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IN THE SUPREME COURT OF THE STATE OF IDAHO

SAMUEL AND PEGGY EDWARDS, Complainants-Appellants, v. IDAHO PUBLIC UTILITIES COMMISSION and PACIFICORP, d/b/a ROCKY MOUNTAIN POWER COMPANY, Respondents.	Supreme Court Docket No. 51238-2023 Idaho Public Utilities Commission No. PAC-E-23-05

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 submits this *Response Brief of Respondent*, which responds to *Complainants-Appellants' Brief* filed on March 7, 2024, by the Complainants-Appellants Samuel and Peggy Edwards ("the appellants").[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 appellants contested a notice informing them that PacifiCorp would disconnect their electrical service due to their refusal to allow the Company to replace their traditional meter with an Advanced Metering Infrastructure ("AMI") meter. The complaint alleged that the notice of disconnection of service constituted the following eight violations of law: (1) Breach of peace by attempting to install AMI meters on their residence; (2) Attempted extortion of the appellants' will; (3) Impairment of contractual obligations; (4) Attempted extortion by trying to take over the appellants' private property for commercial use; (5) Attempted illegal wiretapping; (6) Threat with intent to commit harm of the appellants; (7) Gross and hazardous negligence; and (8) Actionable Fraud. The appellants also advanced several unsupported arguments that AMI meters are unsafe, which directly contradict findings of the Federal Communications Communication ("FCC").

After consideration of the arguments presented, the Commission dismissed the appellants' claims of criminal and tortious conduct. In particular, the Commission found that the Electric

[1] In compliance with Idaho Appellate Rule 35(d), which states that "Counsel will be expected in their briefs and oral arguments to keep to a minimum reference to parties by such designations as 'appellant,' 'respondent,' and 'cross-appellant.'" PacifiCorp will refer to the appellants simply as "the appellants" 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.

Service Regulations ("ESR") granted PacifiCorp the authority to remove existing meters and replace them with AMI meters and that the notice of disconnection was lawful in accordance with the Utility Customer Relation Rules ("UCRR"). In this appeal, the appellants argue that the Commission erred by: (1) not making a specific finding as to whether the Company could disconnect their service pursuant to UCRRs; (2) interpreting the ESRs to grant PacifiCorp the authority to install AMI meters; and (3) violating Article I, Section I of the Idaho Constitution.

This Court should dismiss these arguments because: (1) a finding pertaining to the UCRRs was not necessary to resolve the claims raised in the complaint; (2) the Commission's interpretation of the ESRs is reasonable and should be afforded deference by this Court; and (3) the arguments relating to the Idaho Constitution are raised for the first time on appeal.

II. ARGUMENT

A. The Commission made sufficient findings to dismiss the appellants' complaint.

This Court should give no weight to the argument that the Commission failed to make sufficient findings to dismiss their complaint. A.B. at 14-16. The claims raised in the complaint do not pertain to whether PacifiCorp was permitted to disconnect service under UCRR 302.[4] Indeed, PacifiCorp has not disconnected the service of the appellants. Instead, the issues raised in complaint centered on alleging various criminal and tort offenses related to the notice of disconnection of service—not the regulatory authority to disconnect. A.R. at 8-12. In particular, the claims raised make no assertion that PacifiCorp lacked regulatory authority or was in violation of any regulation, including the UCRRs, to disconnect service. A.R. at 8-12; 164-165.

