

Richard A. Rochlin
rrochlin@sigmanandrochlin.com
v: 860.357.9158
f: 860.218.9659

October 25, 2010

VIA FEDERAL EXPRESS

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

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OCT 25 2010

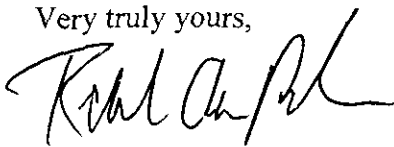
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Re: **Ellington Condominium Association v. Trigen-Philadelphia
Energy Corporation**
Docket No. C-2009-2092612

Dear Secretary Chiavetta:

Enclosed are an original and ten (10) copies of **Ellington Condominium Association's Main Brief to Administrative Law Judge Cynthia Williams Fordham** and Certificate of Service in the above-referenced matter.

Very truly yours,



Richard Rochlin

RR:um

Enclosures

cc: All parties listed on Certificate of Service (w/enclosure) (via Federal Express)
Administrative Law Judge Cynthia Williams Fordham (w/enclosure) (via Federal Express)
Pam Ellington (via email, w/enclosure)

TABLE OF AUTHORITIES

CASES

Burleson v. Pa. P.U.C.,
461 A.2d 1234 (Pa. 1983).....

Jersey Central Railroad, Inc. v. Pa. P.U.C.,
No. 20016571, 2005 WL 808367 (Pa.P.U.C. March 7, 2005).....

Kupstas v. Pa. P.U.C.,
76 Pa. P.U.C. 334 (1992).....

Milkie v. Pa. P.U.C.,
768 A.2d 1217 (Pa. Cmwlth Ct. 2001).....

Samuel J. Lansberry, Inc. v. Pa. P.U.C.,
578 A.2d 600 (Pa. Cmwlth. 1990).....

Se-ling Hosiery v. Margulies,
70 A.2d 854 (Pa. 1950).....

Waldron v. Philadelphia Electric Co.,
No. C-77100047, 1980 WL 140964 (Pa. P.U.C. March 19, 1980).....

OTHER AUTHORITIES

66 Pa. C.S. § 332(a).....

66 Pa. C.S. § 701 *et seq.*

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COMMONWEALTH OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

The Ellington Condominium Association :
 :
 v. : Docket No: C-2009-2092612
 :
 Trigen-Philadelphia Energy Corporation :

I. THE CASE

This is a case about a public utility company fighting to enforce erroneous invoices with (i) costs and fees likely to exceed the amount in dispute; (ii) a hired sub-contractor disguised as an unbiased “expert” brought in at the last minute to dispute overwhelming and credible testimony; and (iii) any morsel of evidence to suggest that its meters are accurate despite its own emails and actions to the contrary. This level of response suggests that as far as the public utility company is concerned, there is more at stake here than just forty thousand dollars.

The Ellington Condominium Association (the “**Ellington**”), a condominium building, located at 1500 Chestnut Street, Philadelphia, uses steam for heat and air-conditioning provided by Trigen Philadelphia Energy Corporation (“**Trigen**”). The steam provided by Trigen powers the Ellington’s mechanical system that provides both heat and air-conditioning for the common areas of the building as well as the individual residential and commercial units. For many years, the Ellington has been invoiced by Trigen for its steam usage and paid such invoices promptly.

Trigen’s invoice to the Ellington for the period of June 12, 2008 through July 14, 2008 (the “**July Invoice**”) and the invoice for the period of August 8, 2008 through September 9, 2008 (the “**September Invoice**”), however, were extraordinarily, out of the norm, and excessive.

According to Trigen, the Ellington had consumed 4,078.9 mlbs of steam for the period covered by the July Invoice and 3,610 mlbs of steam for the period covered by the September Invoice. This usage more than doubles the usage of the previous years. In fact, historically, the Ellington has never consumed over 2,000 mlbs of steam in a month other than the two months in question.

