



City of Tacoma
Hearing Examiner

July 11, 2017

Christopher R. Umphenour
Kathleen Umphenour
3001 North 26th Street
Tacoma, WA 98407-6306
(First Class & Electronic Mail Delivery)

Kathryn Weller, Customer Accounts Supervisor
Tacoma Public Utilities
3628 S. 35th Street
Tacoma, WA 98409-3192
(Interoffice & Electronic Mail Delivery)

Re: *Christopher R. and Kathleen Umphenour v. Tacoma Public Utilities*
File No. HEX2017-009 (CA #100355730)

Dear Parties,

Please find enclosed a copy of the Hearing Examiner's Findings of Fact, Conclusions of Law, and Decision entered on July 11, 2017, in the above entitled matter.

Sincerely,

Louisa Legg
Office Administrator

Enclosure (1) – Findings, Conclusions, and Order

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **CHRISTOPHER R. UMPHENOUR**
4 **and KATHLEEN UMPHENOUR,**

5 **Appellants,**

6 **v.**

7 **TACOMA PUBLIC UTILITIES,**

8 **Respondent.**

HEX NO. 2017-009
(CA # 100355730)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

9
10 **THIS MATTER** came on for a hearing before JEFF H. CAPELL, Hearing Examiner
11 for the City of Tacoma (the “City”), on June 29, 2017. The Appellants, Christopher R. and
12 Kathleen Umphenour (collectively, the “Umphenours”), represented themselves *pro se*.
13 Tacoma Public Utilities (“TPU”) was represented by Katherine Weller, Customer Accounts
14 Supervisor, also without legal counsel.

15 Witnesses were placed under oath and testified. Exhibits were admitted and reviewed
16 and the parties made closing arguments.

17 Based upon the evidence submitted, the Hearing Examiner makes the following:

18 **FINDINGS OF FACT**

- 19 1. Christopher and Kathleen Umphenour own the real property located at 3001
20 North 26th Street in Tacoma, Washington (the “Subject Property”).
21 2. The Umphenours have lived at the Subject Property since at least 2005, and the

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
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ORIGINAL

1 Subject Property has obtained electric power service from TPU for that entire time. For a
2 period leading up to 2009, the Umphenours' service was set up for "budget billing."
3 *Umphenour Testimony; Exhibits A-9, A-10.* By July of 2008, budget billing had resulted in an
4 overpayment credit of approximately \$912 that was used to offset the Umphenours' payment
5 until February 2009, after which budget billing was discontinued. *Weller Testimony,*
6 *Umphenour Testimony; Exhibit A-9.*

7 3. On approximately October 30, 2007, the Umphenours' electric power meter at
8 the Subject Property was replaced with a new, digital meter. The new meter started its service
9 with a usage reading of "0." *Umphenour Testimony, Weller Testimony; Exhibits A-10, R-1.*

10 4. Although the new meter is classified as a "digital" meter, it does not send meter
11 readings automatically to TPU for any purpose, including billing. *Weller Testimony.* As a
12 result, usage information from the Subject Property must be collected visually/manually from
13 the existing meter. *Weller Testimony.*

14 5. TPU personnel have been present at the Subject Property at regular intervals,
15 ostensibly to take meter readings, for the period from 2007 to 2016. *Umphenour Testimony.*
16 TPU sent out annual letters to the Umphenours indicating approximately when TPU personnel
17 would be at the Subject Property to take meter readings. *Umphenour Testimony.* TPU's
18 standard operating procedure is to have meters read at least every other month. *Weller*
19 *Testimony.*

20 6. From the point that the new meter was installed in 2007, until the latter part of
21 October 2016, any meter readings taken at the Subject Property were not being connected with

1 TPU's billing process, and as a result, the Umphenours were not being billed for energy
2 usage/consumption at the Subject Property, but instead were only assessed a Customer Charge
3 of either \$11.00 prior to 2015, or \$21.00 thereafter. *Umphenour Testimony, Weller*
4 *Testimony; Exhibits A-10, A-16, R-1, R-15, R-19.*

