (1959). Since the [Commission] is an administrative body under [I.C. § 61-201 et seq], the same principles of construction that apply to statutes apply to rules and regulations promulgated by an administrative body. 73 C.J.S. Public Administrative Bodies & Procedure, § 105 at 425; *Orloff v. Los Angeles Turf Club*, 36 Cal.2d 734, 227 P.2d 449, 452 (Cal.1951); *Hillman v. Northern Wasco County People's Utility Dist.*, 213 Or. 264, 323 P.2d 664, 680 (1958); *Hayes v. Yount*, 87 Wash.2d 280, 552 P.2d 1038, 1044 (1976)…
>
> Indeed, some courts have gone so far as to hold that in suits involving a public administrative agency the rules and regulations of such agency should be strictly construed against it." See Cole v. Young, 351 U.S. 536, 556, 76 S.Ct. 861, 100 L.Ed. 1396 (1956); Ferguson v. Union Nat'l Bank of Clarksburg, 126 F.2d 753, 757 (4th Cir.1942). Any ambiguities

[7] Appellants initially cited I.C. § 61-315 (A.B. at 20), but the Commission has cited the more relevant reference for public visibility of utilities' regulations or services in R.B.IPUC at 12.

> contained therein should be resolved in favor of the adversary. State ex rel. Merrill v. Greenbaum, 75 N.E.2d 598, 603 (Ohio Com.Pl. 1947), rev'd on other grounds, 83 Ohio App. 484, 84 N.E.2d 253 (Ohio 1948); Theodore v. State, 407 P.2d 182, 189 (Alaska 1965), cert. denied, 384 U.S. 951, 86 S.Ct. 1570, 16 L.Ed.2d 547 (1966). From *Higginson v. Westergard*, 604 P.2d 51, 100 Idaho 687 (1979).

As the Commission's investment of authority (I.C. § 61-501) is great - supervising and regulating every public utility in the state and affecting most Idaho residents – so, the regular pursuit of its authority (I.C. § 61-629) is critical. The Appellants have argued that "the effect of Final Orders #35849 and #35904 is not to adjust the Company's practices to the written ESRs, but rather to loosen ESR No. 6(2)(d) and ESR No. 7(1) so as to permit the Company access to Complainants-Appellants' property for the purpose of meter replacement." A.B. at 20. The Appellants do not contest Commission authority, but argue that clarifying this reason for access in Final Orders is insufficient, unless followed by an update to the ESR. This Court has ruled that, until such a time as ESR 6(2)(d) is updated, "ambiguities contained [in the regulation] should be resolved in favor of the adversary." *Higginson v. Westergard*, 604 P.2d 51, 100 Idaho 687 (1979).

This strict interpretation of ESR 6(2)(d) is not absurd, as alleged by the Company (R.B.IPUC at 6), and electric customers in Idaho are already refusing utility access to their meter for replacement. Instead, updating ESR 6(2)(d) would make the Commission intention clear and provide the Company with unambiguous authority. AMI meter replacements have been occurring (mostly voluntarily) for 20 years already, so the Company's concerns about disfavored outcomes seem exaggerated, especially as future meter upgrades must be anticipated. R.B.IPUC at 6-7.

> The actions of an agency like the Board are afforded a strong presumption of validity. *Cooper v. Bd. of Prof'l Discipline*, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000). This Court may not substitute its judgment for that of the Board. Id. The Board's decision may be overturned if it: "(a)

> violate[s]constitutional or statutory provisions; (b) exceed[s] the agency's statutory authority; (c) [is] made upon unlawful procedure; (d) [is] not supported by substantial evidence on the record as a whole; or (e) [is]arbitrary, capricious, or an abuse of discretion." Id. (citing I.C. § 67-5279(3)). Further, the Board's decision will be upheld unless the appellant demonstrates that one of his substantial rights has been prejudiced. Id. (citing I.C. § 67-5279(4)).
>
> Where an agency interprets a statute or rule, this Court applies a four-pronged test to determine the appropriate level of deference to the agency interpretation. This Court must determine whether: (1) the agency is responsible for administration of the rule in issue; (2) the agency's construction is reasonable; (3)the language of the rule does not expressly treat the matter at issue; and (4) any of the rationales underlying the rule of agency deference are present. *Preston v. Idaho State Tax Comm'n*, 131 Idaho 502,504, 960 P.2d 185, 187 (1998); *Duncan v. State Bd. of Accountancy*, 149 Idaho 1, 3, 232 P.3d 322, 324 (2010).

Soberly, therefore, Appellants argue that this Court should substitute its judgment for that of the Commission's, since loosening of Company regulations in the Final Orders instead of updating ESR 6(2)(d) to include "meter replacements" or the like, does not execute the Commission's authority in accordance with I.C. § 61-305, 61-501 and 61-503 and is therefore an unlawful procedure. Construction of this interpretation within Final Orders 35849 and 35904 has the effect of loosening of Company regulations, as exemplified by the phrase "*among other things*". Such loosening of Company regulation is expected to have negative affects to Commission regulatory power and transparency of regulations as discussed briefly above. Further, the Final Orders are not afforded the same weight of law as the rule or regulation of an administrative agency, as discussed by this Court in *Higginson v. Westergard*. The Company is also responsible to "keep open to public inspection …all rules, regulations, contracts, privileges and facilities which in any manner affect or relate to… service." I.C. § 61-305. Finally, Appellants have argued that one of their substantial (that is, Constitutional) rights is prejudiced by Final Order 35904. For each of these reasons,

agency construction of this interpretation of Company authority to replace meters is *not* reasonable.

