



## **BACKGROUND AND PROCEDURAL HISTORY**

### **Petition**

In his Petition dated March 8, 2012, Petitioner alleges that he experienced a diversion of service and that PSE&G overbilled him for electric and gas usage during the period between June 6, 2009 and February 8, 2012. (Petition ¶ 1). According to the Petitioner's estimate, PSE&G billed him for \$33,566.95 where he should have been billed for \$6,600. (Petition ¶¶ 1, 6). On February 1, 2011, the Petitioner alleges that he paid PSE&G \$2,000 and that PSE&G applied this \$2,000 as a deposit rather than a credit toward his usage. (Petition ¶ 8).

The Petitioner claims that PSE&G's meter continued to record electric usage even after he shut off electricity from his apartment's main panel. (Petition ¶ 3). He also claims that PSE&G continued to bill him for gas usage after he shut off the gas from the main valve in his apartment and shut off the all gas appliances and gas heaters. (Petition ¶ 4). According to the Petitioner, PSE&G's agents investigated electric usage in the hallways on all the floors in his building but failed to investigate gas usage on non-hallway portions of other floors. (Petition ¶ 5).

In addition, the Petitioner claims that PSE&G improperly refused to classify his account as "residential" during the period between November 2009 and January 2011 – only to later reclassify his account as "residential" in February 2011. (Petition ¶ 9). Finally, the Petitioner demands that PSE&G credit the bill's excess to his account, that PSE&G credit his \$2,000 payment toward his usage rather than a deposit, that the Board review his bills and determine their accuracy before and after the reclassification of his apartment, and that the Board permit him to propound discovery on PSE&G. (Petition ¶¶ 7–10).

### **Answer**

In its Answer dated April 13, 2012, PSE&G denies all of the Petitioner's allegations. (Answer ¶ 1). PSE&G alleges the Petitioner owed PSE&G \$33,063.43 as of April 11, 2012. (Answer ¶ 3).

According to PSE&G, it conducted a field investigation on February 4, 2011 that revealed the Petitioner was utilizing a 4,000-square foot open loft area for both commercial and residential purposes. (Answer ¶ 7). PSE&G claims it investigated whether it could classify the Petitioner's account as "residential" and whether it would benefit the Petitioner to do so. (Answer ¶ 8).

PSE&G raises various affirmative defenses including the Petitioner's failure to state a claim; PSE&G's conformity with its tariffs, New Jersey statutes, and regulations of the Board of Public Utilities; and the accuracy of PSE&G's billing. (Answer ¶¶ 1–4). PSE&G demands an order denying Petitioner's requested relief and dismissing the Petition. (Answer ¶ 4).

### **Prehearing Order**

The Prehearing Order set deadlines for discovery, discovery motions and replies. Specifically, the order required Petitioner to produce discovery by May 21, 2012 and for PSE&G to reply by June 4, 2012.

### **Status Conference and Discovery**

At a status conference on July 2, 2012, the Petitioner stated that he was going to file a discovery motion. (Initial Decision Page 2). The parties agreed that the Petitioner would send the motion that day and that PSE&G would have until July 20, 2012 to respond. Ibid. On July 6, 2012, the OAL received the Petitioner's Motion seeking to compel answers to several interrogatories, to compel the production of documents, and to extend the discovery period until compliance with these requests (Motion to Compel Answers Page 1; Motion to Compel Production of Documents Page 1; Motion to Extend Discovery Page 1). On July 11, 2012, PSE&G filed its Opposition. PSE&G argued that it had sufficiently responded to the Petitioner's interrogatories and document requests and that the Petitioner had not made a substantial showing to justify an extension of time. (Opposition Pages 2-3). Petitioner's motion was denied. (Initial Decision Page 2).

### **Hearing**

At an evidentiary hearing held on July 27, 2012, the Petitioner testified about the alleged diversion of his gas and electric service, the improper classification of his apartment, and PSE&G's subsequent errors in revised bills. As of the trial date, Petitioner testified that his balance was \$33,645.28 and demanded a reduction of \$21,714.12. (T12-2 to 3; T89-19 to 20). During the hearing, Ed Sullivan, a PSE&G employee with experience in meter reading, accounting, customer relations, and regulatory work, testified that the Petitioner's balance was \$33,655.38. (T52-16 to 19).

Petitioner has alleged a diversion of gas and electric service since 2009. (Exhibit P-1 to Initial Decision). To support his allegations of diversion of electric service, Petitioner testified that his building has electric service panels with conduits that lead outside his apartment. (T92-12 to 17). The building has heavy-duty air conditioners that run to the roof of the building. (T28-18 to 20). Petitioner testified that the lights in his apartment are all low-wattage. (T31-7 to 8). These lights, according to Petitioner, are on twenty-four hours a day. (T13-13 to 16). Both parties acknowledged that Pete Sequeira, a field service technician for PSE&G, visited his apartment in December of 2011 to investigate the alleged diversion. (T12-12). Petitioner alleged Mr. Sequeira could not have properly investigated the diversion of his electric usage in December because the building's air conditioners were not turned on at that time. (T28-10 to 14). According to Petitioner, Mr. Sequeira acknowledged in December 2011 that Petitioner's electric meter was wired to the hallways on all four floors of the building. (T13-4 to 8; T14-6 to 10).

