

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>GREGORY BERRY,</b>	)	
<b>Complainant and Appellant</b>	)	<b>Docket No.: F-2010-2163390</b>
	)	
<b>v.</b>	)	
	)	
<b>PHILADELPHIA GAS WORKS,</b>	)	
<b>Defendant and Respondent</b>	)	<b>Date: December 21, 2010</b>
_____	)	

**MEMORANDUM OF LAW IN SUPPORT  
OF FORMAL COMPLAINT**

Gregory Berry, Complainant and Appellant, respectfully submits this Motion for Judgment on the Pleadings in the above-captioned matter.

**PRELIMINARY STATEMENT**

PGW has a duty to bill known users of its gas service. If a gas service is being consumed by a customer and PGW does not contract with the user for that service, its only option is to terminate service. Even during the winter months, service *must* be terminated if PGW is not billing, only the rules regarding termination are more stringent. In this case, PGW knew gas was being consumed at the service address. Yet PGW did not bill the user. And PGW did not terminate service. The complainant cannot be held responsible for service that PGW knowingly provided in violation of the PUC Code. Mr. Berry *could not* have fixed the consumption problems,

*because he was never made aware of them. PGW did know of the consumption, and did not lift a finger to inform Mr. Berry, even though the law clearly requires it to do so.*

In addition, even if PGW were not in obvious violation of the PUC Code, PGW has a further duty of good faith and fair dealing. PGW's conduct in this matter has been in flagrant, almost shocking bad faith toward Mr. Berry (and demonstrated as well by its disdain for this court). Even were it not in direct violation of the PUC Code, its bad faith conduct requires a finding against it.

Furthermore, common-law contractual law requires an injured party to mitigate damages. PGW's conduct here is a textbook example of this fundamental principle. All it had to do was *let Mr. Berry know* about the excessive gas usage, and he could have investigated and fixed the problem. This case demonstrates precisely the reason for this doctrine. An injured party cannot sit idly by while it is "injured," then complain about the injury. That principle is so obvious it almost goes without saying.

For these reasons this court must roundly reject PGW's conduct toward Mr. Berry and hold PGW solely responsible.

## **STANDARD OF REVIEW**

The standard of review for the presiding officer in a formal complaint is de novo. (52 Pa. Code § 56.173.) In all matters before the PUC, the statutes will be liberally construed. (52 Pa. Code § 56.1.)

## **FACTS**

It is important to note, as a preliminary matter, that the parties are bound by the facts they asserted in their pleadings. The factual matters for a trial court to resolve must be facts that the parties disagree on. In the present matter, there are no facts in dispute. The facts as alleged by the defendant PGW in its pleadings are sufficient to find against PGW as a matter of law. Any facts that PGW now attempts to claim are in dispute must not contradict the facts as it has already alleged them. For this court to fail to hold PGW to the facts alleged in its pleadings would be enormously prejudicial to the complainant, who had no opportunity whatever to prepare to confront testimonial facts that are at odds with PGW's previous pleadings. PGW must be judicially estopped from arguing facts other than it alleged in its pleadings.

Here then are the relevant facts *as admitted by PGW in its pleadings*:

[1] PGW requested a security deposit from the Complainant. The Complainant did not pay the requested deposit amount. The Complainant telephoned PGW on October 10, 2007. PGW requested a security deposit

in the amount of \$365. The Complainant discontinued the telephone call. *The gas usage was billed to a placeholder account beginning August 16, 2007.* After several months of usage, PGW sent a serviceperson to the Service Address to investigate.

[2] PGW [placed] a 72-hour termination notice [ ] at the Service Address. The Complainant did not receive monthly bills. The Complainant did not have an active gas account for the period beginning August 16, 2007 through April 14, 2008. The Complainant went to a PGW office to apply for gas service on April 14, 2008. The Complainant eventually paid the security deposit of \$365.