Trigen's own employees were alarmed at this usage. Anthony Ripanti ("**Ripanti**"), Ellington's account manager at Trigen, informed Pam Clifton ("**Clifton**"), property manager of the Ellington that Trigen had "pulled" these invoices because they were flagged as being unusual and Trigen was trying to determine why the consumption reflected on such invoices was unusual. Anne Crosswell of Trigen told Clifton that Trigen was having computer problems during such time. Historically, the Ellington consumed an average of 4.2 mlbs of steam for every cooling degree day for the past four years. During the time period covered by the July Invoice and the September Invoice, the Ellington's average steam consumption jumped to 8.4 mlbs per cooling degree day. The alleged usage reflected in the July Invoice and the September Invoice equates to at least a 100% increase over applicable 2007 usage with only a 10% to 12% increase in occupancy. There was no possible way that Ellington could consume this extraordinary amount of steam for the periods covered by the July Invoice and the September Invoice.

II. QUESTIONS PRESENTED

1. Did Ellington establish a *prima facie* case by showing that its steam consumption from June 12, 2008 through July 14, 2008, and from August 8, 2008 through September 9, 2008 was inconsistent with bills for earlier periods?

2. Did Ellington, having established a *prima facie* case, prove by a preponderance of the evidence, that the steam consumption reflected on the July Invoice and the September Invoice was erroneous?

III. PROPOSED FINDINGS OF FACT

1. Ellington is located at 1500 Chestnut Street, Philadelphia, 19102 and has been managed by Clifton since April of 2007.¹
2. The Ellington uses steam for heat and air-conditioning provided by Trigen.²
3. The steam powers the Ellington's mechanical system that provides both heat and air-conditioning for the common areas of the building as well as the individual residential and commercial units.³
4. The steam provided by Trigen to the Ellington comes into the Ellington from a pipe in the basement of its building located at 1500 Chestnut Street in Philadelphia, Pennsylvania.⁴
5. Trigen sends invoices for steam usage to the Ellington.⁵
6. Trigen's invoice to the Ellington for the period of June 12, 2008 through July 14, 2008 (the "**July Invoice**") and the invoice for the period of August 8, 2008 through September 9, 2008 (the "**September Invoice**") were extraordinarily, out of the norm, and excessive.⁶
7. The invoice for July, 2006 provided that the Ellington had used 1,575 mlbs of steam for such period.⁷

¹ See Notes of Testimony ("N.T."), p. 30, lines 19-22; p. 31, line 25; p. 32, lines 1-8.

² See N.T., p. 33, lines 2-8.

³ See N.T., p. 33, lines 5-8.

⁴ See N.T., p. 33, lines 9-11.

⁵ See N.T., p. 33, lines 18-19.

⁶ See N.T., p. 34, lines 6-17.

⁷ See N.T., p. 34, lines 21-25; p. 35, lines 1-5; see also Plaintiff's Exhibit 10.

8. The invoice for July, 2007 provided that the Ellington had used 1,083 mlbs of steam for such period, and in July of 2008, according to Trigen, the Ellington consumed over 4,000 mlbs of steam for the period covered by the July Invoice (approximately a four-fold increase over the amount used in July, 2007).⁸

9. According to Trigen, as reflected on the July Invoice, the Ellington had consumed 4,078.9 mlbs⁹ of steam for the period covered by such invoice.

10. According to Trigen's records, the Ellington has never consumed over 3,600 mlbs of steam for any billing period other than for the period covered by the July Invoice and the September Invoice.¹⁰

11. According to Trigen's records, the Ellington has never consumed over 3,000 mlbs of steam for any billing period other than for the periods covered by the July Invoice and the September Invoice.¹¹

12. In fact, according to Trigen's records, the Ellington has never consumed over 2,000 mlbs of steam for any billing period other than for the periods covered by the July Invoice and the September Invoice.¹²

13. In August of 2008, according to Trigen, the Ellington consumed 1,807 mlbs of steam which was in line with the consumption of August 2006 and August 2007.¹³

14. In August of 2006, according to Trigen, the Ellington consumed 1,787 mlbs of steam.¹⁴

⁸ See N.T., p. 34, lines 21-25; p. 35, lines 1-5; see also Plaintiff's Exhibit 10.

⁹ See N.T., p. 34, lines 21-25, p. 35, lines 1-5; see also Plaintiff's Exhibit 10.

¹⁰ See N.T., p. 35, lines 20-23; see also Plaintiff's Exhibit 10.

¹¹ See N.T., p. 74, lines 13-25; see also Plaintiff's Exhibit 10.

¹² See N.T., p. 74, lines 13-25; see also Plaintiff's Exhibit 10.