In response to the Petitioner's allegations of electric diversion, Mr. Sequeira testified there was no diversion of electric service because the Petitioner's electric meter stopped recording when he turned off the Petitioner's breaker during his investigation in December 2011. (T-69-10 to 14). Mr. Sequeira testified that PSE&G generally does not check internal wiring as part of its diversion of service investigations. (T71-20). If PSE&G discovers diversion in a commercial building, it generally relies on the tenants to resolve the dispute. (T82-13 to 14). In a residential building, it revises the tenant's bill and bills the landlord for the diverted service. (T86-14 to 19). Mr. Sullivan acknowledged that some follow-up was needed when Mr. Sequeira discovered Petitioner's meter was connected to the hallways. (T57-22 to 23).

To support his allegations of diversion of gas service, the Petitioner alleged that PSE&G billed him for gas usage even after he shut off his gas appliances. (T-21-T22). The Petitioner testified that his heating system is powered by gas. (T31-6 to 7). The Petitioner stated that he kept the temperature in his apartment in the winter at 62 degrees. (T91-13). He testified that he sealed and caulked his windows to make his apartment more energy efficient. (T15-21 to 25). However, the pipes in his apartment froze in the winter while the water on the vacant, third floor remained running. (T17-14 to 17; T18-8 to 9).

In response to the Petitioner's allegations of gas diversion, Mr. Sequeira testified the gas meter spun when he turned on the heat and stopped when he shut it off during his investigation in December 2011. (T69-18 to 20). Based on these observations, Mr. Sequeira concluded that the Petitioner's gas meter was supplying gas for only the Petitioner's fourth floor apartment and that there was no diversion of gas service. (T69-23 to 24).

To support his allegation that PSE&G improperly classified his space as commercial, the Petitioner testified that he and his family reside in the space and do not operate a business there. (T8-19 to 22; T9-T10). According to the Petitioner, Mr. Sequeira acknowledged the space was residential. (T22-23 to 25). Mr. Sequeira testified that he visited the Petitioner's apartment in February 2011 to determine whether it was commercial or residential. (T63-T64). Mr. Sequeira testified that the Petitioner refused to let him enter the apartment in February 2011. (T65-4 to 8). Mr. Sequeira concluded the Petitioner operated a show business because he could see stage designs in the apartment and the building owner told him the Petitioner had a show business. (T74-T75).

Mr. Sequeira testified that, in February 2011, PSE&G changed the Petitioner's commercial gas meter to a residential meter. (T76-3 to 7). Petitioner also testified that PSE&G improperly billed him for prior usage at the commercial or "general" service gas heating rate in effect in March 2011, not at the residential service gas heating rates in effect during the prior months. (T23-23 to 25). According to Mr. Sullivan, PSE&G compared the Petitioner's bill under commercial rates and the Petitioner's bill under residential rates and concluded the Petitioner actually benefited from the commercial rate. (T50-16 to 23).

Mr. Sequeira testified that, in December 2011, a PSE&G technician changed the Petitioner's commercial electric meter to a residential (RS) meter. (T77-17 to 21). Mr. Sequeira was unsure why PSE&G installed a residential meter rather than a residential load management (RLM) meter, which would register off and on peak usage. (T77-T78). According to the Petitioner, PSE&G never revised the Petitioner's prior electric bills. (T26-10 to 12).

The Petitioner did not present any evidence to support his contention that his \$2,000 deposit should be applied to his usage, rather than to a deposit. Mr. Sullivan testified that the Petitioner paid PSE&G \$2,000 in February 2011 and that PSE&G applied that payment to the Petitioner's security deposit. (T46-13 to 15). Mr. Sullivan testified that, in February 2011, the Petitioner entered an installment plan with PSE&G wherein he agreed to pay \$1,656 a month for 12 months. (T46-16 to 19). According to Mr. Sullivan, the Petitioner made one payment of \$1,656. (T46-8 to 13).

### **Initial Decision**

On August 20, 2012, an Initial Decision was issued. The Initial Decision contained the following findings of fact: that the Petitioner's electric meter was wired to the lights in the stairwell of all four floors; that these lights were outside the Petitioner's premises; and that the Petitioner did not agree in a lease to pay for lights outside his premises. (Initial Decision Page 5). The findings were based on the Petitioner's testimony and on Mr. Sequeira's December 2011 report, which stated the lights in the stairwell were wired to one of the Petitioner's breakers. (Initial Decision Page 5). Based on these findings, the ALJ concluded that the Petitioner had experienced a diversion of electric service. (Initial Decision Page 8).