For these reasons, this Court should not defer to the Commission's interpretation in this case. This Court should determine that the Commission has not regularly pursued its authority for regulating Customer and Company responsibilities (per ESR 1[2]) as pertaining to access for meter replacement and set aside or set aside in part Orders 35849 and 35904. As the Commission has the authority to establish new regulations (I.C. § 61-503), so an update to ESR 6(2)(d) to allow for meter upgrades is required, or else the Commission should be grant to Idahoans the ability to "opt-out" of the AMI metering program, as previously argued.

C. I.C. § 61-629 allows for a constitutional issue to be raised for the first time on appeal.

> 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. I.C. § 61-629

A plain reading of I.C. § 61-629 marks constitutional rights as separate from this Court's other actions to "determine whether the commission has regularly pursued its authority". Other case law which Respondents cite as related to error preservation, including *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991), adhere to a different section of Idaho Code than section 61. On this point, *Sanchez v. Arave* and *Murray v. Spalding*[8] both pertain to criminal lawsuits rather than responding to IC 61-629 which

[8] *Murray v. Spalding*, 141 Idaho 99, 101–02, 106 P.3d 425, 427–28 (2005)

directly questions whether the Order appealed from violates any right of the appellant under the constitution of the United States or of the state of Idaho. Further, it could not be determined whether Order 35904 "violates any right of the appellant under the constitution of the United States or of the State of Idaho" until Order 35904 existed. Also, I.C. § 61-627 and 61-629 pertain directly to appeals to the Supreme Court and not to earlier petitions to the Commission for reconsideration (I.C. § 61-627).

In seeking consideration of a constitutional issue raised for the first time on appeal, I.C. § 61-629 is more direct justification than reference to this Court's statement in *Murray v. Spalding*, which provides an "exception to [the well-settled] rule if such consideration is necessary for subsequent proceedings in the case", as quoted in *Idaho Power and IPUC vs. Tidwell*, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2018). Therefore, even though the Appellants have twice concluded in this Reply that the Commission has not regularly pursued its authority in Final Order 35904 – the Appellants ask that the Court consider the Appellants' argument on its merit, independent of whether the Court finds that the Commission has regularly pursued its authority.

While most of the Responses to Appellants' constitutional argument were focused entirely upon barring consideration; yet, the Commission asserted that "the validity of the Edwards' constitutional claim depends substantially upon the notion that smart meters are unsafe for use near their residence." R.B.IPUC at 16. Also, the Company asserts that "the appellants' claim is premised on the factual finding that AMI meters are unsafe." R.B.RMP at 9. Appellants take issue with these comments, because they presuppose an external determination of safety before Appellants could act to secure our safety. The Appellants have not delegated Constitutional rights under Article I, Section 1 to anyone. In other words "the Commission's duty to require safety regulations does not replace individuals'

responsibilities to secure their own safety, but rather appears intended to create an atmosphere in which employees, customers or the public may more readily choose health and safety." A.B. at 25.

V. Conclusion

In response to this Court's invitation to reply to Respondents' briefs, the Appellants re-affirm that Final Orders do not answer whether Appellants have provided proper legal grounds for service termination. Therefore, the Commission, in regular pursuit of its authority should rescind, alter or amend Final Order Denying Reconsideration 35904 and state the legal standard and its determination concerning service termination if an AMI meter is refused. Likewise, the Commission interpretation of ESRs within Final Orders is not reasonable and avoids regular pursuit of its authority, so the Commission should update to ESR 6(2)(d) to allow for meter upgrades or else grant to Idahoans the ability to "opt-out" of the AMI meter program, as previously argued. Otherwise, this Court should determine that the Commission has not regularly pursued its authority for regulating Customer and Company responsibilities as pertaining to access for meter replacement.

This Court should not defer to the Commission's interpretation of ESRs in Orders 35849 and 35904. Rather, in accordance with I.C. § 61-629, the Appellants respectfully request that this Court set aside or set aside in part Orders 35849 and 35904 and enjoin the Commission to regulate public utility companies consistent with I.C. § 61-305, 61-501, and 61-503. All other Conclusions from A.B. at 30-31 still apply.

RESPECTFULLY SUBMITTED this 26th day of April, 2024.

Samuel Z. Edwards, Sui Juris

Peggy M. B. Edwards, Sui Juris

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of April 2024, served the "Complainants-Appellants Brief" which Peggy and I signed on 26 April 2024 for Supreme Court docket # 51238-2023, by forwarding a copy thereof, to the following, via e-mail addresses listed:

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