



City of Tacoma
Hearing Examiner

May 13, 2019

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Re: Kyle A. Kendig v. City of Tacoma, Department of Public Utilities
File No.: HEX2019-006 (CA #101009000)

Dear Parties,

In regard to the above referenced case, please find enclosed a copy of the Hearing Examiner's Findings of Fact, Conclusions of Law, and Decision entered on May 13, 2019.

Sincerely,

Louisa Legg
Office Administrator

Enclosure (1): Findings, Conclusions, and Decision

Cc: John Hoffman, Customer Services Assistant Manager, Tacoma Public Utilities
(Electronic Mail Delivery Only)

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **KYLE A. KENDIG,**

4 **Appellant,**

5 **v.**

6 **THE CITY OF TACOMA,** through
7 its Department of Public Utilities,

8 **Respondent.**

HEX NO. 2019-006
(CA #101009000)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

9 **THIS MATTER** came on for hearing before JEFF H. CAPELL, Hearing Examiner
10 for the City of Tacoma (the “City”), on April 25, 2019. Appellant Kyle A. Kendig
11 (“Appellant” or “Kendig”) appeared at hearing *pro se*. Tacoma Public Utilities (“TPU”) was
12 represented by Trina José, Customer Accounts Supervisor, and John Hoffman, Customer
13 Services Assistant Manager, also without legal counsel present.

14 Witnesses were placed under oath and testified. Exhibits were admitted and reviewed.
15 Based upon the evidence presented, the Hearing Examiner makes the following:

16 **FINDINGS OF FACT**

17 1. This appeal concerns TPU’s provision of water utility services, under TPU
18 Account No. 101009000 (the “Account”), to residential real property that Appellant owns at
19 the addresses of 851 and 853 South 54th Street, in the city of Tacoma, Washington (the
20 “Subject Property”) for the billing period of October 12, 2018 to December 13, 2018 (the
21 “Billing Period”). *Ex. R-9, Ex. A-4.1, Ex. A-4.2.* The Subject Property is improved with a

FINDINGS OF FACT,
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1 duplex that houses five (5) rental tenants of Appellant Kendig.¹ The duplex is on a single
2 meter for water usage. *Kendig Testimony*.

3 2. Kendig first contacted TPU regarding perceived high water use at the Subject
4 Property on January 4, 2019, after the Billing Period had ended and just before the payment
5 due date (for that bill) of January 7, 2019. *Kendig Testimony, José Testimony; Ex. R-1,*
6 *Ex. R-9.*² It appears from TPU's Exhibit R-9 that water usage for the Subject Property was
7 billed under Appellant Kendig's name at the 851 Side of the duplex.

8 3. Kendig testified that the amount invoiced for the Billing Period was "roughly
9 37,000 gallons more than the previous six month average" for the Subject Property, which led
10 him to contact TPU.³ TPU responded by verifying the meter reading for the Billing Period on
11 January 8, 2019. TPU determined that the meter reading was correct. The meter read 3195.02.
12 The reading listed on the invoice for the Billing Period was 3184.790. *José Testimony,*
13 *Carreau Testimony; Ex. R-1, Ex. R-9.*

14 4. Nonetheless, Kendig asked that the meter be replaced. *Kendig Testimony, José*
15 *Testimony; Ex. R-1, Ex. R-2.* TPU replaced the then-in-use Rockwell Meter, (City ID number
16 4441, *See Ex. A-5*), with a Neptune Meter (City ID number 227428, *See Ex. A-6.1 and Ex. A-*
17 *6.2*). *Carreau Testimony, Ex. R-1, Ex. R-2.*

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20 ¹ The two sides of the duplex are referred to hereafter as the "851 Side" and the "853 Side."

21 ² Appellant's Exhibit A-4.2 is a TPU Invoice in the name of Shawn T McDonald [sic], Appellant's tenant at the 853 Side of the Subject Property. This invoice has a different due date than TPU's Exhibit R-9, and Exhibit A-4.2 shows only amounts due for "Electricity" and "Solid waste & recycling," not water. Appellant's Exhibit A-4.1 appears to be the second page of this same invoice that coincides with the Billing Period.