5 7. TPU's Meter Reading Operations Manager added the Umphenours' meter to a
6 "reading route" on October 12, 2016. *Exhibit R-19.* To the extent that meter readings were
7 taken at the Subject Property for the prior period (2007 to 2016), it appears that TPU has no
8 record of these readings. *Exhibit R-19.* TPU does have the aggregate meter reading for
9 usage/consumption from the Subject Property from the time the meter was installed in 2007,
10 until the end of the contested period here, October 11, 2016. *Weller Testimony; Exhibits R-1,*
11 *R-2.*

12 8. The Umphenours do not contest that they were not being billed for energy
13 usage/consumption during the period from 2007 until 2016. They did, however, provide
14 lengthy testimony regarding numerous ways in which they believe TPU mismanaged their
15 account. *Umphenour Testimony; Exhibit A-8.* These include, at a minimum:

16 (a) mistakenly identifying the 2007 meter as malfunctioning; *Umphenour*
17 *Testimony, Weller Testimony; Exhibits A-8, R-1;*

18 (b) mistakenly shutting off the Umphenours' water service on March 14,
19 2017, for approximately two hours; *Umphenour Testimony, Weller*
20 *Testimony; Exhibit R-1;*

21 (c) using unartful or incorrect language in other correspondence that
further confused the Umphenours' situation; *Umphenour Testimony,*
Weller Testimony; Exhibits R-1, R-4; and

1 (d) failing to marry up meter readings with billing so that the proper
2 amounts for usage/consumption could be billed for approximately nine
years. *Umphenour Testimony, Weller Testimony; Exhibits A-8, R-1, R-19.*

3 9. The Umphenours contend that TPU's mismanagement should preclude TPU
4 from collecting any under billing and that the amount for which they have been back-billed is
5 too high or unfair. *Umphenour Testimony; Exhibit A-8.* TPU has back-billed the Umphenours
6 for \$5,049.28 (the "Back-Billed Amount"). *Exhibits R-1, R-16.*

7 10. TPU does not deny that the above listed (FF 8) errors were made. *Weller*
8 *Testimony; Exhibit R-1.* That notwithstanding, TPU testified that it is required by law to
9 collect any under billed amounts. *Weller Testimony.*

10 11. Per its own policy, TPU is not seeking to collect for non-billed usage/
11 consumption going back further than three (3) years. *Weller Testimony; Exhibits R-1, R-3.* The
12 back-billing period in dispute is from approximately October 11, 2013 to October 11, 2016
13 (the "Back-Billed Period"). *Umphenour Testimony, Weller Testimony; Exhibits A-10, R-1,*
14 *R-5.*

15 12. Starting sometime in 2010, the Umphenour residence went from six occupants to
16 four. *Umphenour Testimony; Exhibit A-10.* Shortly thereafter, the Umphenours purchased
17 several energy efficient upgrades for use at the Subject Property including a new refrigerator
18 (2010), new furnace (2013), new water heater (2014), and more efficient light bulbs (2013-
19 2015). *Umphenour Testimony; Exhibits R-11, R-12, A-4, A-5, A-6, A-10.*

20 13. TPU calculated the usage/consumption at the Subject Property during the Back-
21 Billed Period using the aggregate meter reading for the period from installation in 2007, when

1 the meter read “0”, until the billing failure was discovered in October of 2016. TPU used the
2 meter reading of “5017” on October 18, 2016, and “multipl[ied] by the meter constant of 40”
3 to arrive at “the actual kWh consumption of 200,680 for the almost 9 year period
4 [that]...consumption was not being billed.” *Exhibit R-1; Weller Testimony*. The total
5 consumption figure of 200,680 kWh was then “divided by the total number of days between
6 October 20, 2007 and October 18, 201[6] to get a daily kWh consumption of 61.3512687251.
7 *Id.* This daily consumption rate was used to calculate the Back-Billed Amount. *Id.*

8 14. After TPU billed the Umphenours for the Back-Billed Period, extended
9 discussions took place between TPU representatives and the Umphenours regarding the
10 accuracy and propriety of the Back-Billed Amount, and the cause of the billing failure.
11 *Umphenour Testimony, Weller Testimony; Exhibits A-1, A-7, A-11, A-12, A-13, R-4, R-6, R-7*
12 *through R-13*. Part of those discussions included debate about adjusting the Back-Billed
13 Amount (\$5,049.28) due to the Umphenours’ conservation efforts (purchasing new, efficient
14 appliances; *see FF 12 above*). *Exhibit A-7*. Ultimately, TPU offered a fifteen percent (15%)
15 reduction to the Back-Billed Amount in an attempt to resolve the outstanding balance. This
16 reduction was based, at least in part, on the Umphenours’ conservation measures. The
17 Umphenours declined TPU’s offer and this appeal followed. *Weller Testimony; Exhibit R-12*.