¹³ See N.T., p. 35, lines 9-14; see also Plaintiff's Exhibit 10.

¹⁴ See N.T., p. 35, lines 9-14; see also Plaintiff's Exhibit 10.

15. In August of 2007, according to Trigen, the Ellington consumed 1,521 mlbs of steam.¹⁵

16. This usage was also in line with the invoice issued to the Ellington in September, 2006, where, according to Trigen, the Ellington consumed 1,217 mlbs of steam.¹⁶

17. Again, this usage was in line with the invoice issued to the Ellington in September of 2007, where, according to Trigen, the Ellington consumed 1,626 mlbs of steam.¹⁷

18. However, according to Trigen, for the period covered by the September Invoice, the Ellington consumed 3,610 mlbs of steam (more than double the usage of September, 2007).¹⁸

19. The Ellington has never consumed over 2,000 mlbs of steam in a month other than the two months in question, July of 2008 where, according to Trigen, the Ellington consumed 4,078.9 mlbs and September 2008 where, according to Trigen, the Ellington consumed 3,610 mlbs of steam.¹⁹

20. The steam usage levels reflected on the July Invoice and the September Invoice were unprecedented.²⁰

21. As a result of the unprecedented usage, Clifton contacted Ripanti, the Ellington's account manager at Trigen.²¹

22. Ripanti informed Clifton that Trigen had "pulled" these invoices because they were flagged as being unusual and Trigen was trying to determine why the consumption reflected on such invoices was unusual.²²

¹⁵ See N.T., p. 35, lines 9-14; see also Plaintiff's Exhibit 10.

¹⁶ See N.T., p. 35, lines 15-23; see also Plaintiff's Exhibit 10.

¹⁷ See N.T., p. 35, lines 15-23; see also Plaintiff's Exhibit 10.

¹⁸ See N.T., p. 35, lines 15-23; see also Plaintiff's Exhibit 10.

¹⁹ See N.T., p. 35, lines 20-25; p. 36, lines 1-2; p. 74, lines 13-25; see also Plaintiff's Exhibit 10.

²⁰ See N.T., p. 35, lines 20-25; p. 36, lines 1-2; see also Plaintiff's Exhibit 10.

²¹ See N.T., p. 36, lines 3-9.

²² See N.T., p. 36, lines 10-20.

23. Anne Crowwell of Trigen told Clifton that Trigen was having computer problems during the time in question.²³

24. The steam usage for the Ellington in 2008 spiked for the period covered by the July Invoice, returned to normal for the period covered by the August, 2008 invoice, and then spiked again for the period covered by the September Invoice.²⁴

25. The Ellington had not done anything differently than it had done in previous years or months than it was doing during the period of these two non-consecutive months where there was an extraordinary spike in usage.²⁵

26. During the time period covered by the July Invoice and the September Invoice, there was nothing out of the ordinary during a visible inspection of the steam system at the Ellington during these two spikes.²⁶

27. During the time period covered by the July Invoice and the September Invoice, there was no leaking steam and nothing leaking from the steam equipment.²⁷

28. During the time period covered by the July Invoice and the September Invoice, there was no visible steam in the basement.²⁸

29. During the time period covered by the July Invoice and the September Invoice, there were no visible signs of any steam leaking or gushing out of the many pipes in the basement.²⁹

²³ See N.T., p. 36, lines 10-19.

²⁴ See N.T., p. 37, lines 23-25; p. 401, lines 1-2; see also Plaintiff's Exhibit 10.

²⁵ See N.T., p. 40, lines 3-6.

²⁶ See N.T., p. 40, lines 7-9.

²⁷ See N.T., p. 40, lines 10-16.

²⁸ See N.T., p. 40, lines 12-13.

²⁹ See N.T., p. 40, lines 17-21.