³ Kendig's Exhibits A-3.1, A-3.2, and A-3.3 show TPU billings for the 851 Side of the Subject Property both before and after the Billing Period in the name of Ebony R Porter [sic]. These exhibits were not explained or referenced at the hearing, and their relation to water usage at the Subject Property is not clear, in that they only show amounts billed for "Electricity" and "Solid waste & recycling" when water usage was the issue on appeal.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
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1 5. Darrel Carreau, a TPU Water Service Worker, was given the assignment of
2 looking into Kendig's concerns. *Carreau Testimony*. At Kendig's request, on January 8, 2019,
3 Carreau inspected the then-in-use Rockwell Meter, which appeared to be functioning
4 properly. *Id.* On January 9, 2019, Carreau inspected for indications of a leak at the Subject
5 Property and found none, nor did Kendig, who conducted his own investigation for leaks.
6 *Carreau Testimony, Kendig Testimony*.

7 6. This same day, Carreau carried out Kendig's request and changed out the
8 Rockwell Meter. *Id.; Ex. R-2*. After changing out the Rockwell Meter, Carreau took it straight
9 back to the shop within fifteen (15) minutes of the change out, and it was tested and time
10 stamped within the hour of its arrival. *Peterson Testimony, Carreau Testimony; Ex. R-2*.

11 7. As already alluded to, Carreau and Kendig interacted at various points during the
12 events leading up to this appeal. At one point, Kendig asked Carreau to turn over the
13 Rockwell Meter to him for testing. Carreau declined this request, instead telling Kendig that
14 he could pay to have the meter tested by TPU for a \$70 fee. *Carreau Testimony*.⁴ Carreau
15 further testified that if a meter tests "within spec" the customer requesting the test pays the
16 fee, but if the meter tests "out of spec," no fee is assessed. Kendig declined paying the fee,
17 and therefore also declined having the meter tested at his request. *Kendig Testimony, Carreau*
18 *Testimony; Ex. R-6, Ex. R-7*. Nonetheless, TPU tested the meter of its own accord. *Kendig*
19 *Testimony, Carreau Testimony, Peterson Testimony; Ex. R-1, Ex. R-2*.

20 8. Eric Peterson, a Water Meter Repair Worker for TPU with 20 years' experience,
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⁴ Some testimony at the hearing indicated that Kendig may have been told the fee was \$75.

1 conducted the test of the Rockwell Meter on January 9, 2019. *Peterson Testimony*.⁵ Peterson
2 testified that the Rockwell company had either merged with or been acquired by the Sensus
3 company, or otherwise undergone a name change, and therefore the “Sensus” setting in the
4 meter test was the correct one to use when testing the Rockwell Meter previously in use at the
5 Subject Property. *See Ex. R-2*. When tested, water meters must be accurate to within +/- (plus
6 or minus) 1.5%, or between 98.5% and 101.5% to remain in service. *Peterson Testimony*. The
7 Rockwell Meter tested within that range for most testing runs, but actually measured out of
8 spec low on “a few” of the test runs. *Id.; Ex. R-2*. Water meters tend to start measuring lower
9 and running slower as they age due to “degradation,” thereby registering less usage than
10 actual, rather than conversely registering high. *Peterson Testimony*. Peterson testified that the
11 degradation that leads to low readings results in the customer paying less rather than more.

12 9. On cross examination from Kendig, Peterson testified (a) that TPU’s water meter
13 testing equipment is calibrated twice a year, (b) that no accounting is made for water
14 temperature fluctuation when a meter is tested, but (c) that the temperature of Tacoma water
15 only fluctuates about five degrees (5°) seasonally and such variance does not really affect the
16 test in any appreciable way. No evidence was offered as to how temperature fluctuations
17 would affect a meter test otherwise.

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19 ⁵ During the hearing, Kendig raised objections to various items of TPU testimony and other evidence, including
20 TPU’s offering Eric Peterson’s testimony. Kendig’s primary stated grounds were that he was denied access to the
21 Rockwell Meter and that TPU had not provided him documents he requested related to the testing and
certification of the Rockwell Meter. At the outset of the hearing, he asked that Peterson be excluded as a witness
because he did not appear on TPU’s witness list. This request was denied because Kendig could show no actual
prejudice to his appeal, especially in light of the fact that his other evidentiary objections were grounded in his
desire for more information about the testing of the Rockwell Meter—information that Peterson was there
specifically to provide. TPU was admonished about the proper handling of witness lists, however. The Examiner
did offer Kendig the opportunity to continue the hearing to a later date in order to (1) gain access to the Rockwell
Meter for third party testing via Hearing Examiner subpoena/order, (2) get the additional documents he was
seeking from TPU, and (3) possibly depose Eric Peterson. Kendig declined the opportunity to continue, and
elected instead to proceed with the hearing as scheduled.