The ALJ also concluded the Petitioner was incorrectly billed for gas usage at a commercial rate from July 2009 until PSE&G changed his gas meter in February 2011. (Initial Decision Page 8) and that the Petitioner was incorrectly billed for electric usage at a commercial rate from July 2009 until PSE&G changed his electric meter in December 2011. (Initial Decision Page 8). The Initial Decision did not address the Petitioner's contention that PSE&G should have applied his \$2,000 payment to his usage, rather than to a deposit.

The Initial Decision ordered PSE&G to:

1. Determine the amount attributable to the Petitioner's diversion of service and to contact the Petitioner's landlord to correct the diversion;
2. Re-bill the Petitioner for gas usage from July 2009 to February 2011 at the residential rate in effect during those months; and
3. Re-bill the Petitioner's for electric usage from July 2009 to December 2011 at the residential rate in effect during those months.

[Initial Decision 8-9].

### **Compliance Letter**

On August 28, 2012, PSE&G filed a compliance letter informing the Board that it re-billed the Petitioner pursuant to ALJ Moss's Order and contacted the Petitioner's landlord regarding the diversion. (August 28, 2012 Letter ¶ 1). As a result of the re-billing of Petitioner's electric charges from July 2009 through December 2011 at residential rates that were in effect at that time, the Petitioner owed an additional \$180.92 for gas usage and had a credit of \$5.97 for electric usage. Ibid. Pursuant to the Initial Decision's conclusion that Petitioner experienced a diversion of electric service because one of his breakers provided service to the lights in the stairwell, PSE&G credited Petitioner's account for the usage associated with the eight lightbulbs at forty watts each from June 2009 to August 2012 totaling \$1,628.47. As a result, Petitioner's balance owed is \$33,361.80. (August 28, 2012 Letter ¶ 2). Petitioner's landlord informed PSE&G that the Petitioner was the only tenant benefitting from the hallway lights and his lease is a commercial lease. Ibid.

## **Exceptions**

On August 28, 2012, the Petitioner filed exceptions with the Board of Public Utilities. (Exceptions Page 1). The Petitioner alleged he suffered a "much greater" diversion of service than stated in the Initial Decision. (Exceptions Page 1). For example, Petitioner refers to five or six A/C compressor units, but these were "not mentioned in the OAL Initial Decision in reaching its conclusions." (Exceptions Page 4). The Petitioner also alleged the Initial Decision failed to resolve whether PSE&G properly conducted its diversion of service investigation as required under N.J.A.C. 14:3-7.8. (Exceptions Page 1). According to the Petitioner, the Initial Decision lacked sufficient findings of fact regarding the promptness of PSE&G's investigation (Exceptions ¶¶ 2, 5, 18) and its distribution of a written diversion report. (Exceptions ¶¶ 2).

## **Reply to Exceptions**

In its Reply to the Petitioner's Exceptions, filed on September 7, 2012, PSE&G urged the Board to adopt the Initial Decision without modifications because it constituted an appropriate balancing of the issues in dispute. (Reply Page 2). PSE&G argued the Petitioner's Exceptions did not meet regulatory requirements because they merely expressed displeasure with ALJ Moss's evaluation of testimony and drew conclusions with no basis in law or fact. (Reply Page 3). PSE&G argued that it does not speculate as to a customer's usage and that it properly billed the Petitioner for usage recorded by his meters. (Reply Page 3).

## **DISCUSSION AND FINDINGS**

### **I. The Petitioner's Exceptions**

First, the Board must determine whether the Petitioner's filed Exceptions to satisfy the requirements provided in N.J.A.C. 1:1-18-4. Pursuant to N.J.A.C. 1:1-18.4, any party may file exceptions with the agency head within 13 days from the date the judge's initial decision was mailed to the parties and a copy of the filed Exceptions shall be served on all other parties and the judge.

On August 30, the Petitioner mailed his Exceptions to the Board at the address specified in the Initial Decision (2 Gateway Center, Suite 801, Newark, NJ 07102). (Initial Decision Page 9). Because the Board relocated its offices to Trenton, the Petitioner's Exceptions were returned to him undelivered on September 1, 2012. Petitioner subsequently mailed his Exceptions to the current mailing address of the Board in Trenton on September 6, 2012. The BPU Case Management received his exceptions on September 7, 2012. The Board has the discretion to relax or disregard a procedural rule if adherence would result in unfairness or injustice. N.J.A.C. 1:1-1.3. Because the Petitioner's Exceptions would have been timely if the Initial Decision had given him the current Board's address in Trenton, the Board will disregard the time requirements of N.J.A.C. 1:1-18.4 and consider the Petitioner's Exceptions.

Substantively, exceptions must:

1. Specify the findings of fact, conclusions of law or dispositions to which exception is taken;
2. Set out specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge;

3. Set forth supporting reasons. Exceptions to factual findings shall describe the witnesses' testimony or documentary or other evidence relied upon. Exceptions to conclusions of law shall set forth the authorities relied upon.