In deciding a motion to dismiss, the Commission must look at the merits of what was pled in the original complaint. *See* I.R.C.P 12. Indeed, the Commission recited the claims in the

[4] UCRR 302 allows PacifiCorp to terminate service due to a customer's denial of access to their electrical meter.

complaint within Order No. 35849 before ordering the dismissal of the complaint. A.R. at 164-165. Consequently, in order to resolve the alleged criminal and tort claims raised in the complaint, 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 the Commission did exactly that. It first found that PacifiCorp had the authority to install AMI meters, as it is a violation of the ESRs for a customer to refuse such access to install an AMI meter:

> We find that refusing to allow the Company's representatives access to replace existing meters with AMI meters is a violation of the ESR agreed to as a condition of receiving the Company's service. ESR No. 6(2)(d) requires Complainants to provide access to the Company representatives "for the purposes of . . . [among other things] repairing or removing metering devices . . . ." Under this ESR, the Company may remove the existing meter to replace it with an AMI meter. If Complainants refuse to allow the Company to remove the Company-owned meters, they are violating the ESR. Further, ESR No. 7(1) requires the Company to "furnish and maintain all meters and metering equipment." When read together, ESR Nos. 6 and 7 require that the Company provide its customers with the meter and associated metering equipment and requires the customer to provide the Company with access to the meter to accomplish this. *Based on the foregoing, the Company has the necessary authority to install an AMI meter on the Complainants' property in its furnishing of electric service as a public utility.*

A.R. at 170 (emphasis added).

Next, the Commission needed to find that the termination notices sent by PacifiCorp were lawful and did not amount to "extortion," as alleged by the appellants. Accordingly, the Commission properly made the following finding: "The Company has complied with the UCRR through its communications with the Complainants." A.R. at 170. This finding referred to UCRR 304 and 305, which specify the notice requirements a utility must follow before termination of service.

The appellants never claimed in their complaint that PacifiCorp lacked the authority to disconnect their service, nor did they amend their complaint to include this allegation. A.R. 8-12. Rather, they continued to assert frivolous claims alleging that a lawful notice of disconnection of

service amounted to various criminal and tort offenses. *Michalk v. Michalk*, 148 Idaho 224, 229, 220 P.3d 580, 585 (2009) ("Pro se civil litigants are not accorded special latitude merely because they chose to proceed through litigation without the assistance of an attorney."). It is questionable if Idaho Code § 61-612 grants the Commission authority to proceed to an adjudication on criminal and tort claims even if they were meritorious.[5]

Given the claims raised in the complaint, the Commission correctly focused on the relevant issues—the authority to install AMI meters and the lawfulness of the notice of disconnection of service. Importantly, for the purposes of this appeal, the Company has *not* disconnected the service of the appellants and has only issued a notice of disconnection of service—that was the subject of claims within the complaint. Accordingly, 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. This is because there was simply no basis to continue to an adjudication on the merits of claims raised in the complaint.

B. The Idaho Supreme Court should defer to the Commission's interpretation of the electric service regulations.

The Court should also give no weight to the appellants' arguments pertaining to the interpretation of the ESRs. A.B. at 19-22. Instead, the Court should afford deference to the

[5] Idaho Code § 61-612. ("Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public utility *including any rule, regulation or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation of any provision of law or of any order or rule of the commission*: provided, that no complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rate or charges of any gas, electrical, water or telephone corporation, unless the same be signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission or other legislative body of the city or county or city or town, if any, within which the alleged violation occurred, or not less than 25 consumers or purchasers or prospective consumers or purchasers of such gas, electricity, water or telephone service.") (Emphasis added).

Commission's interpretation of the ESRs because it is reasonable. The applicable standard of review for agency deference is as follows:

> 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).[6]

ESR 6(2)(d) plainly states that customers must provide "safe, unencumbered access" to utility representatives for meter-related tasks, including "*removing* metering devices."[7] Regulation No. 7(1) further clearly allows the utility to "*furnish* and maintain all meters and other metering equipment."[8] Accordingly, these regulations unambiguously require customers to allow for meter *removal* and the *furnishment* of meter installations as a condition of service. Therefore, the Commission's interpretation that "PacifiCorp has the necessary authority to install an AMI meter on the Complainants' property in its