**FINDINGS OF FACT,
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1 10. As mentioned above, Kendig requested that the Rockwell Meter be made
2 available to him for third-party testing. *Kendig Testimony; see also Ex. R-4.* TPU denied him
3 this opportunity. *Id.* On questioning from the Examiner, TPU representatives could give no
4 reason for this denial.⁶ Kendig testified that he is an unlicensed mechanical engineer⁷ with
5 two (2) engineering related master's degrees and seven (7) years' experience in industrial
6 facilities that employ various fluid metering devices. Without providing specifics, Kendig
7 testified that this background is at least part of what gives him his suspicions that the
8 Rockwell Meter was malfunctioning. *See also Ex. R-4.*⁸

9 11. Kendig also presented the unsworn written statement of the 853 Side tenant
10 stating that there was no unusual water usage for the 853 Side, presumably during the Billing
11 Period. *Ex. A-2.*

12 12. Any conclusion of law herein which may be more properly deemed or
13 considered a finding of fact is hereby adopted as such.

14 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the
15 following:

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20 ⁶ As mentioned above, Kendig was offered the opportunity to continue the hearing in order to obtain access to the
21 Rockwell Meter, among other things. Kendig declined, speculating that TPU would have somehow compromised
the integrity of the meter's condition in the intervening time. TPU rebutted this speculation by testifying about the
chain of custody of the Rockwell Meter, offering that it had not been altered in any way and had always been in
TPU custody at its meter shop.

⁷ In response to questioning, Kendig indicated that he does not have a state license because it does not suit his
work purposes and because he does not want the associated liability.

⁸ Kendig did offer hearsay testimony regarding what others had told him about court evidentiary requirements
regarding establishing the accuracy of metering devices. To that end, TPU did offer testimony about its
calibration regime, and the actual test result of the Rockwell Meter.

**FINDINGS OF FACT,
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AND DECISION**

1 CONCLUSIONS OF LAW

2 1. The Hearing Examiner has jurisdiction over the parties and the subject matter of
3 this case pursuant to Tacoma Municipal Code (“TMC”) 1.23.050.B.21 as a “[d]ispute[]
4 concerning utility service...”

5 2. The Hearing Examiner’s review of this matter is *de novo*. *TMC 1.23.060*.

6 3. The Appellant bears the burden of proof to establish, by a preponderance of the
7 evidence, that his claim is consistent or inconsistent with applicable legal standards and the
8 lower decision should be reversed. *TMC 1.23.070.C*. Here the lower decision was to charge
9 Appellant the full amount for the water usage shown at the Subject Property. Kendig’s
10 challenge to that decision is based in his contention that the meter had to be faulty for the bill
11 to be as high as it was.

12 4. TPU, as a municipal utility, is obligated by law to bill the cost of utility services
13 provided.⁹ The foregoing notwithstanding, “A municipal corporation has inherent power to
14 enter into a compromise settlement of disputed claims, arising out of a subject matter
15 concerning which the municipality has the general power to contract.”¹⁰ TPU chose not to
16 compromise on the full amount of its invoice for the Billing Period, and this appeal followed.

17 5. Pursuant to RCW 35.63.130, the local “[l]egislative body may vest in a hearing
18 examiner the power to hear and decide those issues it believes should be reviewed and
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21 ⁹ See, e.g., RCW 35.92.010, RCW 80.28.080; TMC 12.06.110, and .160; *Housing Auth. v. Sewer and Water District*, 56 Wn. App. 589, 784 P.2d 1284 (1990).