[N.J.A.C. 1:1-18.4(b)].

In reviewing the record, an agency "may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence on the record." N.J.A.C. 1:1-18.4(c). An agency also may not consider evidence not presented at the hearing. Ibid.

Here, the Petitioner took exception to factual findings regarding PSE&G's diversion of service investigation. (Exceptions ¶ 2). Specifically, the Petitioner alleged the Initial Decision failed to state whether PSE&G fulfilled its statutory obligations in conducting its diversion of service investigation. (Exceptions Page 1). In its Reply, PSE&G argued that the Petitioner's Exceptions merely express displeasure with Initial Decision. (Reply Page 3).

## II. PSE&G's Investigation

N.J.A.C. 14:3-7.8 sets forth the responsibilities for the utility and tenant-customer in diversion of service cases. Within two months of receiving an investigation request, the utility must investigate. N.J.A.C. 14:3-7.8(d)(4). The tenant-customer, in turn, must provide the utility with reasonable access, N.J.A.C. 14:3-7.8(d)(5), and with any information that may assist in the investigation, N.J.A.C. 14:3-7.8(d)(9). Within fourteen days of the investigation, the utility must provide the tenant-customer with a written report. N.J.A.C. 14:3-7.8(d)(10). Where the investigation reveals diversion, the utility must notify the landlord within thirty days, N.J.A.C. 14:3-7.8(d)(6), try to determine the identity of the beneficiary, N.J.A.C. 14:3-7.8(d)(6), and try to reach an agreement with the parties involved, N.J.A.C. 14:3-7.8(d)(11).

Petitioner alleges various violations of N.J.A.C. 14:3-7.8. According to Petitioner, he requested a diversion of service investigation in May 2009 and October 2009. (T10-16 to 19; P-1). Petitioner alleged PSE&G did not actually conduct a diversion of service investigation until December 2011 which would be well beyond the two month period allowable under N.J.A.C. 14:3-7.8. (T14-6 to 10; T20-18 to 23). During re-cross examination, Mr. Sequeira acknowledged that he conducted the diversion of service investigation in December 2011. (T64-19 to 23, T86-19 to 20). Mr. Sequeira testified that he tried to schedule a diversion of service investigation on four previous occasions, all in October 2011, but Petitioner was unavailable. (T67-20 to 24).

During the hearing, Petitioner also alleged that PSE&G failed to provide him with a copy of Mr. Sequeira's written report after conducting its diversion investigation, as required under N.J.A.C. 14:3-7.8(d)(10). (T20-12 to 15).

Finally, in his Petition and again in his Exceptions, Petitioner alleged that PSE&G failed to assess whether his service was being diverted to non-hallway areas like the third floor, despite his requests for such an investigation in May 2009 and October 2009. (Petition ¶ 5; Exceptions ¶ 8; P-1). During his testimony, Mr. Sequeira acknowledged that a diversion investigation requires a field service technician to have access to the entire building. (T81-19 to 20;

T84-12 to 14). The Petitioner's allegations thus articulate a potential violation of PSE&G's duty to determine the beneficiaries of diverted service. N.J.A.C. 14:3-7.8(d)(6).

### III. Diversion

Based on a review of the record and the applicable law, the Board finds the Initial Decision articulated reasonable factual findings as to the Petitioner's diverted electric service and the Petitioner's right to a revised electric bill for the lights in the hallways. However, Petitioner's allegation that there was further diversion of electric service has not been fully addressed. In addition, the Board concludes the Initial Decision does not articulate sufficient factual findings to support a finding that the Petitioner experienced a diversion of gas service and that PSE&G must revise the Petitioner's gas bill. Accordingly, the Board now **ADOPTS** the Initial Decision finding diversion of electric service and ordering PSE&G to rebill the Petitioner for electric usage but **REMANDS** for further findings of fact regarding the alleged further diversion of electric service and the alleged diversion of gas service and the Petitioner's potential right to a revised gas bill.

#### A. Diversion of Electric Service

The finding that Petitioner experienced a diversion of electric service rested on the December 8, 2011 report of Mr. Sequiera, which indicated that the lights in the stairwell of the building were wired to a circuit breaker of Petitioner, and that the lights on each of the four floors of the stairwell are clearly outside of the Petitioner's premises. (Initial Decision Page 8). An agency head may not reject or modify an ALJ's finding of fact as to issues of credibility unless it deems the finding arbitrary or capricious. N.J.A.C. 1:1-18.6(c).