[3] PGW's *plac[ed]* gas usage at the Service Address in a *placeholder account* beginning August 16, 2007. After it had determined that the Complainant was using gas service at the Service Address, PGW *considered the Complainant a "user without contract,"* for the period from August 16, 2007 through April 14, 2008.

[4] The Complainant did not receive monthly bills as the Complainant was ultimately considered a "user without contract" for gas service from the period of August 16, 2007 through April 14, 2008.

[5] PGW did not provide the Complainant with a 10-day shut off notice prior to the date of the proposed termination because the Complainant did not have a contract for gas service at the time and was ultimately considered a "user without contract."

No additional facts may be considered by this court. A fact is only relevant if it pertains to some legal argument or defense before the court. In this case, PGW has waived all its legal defenses. The Complainant's legal arguments are supported entirely by PGW's *own* factual admissions. No relevant facts are in dispute. Any additional fact that might be considered *must be considered in support of some argument or defense*. As PGW has already admitted everything set forth above, it has waived any right to present evidence to the contrary at trial. As PGW has waived all defenses, it has waived any right to present evidence in support of any defenses whatsoever.

### **ARGUMENT**

As a preliminary matter, the defendant PGW is bound by its pleadings. As a matter of simple fairness, a party may not make arguments in later stages of the trial that it did not bring up in its pleadings. As a matter of law, PGW has waived all defenses to this complaint. That is the law in every legal proceeding. Here, however, PGW had *three opportunities* to present this court with its defenses, and failed every time to make a single legal response to the complainant's arguments. This proceeding has already been highly prejudicial against the complainant two times over by allowing PGW to repeatedly refine its "arguments" such as

they are, yet even given this wide latitude PGW has failed to present a single legal argument to the court. It must not be allowed now to present arguments that it has waived. It is estopped as a matter of law from doing so, and the enormous prejudice against the pro se complainant that would result otherwise demands it.

Even so, the case against PGW is simple, direct, black-letter law. PGW's refusal to take up the legal issues presented here is a straightforward admission that the law is clear, and PGW's violations of the law are equally clear. The syllogism goes: (1) PGW put Mr. Berry in a placeholder "user without contract" account. (2) The PUC Code does not allow such an action. (3) Therefore, PGW violated the PUC code in refusing to bill Mr. Berry, and Mr. Berry cannot be held responsible for gas usage that he had no opportunity to mitigate. Furthermore, fundamental common-law contract principles dictate that parties to a contract must mitigate damages. PGW, by knowingly and willfully refusing to notify Mr. Berry of the excessive gas consumption happening at the service address, assumed the damages that it alone was in a position to mitigate. These are straightforward, fundamental tenets of the law. PGW has demonstrated in its arrogance its belief that it can treat customers as it wishes without consequence. That presumption must be roundly rejected.

**I. THE PUC CODE IS CLEAR, AND “USER WITHOUT CONTRACT” STATUS IS NOT PERMITTED: PGW SIMPLY HAS NO STATUTORY AUTHORIZATION FOR ITS CONDUCT**

The PUC code has a straightforward purpose, which is to protect customers from abuses by the utilities. In the relationship between gas company and customer, the gas company has all the power. Unchecked, it has the ability to turn off a customer’s heat on the coldest day of winter, to demand any security it wishes to guarantee payment, to charge as much as it wants, to hide the details of a customer’s consumption, and of course bring to bear all the legal resources of a billion-dollar company against any customer it wishes.

The *only thing* preventing these abuses is the PUC Code. As this case demonstrates, PGW *will* treat its customers as aggressively and belligerently as it is allowed to get away with. As this case demonstrates, PGW looks for and finds loopholes where it can, ways around the obvious intent of the PUC code—to demand simple *fairness* from PGW in its treatment of customers. For who knows how long PGW has been in violation of the PUC Code by placing users in “user without contract” status simply because no one noticed—or more likely, had the ability to fight back. But repeated violation of the law does not transform violations into sanctioned behavior.