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[6] Normally, this Court defers to the agency interpretation of statutes and rules. *See, e.g., Canty v. Idaho State Tax Comm'n,* 138 Idaho 178, 183, 59 P.3d 983, 989 (2002); *J.R. Simplot Co. v. Idaho State Tax Comm'n,* 120 Idaho at 863, 820 P.2d at 1220. Generally, this Court has found agency interpretations reasonable unless the agency relied on erroneous facts or law in its determination. *See, e.g., Farber v. Idaho State Ins. Fund,* 147 Idaho 307, 313, 208 P.3d 289, 295 (2009) (finding an interpretation unreasonable because the Department of Insurance erroneously relied on practices from other states that did not have the same statute as the one enacted in Idaho); *Farrell v. Whiteman,* 146 Idaho 604, 610–11, 200 P.3d 1153, 1159–60 (2009) (rejecting an agency interpretation provided in an amicus brief because it was contrary to the language of the statute and the situation in question was provided for by the language of the statute. Agency interpretation of a rule or statute is unreasonable when it "is so obscure or doubtful that it is entitled to no weight or consideration." *Preston,* 131 Idaho at 505, 960 P.2d at 188 (quoting *J.R. Simplot Co. v. Idaho State Tax Comm'n,* 120 Idaho 849, 862, 820 P.2d 1206, 1219 (1991)).

[7] ESR 6(2)(d) ("The Customer shall provide safe, unencumbered access to Company's representatives at reasonable times, for the purpose of reading meters, inspecting, repairing or *removing* metering devices and wiring of the Company.") (Emphasis added).

[8] ESR 7(1) ("All meter locations and provisions for connecting metering equipment are subject to approval by the Company. Meter locations shall be consistent with good engineering and safety practices and shall comply with appropriate codes and standards. The Company will furnish and maintain all meters and other metering equipment. The Customer will furnish and maintain the meter base and other accessories required by the Company, necessary for measuring the electric power and energy used by the Customer.").

furnishing of electric service as a public utility" is rooted in the plain language and reading the ESRs together as a whole. A.R. at 170.

This interpretation is consistent with prior guidance from the Idaho Supreme Court in interpreting administrative rules: "[I]nterpretation begins with the literal language of the rule. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The rule should be considered as a whole, and words should be given their plain, usual, and ordinary meanings." *Grace v. Jeppesen*, 171 Idaho 287, 292, 519 P.3d 1227 (2022) (internal brackets omitted). Consequently, the Commission properly dismissed the complaint as it was predicated on an unsupported assertion that PacifiCorp's lawful authority to *remove* and *furnish* electrical meters amounted to various criminal and tort offenses.

Any other interpretation would be an absurd reading of the regulations. *Gavica v. Hanson*, 101 Idaho 58, 61, 608 P.2d 861 (1980) ("this Court should avoid a statutory interpretation which produces an absurd result."). For example, as advanced by the appellants, a contrary interpretation could result in individuals being able to legitimately file various criminal and tort offences against a utility company for simply installing upgraded electrical infrastructure in the state of Idaho. Such an interpretation is clearly absurd, unprecedented, and would not have been contemplated by the Commission when adopting the ESRs. Moreover, it would authorize electric customers in Idaho to subjectively refuse utility access to their meter for replacement, which can result in numerous disfavored outcomes that would not only undermine the Commission's delegated authority to regulate the electrical grid in Idaho—but also important policy objectives for the state. *Duncan,* 149 Idaho 1, 3, 232 P.3d 322, 324 (2010) ("There are five rationales underlying the rule of deference: (1) that a practical interpretation of the rule exists; (2) the presumption of legislative acquiescence; (3) reliance on the agency's expertise in interpretation of the rule; (4) the rationale of repose; and (5) the requirement of contemporaneous agency interpretation.").