The Board finds the Initial Decision's findings of fact regarding diversion of Petitioner's electric service are reasonable and not arbitrary or capricious. During the hearing, Mr. Sequeira testified that Petitioner's electric meter stopped after he shut off all breakers. (T69-10 to 14). But, in his report (dated December 8, 2011), Mr. Sequeira acknowledged that one of the Petitioner's breakers was wired to the lights in the stairwells on all four floors of the building. (Exhibit P-3 to Initial Decision). Based on this contradiction, it is apparent ALJ Moss made a credibility determination based on the conflicting report and testimony about diversion of electric service. Mr. Sullivan testified that tenants do sometimes pay for common areas and that PSE&G does not concern itself with the lease agreements between landlords and their tenants. (T49-2 to 9). But, during cross examination, Mr. Sullivan stated PSE&G should have followed up when it realized the Petitioner's breaker was connected to the lights in the stairwell. (T57-22 to 23). Therefore, it was reasonable to conclude PSE&G found diversion of electric service for the eight hallway lights. Accordingly, it was reasonable to order PSE&G to retroactively correct the Petitioner's electric bill from July 2009 through December 2011. N.J.A.C. 14:3-7.8(g)(6).

However, Petitioner also alleges that there is a further diversion of electric service, which includes air conditioning. (T9-3 to 10). Petitioner further states that because PSE&G performed tests in the winter, when PSE&G turned the electric off during the test, there would be no indication as to whether the air conditioner would be used from any other floors during this time. (T28-10 to 14). The Initial Decision does not make findings of fact or conclusions of law to resolve Petitioner's allegation of further diversion of electric service from other electric appliances, like the A/C circuit which could carry up to 2,400 watts. (Exceptions Page 4).



## B. Diversion of Gas Service

The Initial Decision did not provide sufficient factual findings as to the Petitioner's alleged diversion of gas service. The Petitioner alleged PSE&G continued to bill him for gas usage after he shut off the gas from the main valve in his apartment and shut off the all gas appliances and gas heaters. (Petition ¶ 4). The Petitioner also alleged the pipes in his fourth floor apartment froze in the winter while the water on the third floor continued to run. (T17-14 to 17; T18-8 to 9). In response, Mr. Sequeira testified there was no diversion because the Petitioner's gas meter stopped when he shut off the Petitioner's heat during his investigation in December 2011. (T69-18 to 20).

Unlike ALJ Moss's decision regarding electric service, the Initial Decision did not make any findings of fact or conclusions to resolve this dispute about diverted gas service. As explained above, the Initial Decision found probative Mr. Sequeira's report and the Petitioner's testimony, concluded there was diversion of electric service, and ordered PSE&G to rebill the Petitioner's electric service. (Initial Decision Pages 8-9). There were no similar findings of fact or conclusions about diversion of gas service which would resolve the dispute between the Petitioner's and Mr. Sequeira's testimony. The Initial Decision contains only ALJ Moss's order directing PSE&G to rebill the Petitioner's gas service. (Initial Decision Page 9).

## IV. Residential Rates

The Initial Decision articulated sufficient findings of fact regarding the rates for the Petitioner's space. ALJ Moss found the Petitioner asked PSE&G in May 2009 to apply residential rates to his electric and gas bills. (Initial Decision Page 5). This finding is supported by the record. The Petitioner requested residential rates in his letter to PSE&G in May 2009. (Exhibit P-1 to Initial Decision). Hence, it was reasonable for ALJ Moss to order PSE&G to retroactively bill the Petitioner at the residential rates in effect in the months following his request. (Initial Decision Page 9). Accordingly, the Board now **ADOPTS** the Initial Decision ordering PSE&G to retroactively apply residential rates to the Petitioner's bills.

Hence, on remand, the OAL must determine:

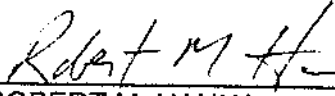
1. if compliance with requirements as set forth in N.J.A.C. 14:3-7.8 regarding the diversion of gas service was satisfied;
2. provide findings of fact and conclusions of law on whether there is further diversion of electric service based on Petitioner's allegations that there are other electrical appliances in use that supply service outside of his unit which he is paying for and based on his allegation that PSE&G did not properly investigate the diversion of electric service; and
3. provide findings of fact to support the conclusion in the Initial Decision that there was a diversion of gas service.

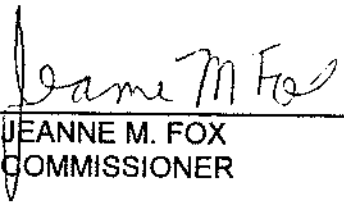
Upon careful review and consideration of the record, and based on the foregoing, the Board **FINDS** that the Initial Decision's conclusions about the Petitioner's diversion of electric service regarding the hallway lights, his right to a revised electric bill, and his request for residential rates are reasonable and fully supported by the record and therefore are **ADOPTED** and the

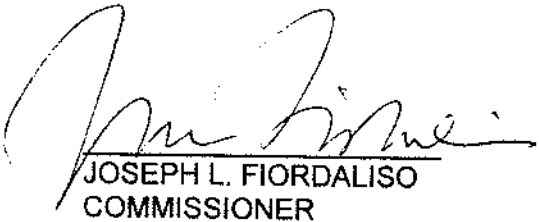
Initial Decision's conclusions regarding PSE&G's compliance with N.J.A.C. 14:3-7.8, the Petitioner's alleged further diversion of electric service as well as the alleged diversion of gas service, and the Petitioner's right to a revised gas bill be **REMANDED** for further findings of fact.