30. As a result of the extraordinary spikes in alleged usage in 2008, Clifton hired Gil Schonour (“**Schonour**”), an engineer from Progressive Engineering, to inspect the Ellington’s steam system.³⁰

31. At all times, and in particular at the time of these extraordinary spikes in alleged usage in July and September of 2008, the Ellington had an employee continually monitoring the steam system and there were no reported problems.³¹

32. Whenever Ellington utilized both absorption chillers, it made no difference in consumption as the absorption chillers shared consumption.³²

33. The apparent “flood” referenced by Trigen in September 2008 did not affect the spike because it occurred at the end of September of 2008 and the bills in question were prior to that time.³³

34. The number of residents living in the Ellington’s building did not affect steam usage as reflected by the chart (the “**Chart**”) below:³⁴

Billed Cooling Steam Consumption						
	2006		2007		2008	
June	473.8 mlbs	56 occupied units	1,659.3 mlbs	124 occupied units	1,653.5 mlbs	148 occupied units
July	1,575.3 mlbs	64 occupied units	1,083.6 mlbs	134 occupied units	4,048.9 mlbs	150 occupied units
August	1787.9 mlbs	78 occupied units	1,521.6 mlbs	136 occupied units	1,807.9 mlbs	151 occupied units
September	1,217 Mlbs	84 occupied units	1,626.3 mlb	138 occupied units	3,610.6 mlbs	151 occupied units

³⁰ See N.T., p. 40, lines 22-25; p. 41, lines 1-13.

³¹ See N.T., p. 42, lines 13-25; p. 43, line 1.

³² See N.T., p. 71, lines 3-7.

³³ See N.T., p. 136, lines 1-10; p. 142, lines 15-17; p. 63, lines 14-18; p.71, 11-14.

³⁴ See Plaintiff’s Trial exhibit P-10, as marked by witness Clifton during trial to reflect occupancy as well as steam usage; See also N.T., p. 72, lines 22-25; p. 73, lines 1-25; p. 74, lines 1-25.

October	1,942.2 mlbs	86 occupied units	1,472.8 mlbs	141 occupied units	1,170.5 mlbs	151 occupied units
November	882.5 Mlbs	88 occupied units	1,075.3 mlbs	141 occupied units	904.2 mlbs	152 occupied units

35. The Chart, which reflects the Ellington’s steam usage, Plaintiff’s Exhibit 10, does fairly and accurately represent the usage that was reflected on the invoices provided by Trigen.³⁵

36. At no point did the Ellington ever use over 2,000 mlbs of steam, even when the building had 150 occupied units other than the two months in question (July and September 2008).³⁶

37. Schonour was accepted by the Court as an expert in steam generation and steam heating and cooling, in particular in steam generation and steam heating and cooling systems.³⁷

38. The opinions provided by Schonour to the Court were given to a reasonable degree of scientific certainty.³⁸

39. Schonour also concluded that after a review of all of the evidence regarding operating procedures, conditions and maintenance records it indicated that everything that was done to these chillers was within the parameters of normal operating procedures and maintenance. Schonour concluded that there wasn’t anything about the Ellington’s steam system that “wasn't ordinary.”³⁹

40. Historically, the Ellington consumed an average of 4.2 mlbs of steam for every cooling degree day for the past four years.⁴⁰

³⁵ See N.T., p. 75, lines 23-25; p. 76, line 1.

³⁶ See Plaintiff’s Trial exhibit P-10; See also N.T. p. 74, lines 17-25.

³⁷ See N.T., p. 111, lines 9 – 15.

³⁸ See N.T., p. 141, lines 18-25; p. 142, lines 1- 6; p. 336, lines 20-22.

³⁹ See N.T., p. 332, lines 19-25; p. 333, lines 1-25; p. 334, lines 1-10.

⁴⁰ See N.T., p. 334, lines 12-25; p. 335, lines 1-10.

41. During the time period covered by the July Invoice and the September Invoice, the Ellington's average steam consumption jumped to 8.4 mlbs per cooling degree day.⁴¹

42. Schonour concluded that the Ellington did not consume that much energy as reflected on the July Invoice and the September Invoice.⁴²

43. Schonour concluded that Christopher Hastings' ("**Hastings**") opinion was inaccurate.⁴³

44. Hastings was given limited information to review and was not informed about the significant computer problems suffered by Trigen at the time period covered by the July Invoice and the September Invoice.⁴⁴

45. In fact, Hastings testified that if he knew of any circumstances in this matter that suggested that there was at the same time for the period in dispute an IT problem or a computer problem with the metering software, he would want to understand the specifics of what the problem is and that he could not speculate if it would impact his opinion or not.⁴⁵

46. Schonour was provided all records and given full access to the location for an onsite inspection.⁴⁶

47. Schonour was provided all of the Ellington's steam plant maintenance records and concluded that while not perfect they "are pretty darn good", and that the machines are well maintained.⁴⁷

48. Hastings is not licensed as an engineer in the Commonwealth of Pennsylvania.⁴⁸

49. Hastings is a current and continuous sub-contractor for Trigen.⁴⁹

⁴¹ See N.T., p. 334, lines 12-25; p. 335, lines 1-10.