PGW has never had the authority to place a customer in “user without contract” status, and it certainly did not have that authority in this case. PGW used that false status to try to justify not billing a *known user* for *five months*, in flagrant violation of the spirit and letter of the PUC code. *All* it had to do was send a bill to the address where they knew the gas was being consumed, and Mr. Berry would have had an opportunity to mitigate. *Or*, if no customer with a contract was residing at the address, they could have turned the service off. (Indeed, why was there gas service at all when Mr. Berry first moved into the house?) Those are the *only two options* PGW had: bill, or terminate. What PGW did rather, knowingly providing service without billing, is simply not allowed.

**A. PGW Had Two Possible Courses of Action: Cancel or Bill**

PGW was quite conniving in finding a way to continue charging customers enormous amounts without billing them, despite the obvious intent of the law. 52 Pa. Code § 56.1. Because the law is so clear on how PGW *should* behave, it does not explicitly contemplate flagrant violations of that intent. So nowhere in the PUC Code does it explicitly say, “user without contract status is not allowed.” Neither does it say explicitly that lying about meter readings is not allowed, but even PGW would not argue that lack of such explicit prohibition means the Code therefore sanctions such conduct. The same is true of “user without contract” status. The

conduct that PGW must follow in dealing with customers is unambiguous: when a customer is using gas and PGW knows about it, PGW has two options: bill the user for the service, or terminate service. Those are the only two options. A customer's dissatisfaction with the service contract does not give PGW sudden *carte blanche* to behave precisely the way the Code prohibits.

PGW has a clear, unmitigated duty to inform customers of gas consumption in a timely manner: "A utility shall render a bill once every billing period to every residential ratepayer in accordance with approved rate schedules." § 56.11. PGW's argument that Mr. Berry is not a ratepayer *because PGW decided not to bill him* is specious and absurd. Section 56.14 provides a list of acceptable reasons why PGW may fail to bill Mr. Berry: "utility billing error [no], meter failure [no], leakage that could not reasonably have been detected [no] or loss of service [no]." Simply choosing not to, either out of laziness, incompetence, spite, or bad faith, is not one of the enumerated reasons. PGW by its own admission *knew gas was being consumed, and knew Mr. Berry was living at the address*. It had to bill him.

Mr. Berry did object to the amount of the deposit requested, and terminated the call. PGW is not forced to keep Mr. Berry as a customer in such a circumstance. The Code does provide an alternative for such a belligerent customer: *terminate the service*. What PGW has not and cannot

explain is why it did not send someone out to simply shut off the gas, which is the only other option the Code gives PGW: Section 56.81(2) provides that PGW may terminate service if the customer “Fail[s] to post a deposit, provide a guarantee, or establish credit.” That’s all: if the customer fails to post a deposit, then it must terminate service. If it does not terminate service, then PGW has *given its implied consent* to have Mr. Berry continue as a customer—as a ratepayer—and therefore it *must* bill him. Termination was always an option: an option that PGW *chose* not to do.

**B. The Winter Moratorium Is Irrelevant,  
and Has Been Wrongly Applied**

The closest thing PGW has come to a defense in this case is that winter was coming on. (And again the court must not consider this defense nor any other, as PGW has waived this defense along with all others by failing to bring it up in its answer to the complaint. It is black-letter law that defenses that are not raised during the pleadings are waived, and further it would be extremely prejudicial to the complainant to allow PGW to argue a defense now that the complainant has had utterly no notice of until the evidentiary hearing.) But a quick perusal of the Winter Moratorium paragraphs from the PUC Code show PGW, amazingly, violated the Winter Moratorium provisions as flagrantly as the billing provisions.

The “Winter Termination Procedures” are set forth in 52 Pa. Code § 56.100. Subparagraph (2) states that: “If at the conclusion of the notification process defined in §§ 56.91–56.95, a reasonable agreement cannot be reached between the utility and the ratepayer, the utility shall register with the Commission, in writing, a request for permission to terminate service, accompanied by a utility report as defined in § 56.152 (relating to contents of the utility company report).” We need not waste any time considering whether PGW attempted to contact Mr. Berry during these winter months as it was required to do. (By its own admission it made *no* contact with Mr. Berry until April 2008.)