DATED: 12/19/12

BOARD OF PUBLIC UTILITIES  
BY:


  
ROBERT M. HANNA  
PRESIDENT


  
JEANNE M. FOX  
COMMISSIONER

  
JOSEPH L. FIORDALISO  
COMMISSIONER

  
NICHOLAS ASSELTA  
COMMISSIONER

  
MARY-ANNA HOLDEN  
COMMISSIONER

ATTEST:   
KRISTI IZZO  
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities  


PETER TRIESTMAN

V.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

BPU DOCKET NO. EC12030239U

OAL DOCKET NO. PUC5419-12

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**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. PUC 05419-12

AGENCY DKT. NO. GC12030239U

**PETER TREISTMAN,**

Petitioner,

v.

**PUBLIC SERVICE ELECTRIC  
AND GAS COMPANY,**

Respondent.

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**Peter Treistman, pro se**

**Alexander Stern, Esq., for respondent**

Record Closed: July 27, 2012

Decided: August 14, 2012

BEFORE **KIMBERLY A. MOSS, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioner, Peter Treistman (Treistman), disputes bills by respondent, Public Service Electric and Gas (PSE&G). He alleges that there was a diversion of service. Treistman's petition was filed with the Board of Public Utilities (Board) on March 12, 2012. The matter was transmitted to the Office of Administrative Law (OAL) and filed on April 24, 2012. In 2011, Treistman filed a petition that was before the OAL on the

same issue. Petitioner failed to appear for the hearing on December 12, 2011. Petitioner sent a letter to the BPU stating he thought that a telephone conference, not a hearing, was scheduled for December 12, 2011. A prehearing conference was held on May 14, 2012. The prehearing order stated that petitioner was to produce discovery by May 21, 2012. Respondent was to reply to discovery by June 4, 2012. Any discovery motions were to be filed by June 15, 2012, and any responses to discovery motions were to be filed by June 27, 2012. No motion was received by June 15, 2012. On July 2, 2012, a status conference was held. At that time petitioner stated that he was going to file a discovery motion. It was agreed that petitioner would send the motion on July 2, 2012, and respondent had until July 20, 2012, to respond to the motion. Petitioner's motion was received on July 6, 2012. Respondent's reply was received on July 11, 2012. Petitioner's motion was denied. The hearing date was held on July 27, 2012. I closed the record at that time.

### **FACTUAL DISCUSSION AND FINDINGS**

The following is undisputed, and therefore **FOUND** as **FACT**:

Treistman is a gas and electric customer of PSE&G. He lives at 115 Monroe Street, Newark, New Jersey. The building has four floors. Petitioner lives on the fourth floor. The first two floors have commercial tenants and the third floor is vacant. On February 4, 2011, Pete Sequeira (Sequeira), a field service representative of PSE&G came to the premises. After Sequeira's visit, Treistman's gas service was billed at the residential rate. On December 8, 2011, Sequeira was sent to the premises to investigate if there was a diversion of service. Treistman's electrical service was changed from commercial to residential in December 2011. Petitioner does not contest the accuracy of the gas or electric meters. Treistman has made two payments to PSE&G since 2009. He paid \$2000 on or about February 1, 2011, and \$1656 on or about February 9, 2011.

Testimony

Peter Treistman

Treistman has lived at 113 Monroe Street for four years. The building was previously a warehouse. There are conduits that run through his apartment. In the winter his bills are approximately \$1000 per month for gas, and \$400 per month for electric. His total bill from June 6, 2009, to July 8, 2012, is \$33,645.28. He requested a diversion of service investigation. The investigation revealed that there were twenty-seven circuit breakers; one of which was connected to the air conditioner. It also revealed that one of the circuits provides electricity to the stairway on each floor in the building. The stairway has lights from the first floor to the fourth floor. PSE&G's report stated that there was no diversion of service. Petitioner has received bills from PSE&G marked "occupant [for usage] on the third floor."

The building has steel and glass windows. He sealed and corked all of the windows in his apartment except one. He insulated the walls in his apartment. The building has six five-ton air conditioner units on the roof. The air conditioner is wired to his panel. There are two space heaters which use gas in his apartment that he shuts off in April and May. The space heaters are over twenty years old but well maintained. When the space heaters are shut off, his bill still registers consumption.

Petitioner wrote to PSE&G beginning in May 2009, stating that he was being billed at commercial rates when he should have been billed at residential rates. Petitioner was re-billed for gas in February 2011 at the residential rates. The rebilling was done at the March 2011 rates not the prior rates. Petitioner did calculations of his gas usage based on Energy Star. These calculations showed that PSE&G over-billed him for gas in the amount of \$1788. Petitioner has no experience with utility accounts and rates.