⁴² See N.T., p. 334, lines 18-25; p. 335, lines 1-10, p. 141, 18-25.

⁴³ See N.T., p. 335, lines 13-18.

⁴⁴ See N.T., p. 302, lines 23-25; p. 303, lines 1-8.

⁴⁵ See N.T., p. 302, lines 14-22.

⁴⁶ See N.T., p. 115, lines 21-25; p. 116, lines 1-10.

⁴⁷ See N.T., p. 142, lines 7-10.

⁴⁸ See N.T., p. 283, lines 22-23.

50. Hastings has and does work as a design engineer for Trigen and was personally asked by General Counsel Larry Plitch of Trigen to examine this case.⁵⁰

51. Hastings was not consulted to testify until sometime in late July 2010, well after the Ellington presented its case in March of 2010.⁵¹

52. In addition to receiving a retainer for his work as an expert witness on this case, Hastings will receive in excess of \$300,000 from Trigen this year alone for engineering related work.⁵²

53. Hastings lives in New Hampshire and never inspected Ellington's steam system.⁵³

54. Hastings never looked at pictures of the Ellington or the Ellington's steam system.⁵⁴

55. Hastings never examined the Trigen steam meters in the basement of the Ellington.⁵⁵

56. Hastings was never provided any information concerning the calibration of the Trigen steam meters used at the Ellington.⁵⁶

57. Hastings never asked (and was never offered) to tour the Ellington or its steam plant.⁵⁷

58. Hastings admitted that a tour would have been helpful in formulating his opinion.⁵⁸

⁴⁹ See N.T., p. 273, lines 14-21.

⁵⁰ See N.T., p. 271, lines 10-17; p. 272, lines 1-2.

⁵¹ See N.T., p.271, lines 10-13.

⁵² See N.T., p. 272, lines 10-12, 22-25; p. 273, lines 1-12.

⁵³ See N.T., p. 289, lines 9-10; p. 276, lines 8-9.

⁵⁴ See N.T., p. 289, lines 11-12.

⁵⁵ See N.T., p. 289, lines 13-14.

⁵⁶ See N.T., p. 300, lines 15-17.

⁵⁷ See N.T., p. 289, lines 15-16.

⁵⁸ See N.T., p. 289, lines 17-18.

59. As for the use of two chillers, Schonour concluded that the usage could not have been doubled by any inefficiency or any abnormality.⁵⁹

60. In fact, Schonour tested the Ellington's use of two chillers in June of 2010 and found that the average usage was 2.7 mlbs.⁶⁰

61. Schonour concluded that the extraordinary alleged usage in July and September of 2008 could not be attributable to running both absorbers.⁶¹

62. Schonour also concluded that the extraordinary load in July and September of 2008 could not be attributable to the leaky steam traps.⁶²

63. Schonour concluded that the alleged steam usage in July and September of 2008 could not be attributable to a purported "flood" as it occurred after the period in question.⁶³

64. Schonour concluded that the extraordinary usage in July and September of 2008 could not be attributable to the ammonia/lithium bromide mix in the chiller.⁶⁴

65. Schonour testified that he knows of no way that the Ellington could have consumed the amount of steam Trigen is billing them for in July and September of 2008 because there is an insufficient load and there is nothing to suggest that the chillers were not operating properly.⁶⁵

66. Schonour further explained that he reviewed the Ellington's consumption history, the profiles of the machinery, the historic load, the fact that the chillers had a good maintenance

⁵⁹ See N.T., p. 335, lines 19-25; p. 336, lines 1-21.

⁶⁰ See N.T., p. 335, lines 2-10.

⁶¹ See N.T., p. 142, lines 13-14.

⁶² See N.T., p. 142, lines 11-12.

⁶³ See N.T., p. 142, lines 15-17.

⁶⁴ See N.T., p. 142, lines 18-20.

