OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

MARGARET WINGERTER, **Appellant,** **v.** **THE CITY OF TACOMA,** through its Department of Public Utilities**,** **Respondent.**	**HEX NO. HEX2021-016** **(TPU Account #100035665)** **FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER**

THIS MATTER came on for hearing before JEFF H. CAPELL, Hearing Examiner for the City of Tacoma (the "City"), on July 8, 2021.[1] Appellant Margaret Wingerter ("Appellant" or "Wingerter") appeared at hearing without legal counsel, but with the assistance of her daughter, Chantelle Ripley. Tacoma Public Utilities ("TPU") was represented by Monique Wells, Customer Accounts Supervisor, with John Hoffman, Customer Services Assistant Manager, also present. TPU also appeared without legal counsel.

Ripley testified on behalf of the Appellant; and Wells testified for Respondent, TPU.[2] All testimony was taken under oath and penalty of perjury. Exhibits were admitted and reviewed, with the hearing record kept open briefly for the parties to submit some additional documentation requested by the Examiner.[3] Based upon the evidence presented, the Hearing Examiner makes the following:

[1] Due to National, State of Washington and City of Tacoma Proclamations of Emergency made in response to the COVID-19 virus, the City of Tacoma closed the Tacoma Municipal Building to the public until further notice on or around March 17, 2020. As a result, the public hearing in this matter was conducted virtually using Zoom teleconferencing with both internet and telephonic access.
[2] After first introduction, parties and witnesses are referred to by last name only.
[3] These became Exhibits A-1~A-5 and R-7.

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FINDINGS OF FACT

1. This appeal concerns the City's provision of electric power, under TPU Account No. 100035665 (the "Account"), to the residential real property located at the address of 3927 Gay Rd. E., Tacoma, Washington 98443-2106 (the "Subject Property") for the billing period of July 31, 2020 to September 29, 2020 (the "Billing Period"). *Ex. R-1, Ex. R-3, Ex. R5, Ex. R-6*. The invoice for the Billing Period (hereafter the "Invoice") showed abnormally high power consumption for the Subject Property when compared to prior use history. As a result, Wingerter[4] enlisted Ripley's assistance to investigate and address the abnormally high charges in the Invoice. *Ripley Testimony; Ex. A-4, Ex. A-5, Exs. R-1~R-3*.

2. Wingerter or other family members have resided at the Subject Property going back approximately 37 years. Power consumption during that time has remained generally consistent, except for brief periods when the Subject Property has been unoccupied. During such periods, consumption has been noticeably lower, such as in 2019. Billed usage at the Subject Property, going back to September of 2016, has generally ranged from approximately $300 to $700. *Ripley Testimony*; *Ex. A-4, Ex. A-5*.

3. After Wingerter received the Invoice, she and Ripley contacted TPU.[5] Ripley testified (a) that during her contacts with TPU immediately following receipt of the Invoice, Customer Service Representative Elle was very helpful, (b) that she seemed to think the Invoice was excessively high in light of typical usage at the Subject Property, and (c) that she

[4] References to "Appellant" hereafter will include both the actions of Ripley and Wingerter unless it is necessary to single out one or the other.

[5] Exhibits R-1 and R-2 give details about the contacts between Appellant and TPU beginning on October 2, 2020, and carrying through until this appeal was filed. Nothing material in these exhibits is in dispute between the parties. Given that, the Examiner finds them to be an accurate, if not entirely complete accounting of how this appeal unfolded.

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tried to help troubleshoot possible causes for the apparent spike in power consumption, making suggestions such as (i) a water heater going out, (ii) some new appliance being plugged in, or (iii) a trespasser being on the Subject Property tapping into the power. None of those possible explanations appeared to be actually happening after further investigation and extended troubleshooting by the Appellant with TPU's continued guidance. *Ripley Testimony*.

4. Ripley testified that no abnormal power consumption activities were taking place at the Subject Property that could account for the spike in consumption and corresponding high charges in the Invoice. Until the disputed Billing Period, there has never been a time when power consumption spiked to the levels recorded during the Billing Period. The Examiner finds Ripley's testimony to be credible, and objective evidence presented in Exhibits A-4 and A-5 corroborates. Invoices subsequent to the Billing Period have been lower—more in line with historic usage. *Ripley Testimony; Ex. R-7*.