¹⁰ *Warburton v. Tacoma Sch. Dist.*, 55 Wn.2d 746, 752, 350 P.2d 161 (1960), citing *Abrams v. Seattle*, 173 Wash. 495, 502, 23 P.(2d) 869 (1933), and *Christie v. Port of Olympia*, 27 Wn.2d 534, 179 P.2d 294 (1947). See also *Eugster v. City of Spokane*, 139 Wn. App. 21, 31-32, 156 P.3d 912, 918 (2007) (*A good faith settlement of a dispute is sufficient consideration, absent any actual donative intent, to not be a violation of the constitutional prohibition on gifting public funds.*).

**FINDINGS OF FACT,
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1 decided by a hearing examiner, including but not limited to: ... (b) Appeals of administrative
2 decisions or determinations; ...”

3 6. As evidenced by the foregoing, hearing examiners are creatures of statute and
4 have only the authority they are given by those same statutes. In the present matter, as stated
5 above, that authority comes from TMC 1.23.050.B.21, which states as follows:

6 B. In regard to the matters set forth below, the Examiner shall conduct
7 adjudicative proceedings, maintain a record thereof, and enter findings of fact,
8 conclusions of law, and a final decision or other order, as appropriate: ...

9 21. Appeals arising from the imposition of charges for service issued by the
10 Department of Public Utilities, as well as those arising from disputes
11 concerning utility service, use of watershed or other Department property, and
12 termination of any use; provided, that the Hearing Examiner shall not
13 adjudicate claims with respect to any rate set by the City Council in a rate
14 ordinance nor hear any challenge to the rate-making process (Chapters 12.06
15 and 12.10);

16 7. In the absence of a preponderance of the evidence showing that TPU's billing
17 was incorrect, and that some other (presumably lesser) amount should have been charged, any
18 action by the Hearing Examiner to adjust TPU's billing demand would amount to the
19 Examiner acting in equity.

20 8. Washington courts generally are in agreement that hearing examiners do not
21 have the discretion to grant equitable remedies unless the ability to do so is expressly granted
in authorizing legislation.¹¹ Although the City of Tacoma and its Department of Public

¹¹ *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984); *see also Bjarnson v. Kitsap County*, 78 Wn. App. 840, 843, 899 P.2d 1290, (1995) (*The scope and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them.*). *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998) (*The power of an administrative tribunal to fashion a remedy is strictly limited by statute.*).

**FINDINGS OF FACT,
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1 Utilities have the power to compromise (settle) claims under the authority cited in Conclusion
2 4 above, the Hearing Examiner does not.

3 9. RCW 35.63.130 and TMC 1.23, the Tacoma Hearing Examiner’s authorizing
4 legislation, do not grant the authority to fashion equitable remedies, but rather limit the
5 Hearing Examiner to applying the Tacoma Municipal Code and applicable Washington State
6 law only.

7 10. In this matter, Appellant Kendig offered what amounted to speculation—based
8 on the high bill itself, and a general statement of his experience and training—that the amount
9 charged for the Billing Period was incorrect and that this incorrectness stemmed from the
10 Rockwell Meter being faulty. “Evidence supporting a party’s case theory ‘must rise above
11 speculation and conjecture...’”¹² Contrarily, TPU offered concrete evidence of how the
12 Rockwell Meter was actually performing—generally correctly, but edging toward the low
13 side. *See Findings of Fact 5~9 above.*

14 11. The burden of proof in this appeal, resting on the Appellant, creates a legal
15 presumption benefiting TPU that its billing is correct unless an appellant can show otherwise
16 by a preponderance of the evidence. “A legal presumption is a conclusion based upon a
17 particular set of facts, combined with established laws, logic or reasoning. It is a rule of law
18 which allow[s][] a court to assume a fact is true until it is rebutted by the greater weight

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¹² *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 851-852, 313 P.3d 431, 441-442 (2013), citing *Bd. of Regents of Univ. of Wash. v. Frederick & Nelson*, 90 Wn.2d 82, 86, 579 P.2d 346 (1978).