⁶⁵ See N.T., p. 141, lines 18-25; p. 142, lines 1-6.

record, and could not find a way that the Ellington's steam system used an extra 2,000 mlbs of steam for the periods in dispute.⁶⁶

67. After hearing all of the testimony and reviewing all of the records Schonour's opinion remained the same: that Ellington did not consume this extraordinary amount of steam for the periods covered by the July Invoice and the September Invoice.⁶⁷

68. Trigen's steam meters in the Ellington are electronic and contain computer chips.⁶⁸

69. Trigen's steam meters in the Ellington are not the mechanical odometers with wheels that spin.⁶⁹

70. Trigen had an error with the meter reading during the summer of 2008 when Ellington experienced the extraordinary bills of July and September.⁷⁰

71. During the summer of 2008, the Trigen meter reading computer was down and the new telemetering computer system was not operating correctly.⁷¹

72. During the summer of 2008, John Torres told Batterman, the head of Trigen's metering department, that, in addition to the meter reading problems, the locations that require a pressure correction applied to them were reading zero consumption.⁷²

73. Stefan Batterman then had the computer behind his desk substituted for the malfunctioning telemetering computer.⁷³

74. Trigen computers communicate with the Ellington's steam meters.⁷⁴

⁶⁶ See N.T., p. 141, lines 18-25; p. 142, lines 1-6.

⁶⁷ See N.T., p. 336, lines 20-22; p. 334, lines 18-25; p. 335, lines 1-10.

⁶⁸ See N.T., p. 329, lines 2-9; p. 319, lines 22-25; p. 320, lines 1-3.

⁶⁹ See N.T., p. 329, lines 2-9; p. 319, lines 22-25; p. 320, lines 1-3.

⁷⁰ See N.T., p. 322, lines 21-25; p. 323, lines 1-11.

⁷¹ See N.T., p. 312, lines 5-25; p. 313, lines 1-19.

⁷² See N.T., p. 312, lines 7-14.

⁷³ See N.T., p. 312, lines 7-14.

⁷⁴ See N.T., p. 323, lines 9-11.

75. Trigen can access the Ellington's electronic steam meters remotely and modify them with the information with which it wants to modify them.⁷⁵

IV. THE LEGAL STANDARDS

The Ellington (as a claimant) bears the burden of proving that the amounts it was billed by Trigen in the July Invoice and the September Invoice were erroneous. 66 Pa. C.S. § 332(a). This requires a showing of “credible and competent evidence to show that the metered usage exceeded actual usage”, *Jersey Central Railroad, Inc. v. Pennsylvania Public Utility Commission*, No. 20016571, 2005 WL 808367, at *1 (Pa.P.U.C. March 7, 2005) (citing *Milkie v. Pennsylvania Public Utility Commission*, 768 A.2d 1217, 1220 (Pa. Cmwlth. Ct. 2001)). It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 (Pa. Cmwlth. Ct. 1990). The term “preponderance of the evidence” means that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party. *Se-ling Hosiery v. Margulies*, 70 A.2d 854, 856 (Pa. 1950). While the burden of proof does not change in a proceeding before the Commission, the burden of persuasion (also referred to as the burden of going forward with the evidence) may shift back and forth. *Waldron v. Philadelphia Electric Co.*, No. C-77100047, 1980 WL 140964, at *1 (Pa.P.U.C. March 19, 1980).

In *Waldron*, the Pennsylvania Public Utility Commission held that if a complainant can make a *prima facie* case, the burden of persuasion would shift to the responding utility company. *Id.* at *2. To establish a *prima facie* showing in the instant action, the Ellington must show “that [its] [steam] usage for the billing period in question was unchanged from earlier periods and [its]

⁷⁵ See N.T., p. 318, lines 10-12, 18-21.

bill for the same period was higher than previous bills.” *Burleson v. Pennsylvania Pub. Util. Comm’n*, 501 Pa. 433, 435-436, 461 A.2d 1234, 1235 (1983).^[1] In order to rebut this burden of persuasion, Trigen would then have to present “evidence found to be of co-equal or greater weight with that of [Ellington]” in order to shift the burden of persuasion back to the Ellington. *Id.*

As noted above, the threshold for a complainant making a *prima facie* showing is low. For instance, in *Kupstas v. Pennsylvania Public Utility Commission*, 76 Pa.P.U.C. 334 (1992), the Pennsylvania Public Utility Commission clarified the burden shifting dynamic articulated in *Waldron* as follows:

Waldron . . . stands for the proposition that when a particular bill is significantly different from [Ellington’s] pattern of usage, then the burden of going forward to establish the unusual bill’s accuracy then shifts to [Trigen]. This burden going forward can be met in many ways, but, according to *Waldron*, it is [Trigen’s] burden once [Ellington] shows that a bill has substantially deviated from the expected usage. The accuracy of the meter is not the sole criterion in a high billing dispute.