Petitioner does not have a degree in engineering. He works in furniture restoration and architectural woodwork. Petitioner does not have a lease with his

landlord. He does not have an agreement with the landlord requiring him to pay for the lighting in the stairwell of the building.

Ed Sullivan

Ed Sullivan (Sullivan) is employed by PSE&G. He is the liaison with the BPU and is involved with matters in OAL. He reviewed the field reports and statement of account in this matter. Petitioner's prior account was closed by PSE&G with a \$9,000 balance due to petitioner's bankruptcy. Petitioner's current account began on June 6, 2009. In February 2011 a deferred payment plan was initiated for petitioner. The plan called for petitioner to pay \$1656 monthly in addition to the current monthly charges. Petitioner made one payment of \$1656.

PSE&G did not find a diversion of service. When there is a diversion of service the meter would show an interconnection. There would be wires connected to the meter if there was a diversion. Landlords and tenants can have agreements where a tenant would agree to be responsible for the hallway lighting bill. Sullivan does not know anything about petitioner's lease. If it was discovered that petitioner was not responsible for the payment of the lights on the stairway, more follow-up should have been done.

Petitioner's rate was changed in February 2011 from a commercial rate to a residential rate. When comparing the residential and commercial rates from June 2009 to February 2011, petitioner benefited more from the commercial rate. Petitioner's apartment was a large loft-type space with a rear wall made of glass. Petitioner's current outstanding balance is \$33,655.38.

There are two types of diversion of service. One is diversion directly from PSE&G and the other is third-party diversions. PSE&G only owns the meters. It does not own the pipes and wiring of buildings.

When testing for diversion of service, if the breakers are shut off on a given floor and the only electricity that went out was on that floor; it indicates that there is no

diversion. If the gas is shut off and the meter stops spinning that indicates that there is no diversion.

Pete Sequeira

Pete Sequeira (Sequeira) is employed by PSE&G in the field service division. Part of his job includes diversion of service investigations. Petitioner was concerned regarding diversions of service and the rates being incorrect. His February 4, 2011, investigation was not in regard to a diversion of service. He did not inspect the apartment at that time.

Sequeira conducted a diversion of service investigation on December 8, 2011. When there is a diversion of services there is usually evidence of tampering with the meter or splitting wires. There was no evidence of cross-wiring or tampering with the meter in this matter. He shut off the circuit breakers and the meter stopped. When he turned the gas off the meter stopped. If there is a diversion of service by a landlord, PSE&G tries to determine the amount of the diversion and bills the landlord.

Sequeira is not an electrician and did not check the internal wiring. His sole investigation into the diversion was shutting off the breakers.

On the two occasions that he went to the premises he was not let into petitioner's apartment. He was at the door. He could see two space heaters as well as electrical appliances in the kitchen from the door.

Having heard the testimony, observed the witnesses, and reviewed the exhibits, I **FIND** the following additional **FACTS**:

There is a breaker in petitioner's apartment marked "air conditioner," which controls eight florescent lights in the stairwell of the building. There are two lights on each floor in the stairwell all wired to petitioner's meter. Petitioner contacted PSE&G in May 2009, stating that he was being billed at a commercial rate when he should have been billed at a residential rate. Petitioner did not provide any evidence that the



PSE&G bills that he received marked occupant for the third floor were charged to his account. Petitioner does not have a lease with his landlord. Petitioner did not have an agreement with the landlord to pay the electric bill for the lights in the stairwell.

### **LEGAL ANALYSIS AND CONCLUSIONS**

In this administrative proceeding, the petitioner bears the burden of proof by a preponderance of the competent, credible evidence as to those matters which are justifiably before the OAL. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the facts alleged and generates reliable belief that the tended hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div.), certif. denied, 31 N.J. 75 (1959).

One of the issues in this matter is whether petitioner experienced a diversion of service. N.J.A.C. 14:3-7.8 provides in part:

(b) Each electric, gas, water and/or wastewater utility shall include in its tariff provisions ensuring that tenant-customers shall not be required to pay for service supplied outside their premises without the tenant-customers' consent.

(c) Each electric, gas, water and/or wastewater utility shall notify tenant-customers who apply for service that if the utility's tariff provides for billing through one meter for the tenant-customers' own usage and for service diverted outside the tenant-customers' premises, the tenant-customers may not be required to pay for such diverted service absent their consent or cooperation for such service.