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2 (preponderance) of the evidence against it.”¹³

3 12. Kendig’s appeal presumes that the meter was malfunctioning, otherwise his
4 bill would not have been so high. Kendig’s presumption is one of fact, not law. A
5 presumption of fact “[i]s an argument of a fact from a fact; an inference [] drawn regarding
6 an unknown fact [the functioning of the meter from Kendig’s perspective] based upon a
7 known fact [the high bill].”¹⁴ The inference created from a presumption of fact “[m]ay derive
8 from a past history of their connection; assuming the truth or real existence of something
9 despite a lack of direct or positive proof of the fact, but grounded on circumstantial or
10 probable evidence which makes it believable.”¹⁵ Appellant’s case rests entirely on such a
11 presumption, i.e. the bill at the Subject Property being higher than usual with no apparent
12 change in usage by the occupants of the Subject Property, and on Appellant’s speculation.
13 Appellant presented no evidence of error or malfunction beyond the high bill and its
14 unusually high reported consumption leaving only the *presumption* of error or malfunction,
15 not proof by a preponderance. When offered the opportunity to continue the hearing to obtain
16 more concrete evidence (testing the Rockwell Meter independently), Kendig declined.

17 13. Contrarily, TPU presented evidence of multiple verifications/tests of the
18 Rockwell Meter both visually at the Subject Property, and in TPU’s shop. All tests showed
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20 ¹³ <https://definitions.uslegal.com/l/legal-presumption/>. See also *Ency. of Evidence*, Vol. 9, pg. 882, which
describes the difference between a presumption of fact and a presumption of law as follows:

21 “The distinction usually drawn between these two classes of presumptions is that a presumption of law is
an arbitrary rule of law that when a certain fact or facts appear a certain other fact is, for the purposes of
the case, deemed to be established, either conclusively or until contrary evidence is introduced; while a
presumption of fact is merely a logical inference or conclusion which the trier of the facts is at liberty to
draw or refuse to draw.”

¹⁴ <https://definitions.uslegal.com/l/legal-presumption/>

¹⁵ *Id.*

**FINDINGS OF FACT,
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1 the Meter was functioning properly, but edging toward reading low. *See Findings of Fact 5~9*
2 *above.*

3 14. In this case, neither the Appellant nor TPU know the true cause of the high water
4 usage reported at the Subject Property during the Billing Period. The high water usage at the
5 Subject Property remains unexplained. Without such an explanation by a preponderance of
6 the evidence from the Appellant, the Examiner has no authority to alter Appellant's bill.

7 15. Any finding of fact herein which may be more properly deemed or considered a
8 conclusion of law is hereby adopted as such.

9 Based upon the foregoing Findings of Fact and Conclusions of Law the Hearing
10 Examiner makes the following:

11 **DECISION**

12 Appellant Kendig failed to show by a preponderance of evidence that TPU's bill for
13 the Billing Period was incorrect.

14 Given the foregoing, Kendig's appeal is **DENIED** and he is responsible for the bill as
15 stated. The amount of the bill may be paid in full or on a schedule acceptable to the parties
16 hereto.

17 **DATED** this 13th day of May, 2019.

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19 **JEFF H. CAPELL, Hearing Examiner**

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21 **FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION**

- 10 -
ORIGINAL

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1 **NOTICE**

2 **RECONSIDERATION/APEAL OF EXAMINER'S DECISION**

3 **RECONSIDERATION:**

4 Any aggrieved person or entity having standing under the ordinance governing the matter, or
5 as otherwise provided by law, may file a motion with the Office of the Hearing Examiner
6 requesting reconsideration of a decision or recommendation entered by the Examiner. A
7 motion for reconsideration must be in writing and must set forth the alleged errors of
8 procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14
9 calendar days of the issuance of the Examiner's decision/recommendation, not counting the
10 day of issuance of the decision/recommendation. If the last day for filing the motion for
11 reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next
12 working day. The requirements set forth herein regarding the time limits for filing of motions
13 for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for
14 reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set
15 forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole
16 discretion of the Examiner to determine whether an opportunity shall be given to other parties
17 for response to a motion for reconsideration. The Examiner, after a review of the matter, shall
18 take such further action as he/she deems appropriate, which may include the issuance of a
19 revised decision/recommendation. (*Tacoma Municipal Code 1.23.140*)

11 **APEAL OF EXAMINER'S DECISION TO MUNICIPAL COURT:**

12 **NOTICE**

13 Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing
14 Examiner's decision may be appealable to Tacoma Municipal Court. Any court action to set
15 aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner likely will
16 need to be commenced within 21 days of the entering of the decision by the Examiner, unless
17 otherwise provided by statute.

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**FINDINGS OF FACT,
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