Kupstas, 76 Pa.P.U.C. at 337. Thus, to shift the burden of persuasion to Trigen, the Ellington merely has to demonstrate that the July Invoice and the September Invoice were each significantly different from the normal pattern of Ellington’s usage.

A. Ellington has established a prima facie showing that its steam usage for the disputed periods was unchanged from earlier periods and its bill for the same period was substantially higher than previous bills.

The notion that the July Invoice and the September Invoice “substantially” deviated from expected usage is largely undisputed by the parties. The July Invoice reflected approximately four times the usage reflected in the July 2007 invoice, despite only a 11.94% (11.94% = 16/134)

^[1] “The Commission must measure the weight and credibility of all of the evidence, and simply because the ratepayer has presented a prima facie case does not obligate the Commission to credit this evidence or give it any special weight.” *Milkie*, 768 A.2d at 1220.

increase in occupancy. Findings of Fact, ¶ 8; Chart. The September Invoice reflected more than double the usage reflected in the September 2007 invoice despite only a 9.42% (9.42% = 13/138) increase in occupancy. Findings of Fact, ¶ 18; Chart. In *Kupstas*, the Pennsylvania Public Utility Commission held that a claimant's showing that metered consumption for the two months at issue was more than double the amount for any month during of the previous three years was sufficient to shift the burden of proof to the utility. *Kupstas*, 76 Pa.P.U.C. at 338. As the Ellington has demonstrated the July Invoice and September Invoice reflected usage that was at least double any month during the preceding two years (without a corresponding increase in occupancy), this Court should find that the Ellington has made a *prima facie* showing that the July Invoice and the September Invoice "substantially" deviated from expected usage. Having made such a *prima facie* showing, the burden of proof now shifts to Trigen. *Id.*

B. Trigen has failed to present evidence of co-equal or greater weight than that presented by Ellington.

Trigen's evidence was limited in scope and inadequate in depth. It primarily consisted of testimony that the meters in the Ellington were accurate. As *Kupstas* makes clear, however, this is not the sole criterion in a high billing dispute. *Kupstas*, 76 Pa.P.U.C. at 337. Trigen, up against the ropes from the sheer force of the facts, engaged Hastings, a long-time Trigen subcontractor, financially beholden to the utility for work, to refute Schonour at all costs – even at the expense of credulity. Hastings was not afforded all of the pertinent information relating to this matter – documentation and otherwise (despite his admission that this would have been helpful)– further suggesting that Trigen's engagement of Hastings was a hail mary pass to stymie and otherwise distract the fact finder from just that – the facts.

Trigen also offered now-discredited testimony that the extraordinary usage could be from leaking traps. They were not, however, able to offer an explanation as to how the supposedly

accurate meters on either side of such traps had readings within 1% of each other. Trigen cannot (but wants to) have it both ways.

Trigen then claimed it was a result of increased occupancy at Ellington, however, as reflected in Plaintiff's Exhibit 10 as marked by Clifton, it is clear that there is no correlation between occupancy and usage.

Testimony was also presented that the meters used by Trigen at the Ellington were electronic and although password protected by Trigen could be changed or modified by Trigen.

