



City of Tacoma
Hearing Examiner

November 17, 2017

Lori K. Devine
12918 77th Avenue East
Puyallup, WA 98373-5300
(Electronic & First Class Mail Delivery)

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

Re: *Lori K. Devine v. City of Tacoma, Tacoma Public Utilities*
File No. HEX 2017-024 (CA #100067698)

Dear Parties,

In regard to the above referenced matter, please find enclosed a copy of the Hearing Examiner's Findings of Facts, Conclusions of Law, and Decision entered on November 17, 2017, as the result of a hearing held on November 2, 2017.

Sincerely,

Louisa Legg
Office Administrator

Enclosure (1) – Findings, Conclusions, and Decision

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through City of Tacoma Mail Services to the parties or attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED November 17, 2017 at Tacoma, WA.

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **LORI K. DEVINE,**

4 **Appellant,**

5 **v.**

6 **TACOMA PUBLIC UTILITIES,**

7 **Respondent.**

HEX NO. 2017-024
(CA # 100067698)

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND DECISION

8
9 **THIS MATTER** came on for hearing before JEFF H. CAPELL, Hearing Examiner
10 for the City of Tacoma (the "City"), on November 2, 2017. The named Appellant, Lori K.
11 Devine, represented herself *pro se*. Tacoma Public Utilities ("TPU") was represented by
12 Katherine Weller, Customer Accounts Supervisor, who testified and presented other evidence,
13 and Ryan Cox, Customer Support Supervisor, who did not testify. TPU also appeared at the
14 hearing without legal counsel.

15 Witnesses were placed under oath and testified. Exhibits were admitted and reviewed,
16 and the parties made closing arguments. At the conclusion of the hearing, the record was left
17 open until the close of business on November 2, 2017, for TPU to submit additional
18 information regarding its calculation of the "Fixed Charge" in dispute here. TPU submitted
19 this information and it was added to the record as Exhibit R-10.

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

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

1 **FINDINGS OF FACT**

2 1. This appeal arises from a dispute over monthly billing from Tacoma Water for a
3 “Fixed charge” of \$25.44 based on the existence of a water meter with multiple connections.
4 *Ex. R-1 and R-7.* These charges were billed to TPU Account No. 100067698 held in the
5 names of Lori K, and Patrick Devine (collectively herein the “Devines”). *Id.* Appellant Lori K.
6 Devine (separately herein “Devine”) initially requested a total refund of all Fixed Charges for
7 the multiple connections dating back to 2006. *Ex. A-1; Devine Testimony.* Devine ultimately
8 requested a refund going back six (6) years calculated at \$6,410.80. *Id.*

9 2. The Devines own the real property located at 12918 77th Avenue E., in Puyallup,
10 Washington (the “Subject Property”). *Ex. A-1; Devine Testimony.* The house in which they
11 currently reside was built as the Devine family home in the 1950s on the Subject Property by
12 Devine’s parents. *Id.* Each of the parents’ three daughters was given a nearby parcel of land on
13 which to build their own homes. *Id.* In 1978 the first home built was assigned an address of
14 12914 77th Avenue E. and its waterline was connected by extension to the line servicing the
15 Devine family home located at 12918 77th Avenue E. *Id.* A second home was built in 1982 at
16 address 12926 78th Avenue E. and its waterline also was connected to the line servicing the
17 Devine family home. *Id.* Eventually, a third home was built at address 12912 77th Avenue E.
18 *Id.* Devine testified that this third home was never connected to “the family waterline.” *Id.*

19 3. In 1995, Devine and her husband purchased the Devine family home at 12918
20 77th Avenue E., in Puyallup, Washington from her father. *Id.* Sometime between 2006 and
21 2007, the waterline extensions for the two homes located at 12914 and 12926 77th Avenue E.

1 were disconnected from line servicing the Devine family home. *Id.* Evidence indicates that the
2 homes located on these two properties were removed at or around the time the waterline
3 extensions were disconnected. *Exs. A-1, R-1, and R-4.*

4 4. Despite the waterline extensions for the two homes located at 12914 and 12926
5 77th Avenue E. being disconnected from the main line servicing the Devine family home, TPU
6 continued to assess a Fixed Charge to Account No. 100067698 for the two extensions until the
7 summer of 2017. At that time, Devine initially contacted TPU regarding high water
8 consumption being reflected in her bills and a possible water leak. *Devine Testimony, Weller*
9 *Testimony; Exs. A-2 and R-1.* This discussion led to Devine questioning the various line items
10 in her bill which included the Fixed Charge for the two extensions, at which time she
11 informed TPU that the lines were no longer in use. *Devine Testimony, Weller Testimony.* TPU
12 was unaware of the homes being removed and the extensions being disconnected until the
13 summer of 2017. *Ex. R-1; Weller Testimony.*