18 15. In support of their contention that their meter may be malfunctioning and,
19 therefore, that the Back-Billed Amount is incorrect, the Umphenours offered Exhibit A-13
20 showing an “Error” reading on the meter with an error code of “D6.” TPU explained that an
21 error code of “D6” simply indicates a “load imbalance” in how power is being consumed at

1 the premises and is not an indication that the meter is not recording usage correctly. *Weller*
2 *Testimony; Exhibit R-18.*

3 16. TPU testified that it is audited on a regular basis both by the State and internally.
4 *Weller Testimony.* These audits are conducted using selected accounts, not every customer
5 account. *Id.* The Umphenours' account was apparently not part of any audit sample allowing
6 the billing error to continue for nine (9) years. *Id.*

7 17. Any Conclusion of Law deemed to be properly considered a Finding of Fact is
8 hereby adopted as such.

9 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the
10 following:

11 **CONCLUSIONS OF LAW**

12 1. The Hearing Examiner has jurisdiction over the parties and the subject matter of
13 this case pursuant to Tacoma Municipal Code ("TMC") 1.23.050.B.21.

14 2. The appellant in these proceedings bears the burden of proof to establish by a
15 preponderance of the evidence that *TPU's billing was incorrect.* *TMC 1.23.070.C.* The
16 Hearing Examiner's review of the matter is *de novo.* *TMC 1.23.060.*

17 3. TPU, as a municipal utility, is obligated by law to bill the cost of utility services
18 provided. *See, e.g., RCW 35.92.010, 80.28.080-090; TMC 12.06.010, .040, .110, and .160.*¹

19 4. In both opening and closing argument, the Umphenours stated that they would
20 show by a preponderance of the evidence that TPU mismanaged their account. This they did
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¹ *See also Hous. Auth. of King v. Northeast Lake Wash. Sewer & Water Dist., 56 Wn. App. 589, 784 P.2d 1284 (1990) rev. denied 115 Wn.2d 1004 (1990).*

1 without meaningful refutation from Respondent TPU. TPU freely admitted that a number of
2 mistakes were made in the handling of the Umphenours' account and in communications with
3 the Umphenours (*see* FF 8 above). Unfortunately for the Umphenours, in a billing dispute
4 proceeding such as this, as just stated in Conclusion of Law 2 above, proving that mistakes
5 were made in the handling of one's account is not the issue the appellant(s) must prove by a
6 preponderance of the evidence. The Umphenours' proving that TPU made mistakes, even all
7 the mistakes in Finding of Fact 8 above, is not dispositive of whether the Back-Billed Amount
8 was correct unless the mistakes themselves show that the Back-Billed Amount was in error by
9 a preponderance of the evidence.

10 5. The Umphenours did appear to argue that the evidence of TPU's many mistakes
11 in handling the Umphenours' account is proof that the Back-Billed amount was itself in error.
12 That notwithstanding, argument is not evidence.² The Umphenours provided no direct
13 evidence that TPU's method for calculating the usage/consumption at the Subject Property for
14 the period from October 2007 to October 2016 was in error. While the many mistakes and
15 communication gaffes TPU committed do nothing to enhance TPU's image or instill
16 confidence in its overall performance, they do not prove in any way that TPU erred in its
17 usage calculation or that the meter was malfunctioning. In the absence of such evidence, the
18 Hearing Examiner concludes that TPU's calculations were a reasonably accurate, and
19 acceptable method for determining the Umphenours' power usage/consumption at the Subject
20 Property for the Back-Billed Period.
21

² *Jones v. Hogan*, 56 Wn.2d 23, 31, 351 P.2d 153, 159, (1960).