V. PROPOSED CONCLUSIONS OF LAW

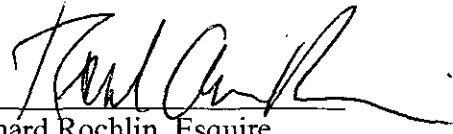
1. The Commission has jurisdiction over this matter. 66 Pa. C.S. § 701 *et seq.*
2. Ellington has the burden of proving its case by a preponderance of the evidence. 66 Pa. C.S. §332(a). *Burleson v. Pa. P.U.C.*, 461 A.2d 1234, 1235 (Pa. 1983).
3. Ellington has established a *prima facie* case.
4. Ellington has met its burden that it is entitled to relief. 66 Pa. C.S. § 332(a).
5. Ellington proved, by a preponderance of the evidence, viewing the evidence presented by Ellington and Trigen as a whole, that the amounts it was invoiced for steam consumption from June 12, 2008 through July 14, 2008 and from August 8, 2008 through September 9, 2008, were erroneous.
6. Ellington's previous payment of \$30,765.71 in respect of the July Invoice and \$26,097.30 in respect of the September Invoice has satisfied its financial obligations to Trigen in respect of such billing periods..
7. Ellington's Complaint against Trigen must be sustained.

VI. PROPOSED ORDERING PARAGRAPHS

1. The Complaint of the Ellington is granted.
2. Taking into account Ellington's previous payments to Trigen of \$30,765.71 and \$26,097.30 (plus finance charges), Ellington shall not have any additional financial obligations to Trigen on account of the July Invoice and the September Invoice.
3. Ellington is not responsible for any additional finance charges.
4. Trigen shall be responsible for a reasonable portion of Ellington's attorneys' fees and costs.

Respectfully submitted,

SIGMAN & ROCHLIN, LLC

By: 
Richard Rochlin, Esquire
Scott P. Sigman, Esquire
Sigman & Rochlin, LLC
1515 Market Street, Suite 1360
Philadelphia, PA 19102
(215) 665-0842
(215) 689-3404 (fax)

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OCT 25 2010
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Dated: October 25, 2010

*Attorneys for Complainant
The Ellington Condominium
Association*

FedEx Express

US Airbill

FedEx Tracking Number

8739 2316 4772

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Form ID No.

0215

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1 From This portion can be removed for Recipient's records.

Date 10/23/10 FedEx Tracking Number 873923164772

Sender's Name Rochlin Phone 860 828-2138

Company SIGMAN & ROCHLIN LLC

Address 1224 MILL ST BLDG D

Dept./Floor/Suite/Room

City EAST BERLIN State CT ZIP 06023-1159

2 Your Internal Billing Reference

3 To Recipient's Name Rosemary Chiavetta Phone _____

Company PMC

Address 400 North Street

Address _____

City Harrisburg State PA ZIP 17110

0427255199



8739 2316 4772

4a Express Package Service * To most locations. Packages up to 150 lbs.

- FedEx Priority Overnight**
Next business morning. * Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Standard Overnight**
Next business afternoon. * Saturday Delivery NOT available.
- FedEx First Overnight**
Earliest next business morning delivery to select locations. *
- FedEx 2Day**
Second business day. * Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Express Saver**
Third business day. * Saturday Delivery NOT available.

4b Express Freight Service ** To most locations. Packages over 150 lbs.

- FedEx 1Day Freight**
Next business day. ** Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected. FedEx 1Day Freight Booking No. _____
- FedEx 2Day Freight**
Second business day. ** Thursday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx 3Day Freight**
Third business day. ** Saturday Delivery NOT available.

5 Packaging * Declared value limit \$500.

- FedEx Envelope***
- FedEx Pak***
Includes FedEx Small Pak and FedEx Large Pak.
- FedEx Box**
- FedEx Tube**
- Other**

6 Special Handling and Delivery Signature Options

- SATURDAY Delivery**
NOT available for FedEx Standard Overnight, FedEx Express Saver, or FedEx 3Day Freight.
- No Signature Required**
Package may be left without obtaining a signature for delivery.
- Direct Signature**
Someone at recipient's address may sign for delivery. Fee applies.
- Indirect Signature**
If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

Does this shipment contain dangerous goods?

- One box must be checked.
- No**
 - Yes** As per attached Shipper's Declaration.
 - Yes** Shipper's Declaration not required.
 - Dry Ice** Dry Ice, 3, UN 1845 _____ x _____ kg
 - Cargo Aircraft Only**
- Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.

7 Payment Bill to:

- Sender Acct. No. in Section 1 will be billed. Recipient Third Party Credit Card Cash/Check
- Enter FedEx Acct. No. or Credit Card No. below. _____ Obtain recip. Acct. No.

Total Packages _____ Total Weight _____ lbs. Credit Card Auth. _____

*Our liability is limited to \$100 unless you declare a higher value. See the current FedEx Service Guide for details.

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