(d) Each utility shall investigate alleged diversions as follows:

1. When a tenant-customer alleges in good faith that the level of consumption reflected in his or her utility bill is unexplainably high, the tenant-customer may request the utility supplying gas, electricity, water and/or wastewater service to conduct a diversion investigation at no cost to the customer;

2. Such request shall be made in writing by the tenant-customer by completing and returning to the utility a diversion investigation application provided by the utility;
3. The application shall state that, if the tenant-customer has made one or more previous diversion complaints in the previous 12-month period, which failed to uncover a diversion of utility service, the utility may bill the customer for the cost of the second and subsequent investigations;
4. The utility shall investigate the alleged diversion within two months of the receipt of the investigation request. Each diversion investigation shall include a meter test conducted in accordance with N.J.A.C. 14:3-4.4;
5. The utility shall have the right of reasonable access pursuant to N.J.A.C. 14:3-3.6. For purposes of utility access, the alleged diversion is presumed to constitute a hazardous condition until the utility investigates;
6. If, as a result of such investigation, the utility determines that the service from the pipes and/or wires serving the tenant-customer has been diverted, the utility shall notify the landlord or his or her agent and instruct him or her to correct the diversion within 30 days through rewiring or repiping. However, this provision shall in no way prohibit a utility from disconnecting service if the utility determines that an unsafe condition exists;
7. If a diversion is found, the utility shall attempt to determine the identity of the beneficiary;
8. A tenant-customer seeking relief shall be responsible for furnishing to the utility the identity and address of the landlord or agent, and of the beneficiary, if known;
9. Additionally, the tenant-customer shall provide any other information, which may assist the utility in its investigation;
10. The utility shall furnish to the tenant-customer, the tenant-customer's landlord, and to the beneficiary (if different from the landlord) within 14 days of the investigation, a written report on the findings of the investigation. This report shall include information on the estimated cost of diverted service based upon prior use, degree day analysis, load study and/or cooling degree hours, whichever is appropriate;
11. If the utility locates a diversion, the utility shall attempt to reach an agreement with the parties involved or, in lieu of

such agreement, proceed to the conference described in (f) below; and

12. If no diversion is located, these diversion proceedings shall end when the utility has completed and filed its investigation report pursuant to (j) below.

This petition concerns the issues of whether there was a diversion of services and whether petitioner was billed at the proper residential rates. It is clear from the December 8, 2011, report of Sequeira that the lights in the stairwell of the building were wired to a circuit breaker of petitioner. The lights that are on each of the four floors of the stairwell are clearly outside of the petitioner's premises. Petitioner did not have an agreement with the landlord to pay the electric bill for the lights in the stairwell. It is clear that there was a diversion with regard to the lights in the stairwell.

Petitioner complained to PSE&G that he was being billed at commercial rates instead of residential rates beginning in May 2009. PSE&G began billing petitioner for gas at residential rates in February. It began billing petitioner for electric at residential rates in December 2011.

I **CONCLUDE** that petitioner experienced a diversion of service because one of his breakers provided service to the lights in the stairwell of the building. Those lights were outside of his premises.

I further **CONCLUDE** petitioner was incorrectly billed at commercial rates for gas until February 2011 and incorrectly billed at commercial electric rates until December 2011.

### **ORDER**

Based on the foregoing, it is hereby **ORDERED** that PSE&G determine the amount of the diversion of service that occurred by virtue of petitioner being billed for the lights in the stairwell and contact petitioner's landlord to correct the diversion of service.

It is further **ORDERED** that PSE&G re-bill petitioner's gas charges from July 2009 thru February 2011 at the residential rates that were in effect at that time.

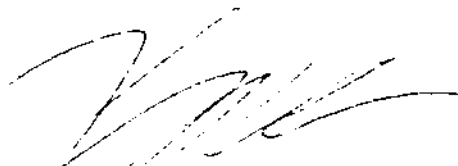
It is further **ORDERED** that PSE&G re-bill petitioner's electric charges from July 2009 thru December 2011 at the residential rates that were in effect at that time.

I hereby **FILE** my Initial Decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

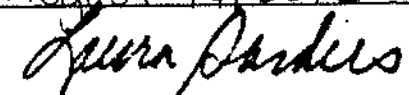
This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 2 Gateway Center, Suite 801, Newark, NJ 07102**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8-14-12  
DATE

  
KIMBERLY A. MOSS, ALJ

Date Received at Agency:

AUGUST 14, 2012  


Date Mailed to Parties: AUGUST 20, 2012  
ljb

DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

**WITNESSES**

**For Petitioner:**

Peter Treistman

**For Respondent:**

Ed Sullivan

Pete Sequeira

**EXHIBITS**

**For Petitioner:**

- P-1 (A) Various Letters to the Board of Public Utilities from Treistman
- P-2 (B) PSE&G bill for July 2012
- P-3 (C) PSE&G Field Report dated December 8, 2011
- P-4 (D) Various PSE&G Bills to Occupant 113 Monroe Street, Ste 3
- P-5 (E) Invoice of Alfred Plumbing dated January 3, 2010
- P-6 (F) Petitioner's calculations of PSE&G Gas Bill
- P-7 (G) Electric Load Consumption
- P-8 (H) Heat and Electric Comparison to Similar Size Houses in Newark

**For Respondent:**

- R-1 PSE&G Field Report dated February 4, 2011
- R-2 Gas Meter Test dated October 11, 2011
- R-3 Statement of Account for Peter Treistman
- R-4 Electric Meter Test dated October 20, 2011
- R-5 PSE&G Field Report dated December 8, 2011