The point of this provision is again, if the customer and PGW cannot for whatever reason enter into a contract for service, PGW *must terminate service*. In the winter months the process by which this is done is more involved, but PGW *cannot* simply let the gas be consumed for five months without billing the user. PGW made no attempt to contact Mr. Berry, made no request to the Commission to terminate service. Did nothing but sit gleefully by, reading the meter every month, watching as the gas was consumed at an outrageous rate, until April when it could slam Mr. Berry with an enormous bill. Mr. Berry could have mitigated the damage if he were given the opportunity. PGW had every ability to notify Mr. Berry of the problem, and indeed had a duty to do so, and simply chose not to. Mr.

Berry cannot be held responsible for the gas service consumed during these months.

## **II. PGW VIOLATED ITS DUTY OF GOOD FAITH AND FAIR DEALING**

PGW's violations of the PUC Code in this case are obvious and flagrant. But even if there were some question about it (and there cannot be for this court as PGW has *waived* all defenses this court might wish to consider), PGW has a larger duty of good faith, honesty, and fair dealing, a duty that arises both in the common law and more significantly, in the PUC Code itself.

One of the most fundamental common-law requirements for any contract performance is the duty of good faith and fair dealing. PGW to the contrary used what it believes is a loophole in the law to stand idly by while Mr. Berry allegedly consumed hundreds of dollars of gas a month—close to three times the average winter bill. Mr. Berry had no knowledge of this problem, as PGW never informed him of it. PGW is the only party in any position whatever to be aware there was a problem, and they did nothing about it. That is a clear violation of their common-law duty of good faith and fair dealing.

But in addition, perhaps more importantly, the utility law itself imposes an affirmative duty of good faith, honesty, and fair dealing.

Section 56.1 states that “this chapter imposes an obligation of good faith, honesty, and fair dealing in its performance and enforcement. This chapter will be liberally construed to fulfill its purpose and policy and to insure justice for all concerned.” It is impossible to see PGW’s conduct in this matter as anything but a willful attempt to avoid the clear purpose and policy of Chapter 56. But whatever the technicalities of the provisions of Chapter 56 (an analysis of which no liberal reading of the statute should require), that PGW violated its obligation of good faith, honesty, and fair dealing is undeniable, and relief must be granted to Mr. Berry on that point alone.

**III. COMPLAINANT CANNOT BE RESPONSIBLE FOR THE BILL BECAUSE PGW VIOLATED ITS COMMON-LAW DUTY TO MITIGATE DAMAGES**

It is well-established common law that parties to a contract have a duty to good faith and fair dealing. It is equally well-established that in the event of a perceived breach, the aggrieved party has a duty to mitigate damages. The Restatement (Second) of Contracts, for instance, provides that, “damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.” Restatement (Second) of Contracts, § 350(1). The case at hand is a classic demonstration of that bedrock principle. PGW was the only party in a position to know how much gas was being consumed. It has standard procedures, followed

hundreds if not thousands of times a day, to read the meter and bill the client, so no “undue risk, burden, or humiliation” is possible. And yet it, the alleged injured party, stood by and did nothing. It did not bill Mr. Berry one time during the five months that the bill was accumulating. Mr. Berry was willfully *denied* the opportunity to identify and fix the problem. According to the common law of contracts, “damages are not recoverable” in this situation.

### **CONCLUSION**

For all the reasons stated above, Mr. Berry requests the Commission to find against PGW for the charges from October 2007 to April 2008, including the security deposit, plus interest on the security deposit from April 2008, and all subsequent late fees and interest charged by PGW, and any other remedial actions the court finds appropriate such as injunctions and fines.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

### **Service List:**

#### **For Defendant:**

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Date: December 21, 2010

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