14 5. Devine contended that “the additional charge is not indicated on the bill” and
15 therefore she “had no way of knowing” about the charge. *Devine Testimony; Ex. A-1 and R-4.*
16 Based on the evidence submitted, Devine’s contention is not correct in that the Fixed Charge
17 does show up on TPU’s billing statements. *Exs. A-4 and R-7.* Devine is correct, however, in
18 her contention that it is not necessarily clear on the face of the TPU bills why the Fixed
19 Charge was assessed. *Id.; Devine Testimony.* From this lack of clarity, Devine appears to
20 contend that the onus was on TPU to ascertain that the lines had been disconnected and to
21

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

1 discontinue assessing the Fixed Charge. *Devine Testimony*. Devine offered no support for this
2 position other than her own opinion and her contention that similar bills from other utilities
3 are somehow clearer.¹

4 6. When TPU became aware that there were no longer buildings on the real
5 properties located at 12914 and 12926 77th Avenue E., it discontinued assessing the Fixed
6 Charge. *Weller Testimony; Ex. R-1*. Nonetheless, the Fixed Charge was assessed without basis
7 for approximately ten (10) years leading up to TPU's being informed of the removal of the
8 homes and disconnection of the extension lines. *Devine Testimony; Weller Testimony*.

9 7. After TPU explained to Devine what the Fixed Charge was for, as referenced
10 above, Devine requested that TPU refund all Fixed Charges dating back to the disconnection
11 of the extension lines, ultimately settling on a written demand for a six (6) year retroactive
12 refund in the amount of \$6,410.80. *Devine Testimony; Exs. A-2, R-4*.

13 8. In response to Devine's demand, TPU offered to refund three (3) years' worth of
14 the Fixed Charge in the amount of \$3,124.90. *Weller Testimony; Exs. R-1 and R-10*. TPU
15 testified that it cannot refund more than three years' worth of "over-billing" based on TPU
16 Customer Service Policy 4.2.10 which reads as follows:

17 Utility billing errors resulting in retroactive adjustments for under-
18 billing shall be limited to a maximum of three years. Utility accounts
19 that have been over-billed will be refunded the full amount of the
over-billing up to a maximum of three years, or up to a maximum of
six years for accounts with a written contract.

20 *Weller Testimony; Ex. R-6*.

21 ¹ The Examiner notes here that the Puget Sound Energy bill that Devine offered into evidence as *Exhibit A-5* does not have a line item similar to the TPU Fixed Charge so a comparison to the TPU billing statement is not entirely apposite.

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

1 Devine rejected TPU's offer of a three year refund leading to the present appeal. *Devine*
2 *Testimony, Weller Testimony; Exs. R-1, A-1 and A-2.*

3 9. Any Conclusion of Law deemed to be properly considered a Finding of Fact is
4 hereby adopted as such.

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

7 **CONCLUSIONS OF LAW**

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

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

13 3. TPU, as a municipal utility, is obligated by law to bill the cost of utility services
14 provided. *See, e.g., RCW 35.92.010, 80.28.080-090; TMC 12.06.010, .040, .110, and .160.*²

15 4. Pursuant to RCW 35.63.130, the local "[l]egislative body may vest in a hearing
16 examiner the power to hear and decide those issues it believes should be reviewed and
17 decided by a hearing examiner, including but not limited to: . . . (b) Appeals of administrative
18 decisions or determinations; . . ." The present matter is an appeal of an administrative
19 decision to not refund more than three (3) years' worth of already imposed and collected
20 utility charges based on an existing customer service policy.

21

² *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 5. As evidenced by the foregoing, hearing examiners are creatures of statute and
2 have only the authority they are given by those same statutes. In the present matter, as stated
3 above, that authority comes from TMC 1.23.050 B.21, which gives the Hearing Examiner the
4 following authority in this matter:

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

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

17 The present matter is both an appeal “arising from the imposition of charges for
18 service issued by the Department of Public Utilities, as well as [an appeal] [] arising from a
19 dispute[] concerning utility service, . . .” *Id.*

20 6. The parties are not in dispute over whether the homes were removed from the
21 real properties located at 12914 and 12926 77th Avenue E., or whether the extension lines
were disconnected in approximately 2006 to 2007 as a result.

 7. The parties are also not in dispute over whether the Fixed Charge was lawfully
owed after the disconnection of the extension lines. It was not. That said, the Devines had
knowledge of this disconnection at the time. Had TPU known of the disconnection, the Fixed
Charges could have been discontinued at that time.

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

1 8. Devine appears to argue that it was TPU's obligation to know about the changed
2 circumstance brought about by the disconnection of the extension lines, and alternatively that
3 TPU had an additional obligation to make its billing statement clearer so that the Devines
4 would have known the basis for the Fixed Charge, and therefore they would have known to
5 request discontinuance of the Fixed Charge sooner. The Examiner finds no support for these
6 contentions. Rather, it is the utility customer's obligation to keep track of what is being billed
7 and to dispute any incorrect billing as it occurs or at least in compliance with applicable
8 policies and statutes of limitations. Likewise, it is the customer's obligation to make TPU
9 aware of any change in usage that may affect billing.

10 9. TPU is correct that its Customer Service Policy 4.2.10 applies in this instance.
11 Thus, the issue in this matter becomes: whether the Hearing Examiner has the authority to
12 override TPU Customer Service Policy 4.2.10 and order TPU to refund over-billed amounts to
13 Account No. 100067698 beyond the three (3) years that the policy requires.