5. In October of 2019, a new heat pump was installed at the Subject Property. Ripley's daughter moved into the house on the Subject Property in April of 2020, after it had been largely unoccupied in 2019 (as referenced above). *Ripley Testimony*. Ripley submitted invoices showing that the heat pump had been serviced in May, July and September of 2020. *Id., Exs. A-1~A-3*. In the July 21, 2020 invoice, the service technician noted that there "may have been a short in the low-voltage wire…" *Ex. A-2*. To the extent that this possible short affected the meter's functioning, or actual power consumption at the Subject Property, it appears to have been addressed prior to the Billing Period. *Ex. A-2*. The heat pump was serviced again during the Billing Period on or around September 2, 2020, and was found to be

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operating properly. *Ripley Testimony; Ex. A-3*.

6. After the high Invoice was issued, TPU went to the Subject Property on October 7 and October 16, 2020 to take readings from the meter at the Subject Property. TPU confirmed that the meter was spinning and meter numbers were accumulating in the usual linearly progressive fashion that Wells explained is like a car's odometer. *Wells Testimony; Ex. R-1, Ex. R-2*.

7. TPU then had the meter at the Subject Property tested on October 26, 2020, and the meter technician noted that the "Meter tested ok." *Wells Testimony; Ex. R-4*. The meter technician noted on the test form that there was an RV (recreational vehicle) plugged into the service, ostensibly as the potential cause of high usage. Ripley testified that this same RV has been on the Subject Property plugged in for "over twenty years."[6] To test the meter technician's hypothesis, the RV was unplugged, but unplugging the RV made no difference in how the meter was spinning, leaving TPU's conjecture about the RV on the scrap heap with the other potential sources of the usage spike. *Ripley Testimony.*

8. Ripley testified that the "AC company" came out again around this time, and again indicated that the heat pump was operating properly. *See also Ex. R-1 entry for October 30, 2020*.

9. After additional discussion between the Appellant and TPU searching for an explanation for the recorded high usage during the Billing Period and coming up empty, the meter was removed from the Subject Property and replaced with a new (at least to the Subject

[6] Shortly after this statement, Ripley indicated that the RV had been there for at least ten to fifteen years. In any event the RV was at the Subject Property and plugged in since well before the spike in usage during the Billing Period.

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Property) meter on November 3, 2020. This was done after TPU offered to replace it, and the Appellant took TPU's offer. The old meter was a ten constant meter; the new meter is a one constant meter. The old meter has been deployed at a new residential address, and TPU presumes that it is working correctly because no complaints have been lodged, nor has TPU's system had any cautions tripped. *Ripley Testimony, Wells Testimony; Ex. R-1, Ex. R-2*.

10. After the new meter was installed at the Subject Property, the Appellant monitored it daily from November 3, 2020, to December 7, 2020 and usage readings for that period dropped back down significantly to more normal levels. *Ripley Testimony*. Bills submitted after the meter swap have been significantly lower as well. *Ex. R-7*.

11. Appellant then went through TPU's dispute process, and that resulted in the present appeal being filed on or around May 14, 2021. *Ex. R-5*. Prior to the hearing, Appellant paid $791.52 from the Invoice, leaving $1,000 unpaid and the subject of the dispute in this appeal. The Appellant took this approach to payment because bills in the $700 dollar range were not atypical at the Subject Property and the Appellant felt like that amount was reasonably due and owing. *Ripley Testimony, Wells Testimony; Ex. R-3, Ex. R-6*.

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

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

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the parties and the subject matter of this

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appeal pursuant to Tacoma Municipal Code ("TMC") 1.23.050.B.21 as a "[d]ispute[ ] concerning utility service…"

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

3. The Appellant bears the burden of proof to establish, by a preponderance of the evidence, that her claim is consistent with applicable legal standards, and that the lower decision should be reversed. *TMC 1.23.070.C.* Here the lower decision was TPU's billing the Appellant the full amount of power usage registered by the former meter at the Subject Property for the Billing Period even though it appeared to be out of the norm for the Subject Property. Wingerter's challenge to that decision is based on her contention that the meter must have been malfunctioning because nothing in usage at the Subject Property had changed, and no source within the Appellant's control could be identified as the cause of the spike.

4. "Preponderance of the evidence" means that the trier of fact is convinced that it is more probable than not that the fact(s) at issue is/are true.[7]

5. As with most cases, the Appellant may meet this burden through direct or circumstantial evidence."[8] Circumstantial evidence is as reliable as direct evidence.[9] Circumstantial evidence is "evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience."[10] "A trier

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[7] *Spivey v. City of Bellevue*, 187 Wn.2d 716, 733, 389 P.3d 504, 512 (2017); *State v. Paul,* 64 Wn. App. 801, 807, 828 P.2d 594 (1992).
[8] *In re Disciplinary Proceeding Against Jones*, 182 Wn.2d 17, 41-42, 338 P.3d 842, 854 (2014); *Sam v. Okanogan County Sheriff's Office*, 136 Wn. App. 220, 229, 148 P.3d 1086 (2006).
[9] *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321, 322 (2008) *citing State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).
[10] *Id.; State v. O'Hara*, 167 Wn.2d 91, 107, 217 P.3d 756, 765 (2009).