1 6. At hearing, the Umphenours characterized the Back-Billed Amount as an unfair
2 estimate and questioned whether estimating the amount they owe is appropriate. *Umphenour*
3 *Testimony*. TMC 12.06.080 contemplates a certain amount of inexactness in determining
4 “demand occurring within the billing period,” and “figur[ing] to the nearest kilowatt” “For
5 billing purposes...”³ Likewise, in situations where a meter has been damaged—although such
6 is not the case here—estimating an amount for billing is authorized by controlling law.⁴ Here,
7 the actual usage amount for the entire unbilled period from 2007 to 2016 was available from
8 the meter. TPU used that figure to perform its calculation, ultimately billing for only three out
9 of the nine years it had missed. There is no evidence that the meter was not recording usage
10 correctly. There is no evidence that TPU’s calculation was incorrect. The Umphenours offered
11 no alternative calculation or figure as a more accurate replacement to the Back-Billed
12 Amount.

13 7. The Umhenours contend that billing them now for three years of an unbilled
14 period of nearly nine years is unfair.⁵ On that point, the *Hous. Auth. of King* case, cited above
15 is controlling. In *Hous. Auth. of King*, the local sewer and water utility negligently failed to
16 bill an apartment building owned by the appellant housing authority for four years. The
17 Housing Authority appealed to various legal and equitable principles⁶ in arguing that the
18 utility should not be able to back bill for charges it had negligently not collected on its normal
19

20 ³ See also TMC 12.06.110.

⁴ TMC 12.06.140.

21 ⁵ The Umphenours’ fairness argument appears to be an appeal to equity—primarily the principle of *Laches*.
Because of the holding in the *Hous. Auth. of King* case controlling the outcome here, no discussion of whether the
Hearing Examiner is empowered to do equity is necessary.

⁶ Among these were equitable estoppel, laches, accord and satisfaction and the doctrine of account stated. *Hous.*
Auth. of King, 56 Wn. App. 590, 595-597.

1 billing schedule. Citing primarily to RCW 80.28.080-090, the court held “that the public
2 policy against rate discrimination apparent in the statutes bars application of equitable
3 defenses in a utility’s claim for inadvertent or negligent undercharges,” and that “the statutory
4 policy against rate discrimination not only permits but *requires* a utility to collect
5 undercharges.” [Emphasis in the original].

6 8. Given this controlling precedent, TPU is correct that it is required by law to
7 collect any under billed amounts. *Weller Testimony; FF 10 above*. Equitable defenses do not
8 apply to prevent the collection of utility costs.⁷

9 9. Prior to the hearing on this matter, TPU agreed to account for the changes in
10 occupancy at the Subject Property and for the Umphenours’ conservation measures (*see FF 12*
11 *and 14 above*) with a fifteen percent (15%) reduction to the Back-Billed Amount in an attempt
12 to resolve the outstanding balance. The Examiner finds the fifteen percent (15%) reduction to
13 the Back-Billed Amount to be reasonable under the circumstances. The fifteen percent (15%)
14 reduction would bring the Back-Billed Amount to \$4,291.89.

15 10. Any Finding of Fact deemed to be properly considered a Conclusion of Law is
16 hereby adopted as such.

17 Based upon the foregoing Findings of Fact and Conclusions of Law the Hearing
18 Examiner makes the following:

19 **DECISION**

20 The Umphenour’s appeal of three (3) years’ worth of back-billed utility charges for the
21 provision of electric power to their real property located at 3001 North 26th Street in Tacoma,

⁷ *Id.*

1 Washington is denied. Tacoma Public Utilities formally billed the amount of \$5,049.28, but
2 has previously agreed to a fifteen percent (15%) reduction of that amount accounting for the
3 Umphenours' conservation measures and for changes in occupancy at the Subject Property.
4 That adjusted amount of \$4,291.89 is ordered paid in full either in a one-time lump sum
5 payment or pursuant to a payment schedule acceptable to Tacoma Public Utilities.

6 **DATED** this 11th day of July, 2017.

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8 **Jeff H. Capell, Hearing Examiner**

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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*)

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

21 **NOTICE**

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing
Examiner's decision is appealable to Tacoma Municipal Court. Any court action to set aside,
enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be
commenced within 21 days of the entering of the decision by the Examiner, unless otherwise
provided by statute.