14 10. The Examiner does not have the authority to override TPU Customer Policies.
15 Policy making is a legislative function.³ Without the express authority to do so, quasi-judicial
16 decision makers, such as hearing examiners, should not substitute their own judgment for that
17 of the legislative policy-making body.⁴

18 It should be noted here that, while this policy works to the detriment of the Devines, it
19 also protects TPU customers who were under-billed for periods going back longer than three

20 //

21 ³ *Jones v. Jones*, 48 Wn.2d 862, 868-869, 296 P.2d 1010, 1013 (1956); *see also City of Pasco v. Shaw*, 127 Wn.
App. 417, 424, 110 P.3d 1200, 1204 (2005) *aff'd at* 161 Wn.2d 450 (2007), *US Supreme Court certiorari denied*
at 128 S. Ct. 1651, 170 L. Ed. 2d 385 (2008).

⁴ *Jones*, 48 Wn.2d at 868-869.

**FINDINGS OF FACT,
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1 (3) years. TPU Customer Service Policy 4.2.10 appears to correspond to RCW 4.16.080(3),
2 which limits to three years “[a]n[y] action upon a contract or liability, express or implied,
3 which is not in writing, and does not arise out of any written instrument;...”

4 11. Devine argued that the TPU-customer relationship constitutes a written contract,
5 and therefore even under Customer Service Policy 4.2.10, she is entitled to six (6) years’
6 worth of refunded Fixed Charges. Although paper is involved in the utility service application
7 process, paper alone does not elevate the TPU-customer relationship to that of a written
8 contract. While an application for utility service from TPU almost certainly creates
9 “contractual rights and obligations”⁵ on both the customer and the City, the application does
10 not necessarily rise to being a “written contract” under applicable law. Other TPU policies
11 appear to make a distinction as well. Customer Service Policy 4.2.10 itself evidences a
12 distinction between normal service, and service under a written contract. Customer Service
13 Policy 7.3⁶ is another example where TPU’s policies seem to elevate a written service contract
14 to a higher level than just the ordinary provision of utility service. As a result, Devine’s
15 customer relationship with TPU under Account No. 100067698 does not rise to being a
16 written contract.

17 12. Again, Devine’s requested remedy—arguing that she has a written contract with
18 TPU—requires the Hearing Examiner to override TPU policy, something the Examiner is not
19 empowered to do. Devine was not legally obligated to pay the Fixed Charge once the line

20 ⁵ See e.g. TPU Customer Service Policy 2.1.

21 ⁶ Customer Service Policy 7.3 reads as follows: If there are conflicts between separately written contracts and these Customer Service Policies, the separately written contracts shall control and govern the resolution of such conflicts.

1 extensions precipitating the charge were gone. To that extent, she overpaid TPU for a period
2 longer than three (3) years. This notwithstanding, TPU's Customer Service Policy 4.2.10
3 coupled with the statute of limitations set forth at RCW 4.16.080(3), relieves TPU from any
4 **legal** obligation to refund this over-payment more than three (3) years in reverse.⁷

5 13. TPU also referenced Washington State Constitution Article VIII, Section 7⁸ as a
6 barrier to being able to refund more than three (3) years of over-billing to Appellant Devine.
7 This Section of the State Constitution does not apply here. Under the facts presented, after the
8 extension lines were discontinued the Fixed Charge assessed on these extensions was no
9 longer the Devines' legal obligation to pay. In other words, factually, TPU was no longer
10 owed the Fixed Charge. However, since TPU did not know of the disconnection, it continued
11 to assess a baseless charge until 2017. Because the charge was baseless after the
12 disconnection, were TPU to refund the whole of the collected, but baseless Fixed Charge,
13 there would nonetheless be no gifting of public funds violation.

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

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

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21 ⁷ Moral obligations and legal obligations are often treated differently under the law. *See e.g., Johnson v. Savage*,
163 Wash. 478, 481-482, 1 P.2d 890, 891 (1931); *Muir v. Kane*, 55 Wash. 131, 104 P. 153 (1909).

⁸ *See Ex.R-9.*

1 **DECISION**

2 1. In accordance with its Customer Service Policy 4.2.10, Tacoma Public Utilities
3 is hereby ordered to refund to Appellant Lori K. Devine all baseless Fixed Charges for the last
4 three (3) years, dated from the date the over-billing was first brought to TPU's attention.

5 2. Appellant Lori K. Devine's request, under this appeal, for a larger refund of
6 already paid Fixed Charges dating back six (6) years is denied due to the Hearing Examiner's
7 lack of authority to override TPU policy and the applicable statute of limitations.

8 **DATED** this 17th day of November, 2017.

9 

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

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 is appealable to Tacoma Municipal Court. Any court action to set aside,
15 enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be
16 commenced within 21 days of the entering of the decision by the Examiner, unless otherwise
17 provided by statute.

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**FINDINGS OF FACT,
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City of Tacoma
Hearing Examiner

November 17, 2017

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