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of fact may rely exclusively upon circumstantial evidence to support its decision."[11] "Whether or not that evidence is sufficient to prove the *case* will depend on the evidence as a whole."[12]

6. The preponderance of the evidence standard is at the low end of the spectrum for burden-of-proof evidentiary standards in the U.S. legal system, and is not particularly difficult to meet.[13]

7. TPU, as a municipal utility, is generally obligated by law to bill the cost of utility services provided.[14]

8. The burden of proof in this appeal, resting as it does on the Appellant, creates a presumption that benefits TPU, essentially presuming its billing is correct unless an appellant can show otherwise by a preponderance of the evidence. Showing that the billed amount was incorrect, or that a mistake was made by a preponderance would effectively rebut this presumption.

9. TPU presented evidence that the meter was spinning and producing readings *after the usage spike occurred*, and that the meter tested as "ok" *also after the usage spike occurred*. TPU presumably offered this evidence to draw an inference that the meter was working properly even when the abnormally high usage was recorded prior to TPU's inquiry. TPU testified further that the meter is presumed to be functioning at its new location because there have been no complaints about it as yet, but TPU's witness had no firsthand knowledge

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[11] *State v. Jackson*, 145 Wn. App. at 818.

[12] *In re F5 Networks, Inc., Derivative Litig.*, 166 Wn.2d 229, 241, 207 P.3d 433, 439 (2009). Emphasis in the original.

[13] *In re Custody of C.C.M.*, 149 Wn. App. 184, 202-203, 202 P.3d 971, 980 (2009). Another somewhat recent case referred to it thusly: "The lowest legal standard of proof [in the U.S. legal system] requires the proponent to prove its case by a preponderance of the evidence." *Mansour v. King County*, 131 Wn. App. 255, 266, 128 P.3d 1241, 1246-1247 (2006).

[14] *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).

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regarding the meter at its new location. In its handling of this appeal, TPU concluded that because the meter appeared to be working "ok" at the later points when it was tested, and because the cause of the spike cannot be pinpointed, something in usage at the Subject Property must have changed during the Billing Period to cause the spike. There is no evidence of that change in usage. TPU's presumption based on a lack of evidence, rather than actual evidence of a change in usage that caused the spike. That presumption, being based on a lack of evidence, cannot overcome the Appellant's credible evidence of no change in usage, especially when coupled with the Appellant's other efforts to test for, isolate, and identify other possible sources of the spike—an effort in which TPU helpfully assisted.[15] Given that, TPU is relying entirely on these two presumptions—that its billing is correct in the first place, and that because the meter tested OK later, that it was functioning properly earlier. Again, these presumptions are outweighed by the Appellant's credible evidence that no changes in usage occurred at the Subject Property during the Billing Period, that the heat pump was functioning correctly, and that the RV was not the source of the spike, nor was any other aberrational source identified.[16]

10. The final tipping evidence in this appeal is the undisputed fact that once the old meter was replaced, usage went back to significantly lower levels more customary to the Subject Property. Changing out the meter becomes the one variable in the inquiry that finally affects the outcome. This is enough, by a preponderance, to convince the Examiner of the

[15] And the Examiner is certainly not faulting TPU for this assistance. As a customer focused, publicly owned utility, TPU should engage in this type of assistance.
[16] On this point (the heat pump functioning properly), the Appellant's testimony and evidence actually provides more firsthand details regarding the heat pump's functioning than TPU's evidence regarding the meter functioning.

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Appellant's position. The Examiner therefore concludes that the atypical amount billed in the Invoice was more probably than not due to a meter malfunction during the Billing Period.

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

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

DECISION AND ORDER

The Appellant's appeal is granted. The amount of $791.52 having already been paid, the remaining $1,000 is waived as erroneously registered, and no additional amount is due on the Account for the Billing Period. All other billings and amounts on the Account (i.e., not for the Billing Period) remain unaffected.

DATED this 26th day of July, 2021.

JEFF H. CAPELL, Hearing Examiner

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NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within l4 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code 1.23.140*)

APPEAL OF EXAMINER'S DECISION TO MUNICIPAL COURT:

NOTICE

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

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