The rationales underlying the rule of deference are present in this case. AMI meters provide important enhancements to Idaho's electrical infrastructure by providing improved grid reliability benefits through enhanced information and billing options, such as time-of-use rates and demand response programs. *See* A.R. at 144. AMI meters also reduce electric rates by lowering costs of physical meter reading. A.R. at 144. As stated by the Commission in Order No. 35849 in this docket, "[t]he Commission is once again asked to … withhold the benefits and efficiencies that customers derive from the use of such devices . . . .". A.R. at 170. AMI meters are *not* new to the state of Idaho as other public utilities, such as Idaho Power Company and Avista Corporation, installed AMI starting over two decades ago. A.R. at 152-153. PacifiCorp carefully planned and communicated its AMI meter rollout over the last several years and began formally communicating its plans to the Commission with a presentation on December 18, 2018. A.R. at 144. The Company also made formal presentations to the Commission on May 2019, March 2021, October 2022, and March 2023. A.R. at 144. AMI meter installations began in Idaho in October 2021 and the Company had completed 84,926 meter exchanges at the time of filing its motion to dismiss in the docket. A.R. at 153.

Contrary to the unsupported claim of the appellants, the record also clearly establishes that AMI meters are harmless to customers. In fact, AMI meters emit 100 times less radio frequency density than a laptop computer, 300 times less than a cell phone, and 50,000 times less than standing next to a microwave oven while it's in use. A.R. at 394. All of these devices have been approved by the FCC as safe for human use. A.R. at 394. The FCC has jurisdiction over the approval of devices that use radio frequencies, like AMI meters, and it has approved AMI meters as safe for customer use. A.R. at 169. As stated by the Commission, the appellants' claims "go against well-established evidence on AMI meter safety." A.R. at 169.

Based on the foregoing, the Commission's interpretation of the ESRs is reasonable, based on a plain reading of the regulations as a whole, and consistent with the rationale underlying agency deference. Furthermore, the Commission is charged with the administration and enforcement of the ESRs under Idaho Code §§ 61-601 – 61-642. Accordingly, the Court should afford deference to the Commission's interpretation of the ESRs and affirm its decision to dismiss the appellants' complaint. PacifiCorp operates in compliance with the rules and regulations approved by the Commission and there was simply no legal or factual basis to continue to an adjudication on the merits of the claims the appellants raised in their complaint.

C. The Court should dismiss the constitutional arguments presented by the appellants, 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 appellants in the present case also neglected to bring forth any arguments related to Article I of the Idaho Constitution, in the initial complaint or in their motion for reconsideration. Specifically, their initial complaint and motion for reconsideration did not include any citations to Article I of the Idaho Constitution. A.R. 5-6, 12-13, 47-51. Consequently, the Court should find that the appellants did not raise this issue before the Commission and, therefore, these arguments will not be considered for the first time on appeal.

The appellants seem to acknowledge that they are raising this issue for the first time on appeal. A.B. at 22. However, without any supporting argument, the appellants imply that an exception to this rule applies to this rule because *supposedly* there are subsequent proceedings scheduled in this case. A.B. at 22-23 (citing *Murray v. Spalding,* 141 Idaho 99, 101–102, 106 P.3d 425 (2005)). *Murray* involved an appeal from an order dismissing an action for failure to service of a summons and a complaint. This Court in *Murray* concluded that "[b]ecause there are no subsequent proceedings in this case, the exception does not apply. Therefore, this Court will not consider the issues raised by the Plaintiff for the first time on appeal." Similar to *Murray*, the appellants have not raised this issue before the Commission and there are no subsequent proceedings scheduled in this case. The Commission has issued a final order and denied the appellants' motion for reconsideration. Accordingly, the Court should not consider this issue for the first time on appeal.

Even if this Court decided to consider this issue for the first time on appeal, the appellants' claim is premised on the factual finding that AMI meters are unsafe. A.B. at 22-29. However,

there is no credible evidence in the record to support such a factual finding by this Court, and such a factual finding would directly contradict the conclusions of the FCC.

III. CONCLUSION

Based on the reasons detailed above, this Court should deny the relief sought by the appellants. Furthermore, PacifiCorp maintains that the appellants' 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 4th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 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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