

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

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| 1. REPORT DATE: September 6, 2006 | 2. BUREAU AGENDA NO. SEP-2006-OSA-0272*R |
| 3. BUREAU: Office of Special Assistants | |
| 4. SECTION(S): | 5. PUBLIC MEETING DATE: |
| 6. APPROVED BY: Director: C.W. Davis 7-1827 Mgr/Spvr: K.G. Sophy 7-8108 Legal Review: | September 15, 2006 DOCUMENT FOLDER |
| 7. PERSONS IN CHARGE: Carol F. Pennington 6-2615 | 9. EFFECTIVE DATE OF FILING: |
| 8. DOCKET NO.: F-01761817 | N/A DOCKETED NOV 21 2006 |

10. (a) **CAPTION** (abbreviate if more than 4 lines)
 (b) **Short summary of history & facts, documents & briefs**
 (c) **Recommendation**

(a) Carlos Perez v. Philadelphia Gas Works

(b) Philadelphia Gas Works (PGW) filed Exceptions to the Initial Decision of Administrative Law Judge (ALJ) Mark A. Hoyer issued on June 26, 2006, wherein the ALJ granted, in part, and denied, in part, Carlos Perez's Complaint against PGW. The ALJ upheld a payment arrangement arranged through the Bureau of Consumer Services and assessed a civil penalty of \$500 against PGW. PGW filed a Petition for Leave to File an Exception out of Time and Exceptions on August 3, 2006. No Reply Exceptions were filed.

(c) The Office of Special Assistants recommends that the Commission adopt the proposed Tentative Opinion and Order that denies PGW's Exceptions and adopts the ALJ's Initial Decision, as modified.

Order Doc. No. 628112v1

Calendar Doc. No. 628807v1

11. **MOTION BY:** Commissioner Chm. Holland

SECONDED: Commissioner Cawley

Commissioner Shane - Yes
Commissioner Pizzingrilli - Yes
Commissioner Fitzpatrick - Yes

CONTENT OF MOTION: Staff recommendation adopted.

KUR



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3205, HARRISBURG, PA 17105-3205

IN REPLY PLEASE
REFER TO OUR FILE

September 19, 2006

F-01761817

CARLOS PEREZ
8901 LEWIN PLACE
PHILADELPHIA PA 19136-1014

DOCUMENT
FOLDER

Carlos Perez
v.
Philadelphia Gas Works

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on September 15, 2006 has adopted an Opinion and Order in the above-entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

James J. McNulty
Secretary

Enclosure
Certified Mail
JF

GREGORY J STUNDER ESQUIRE
PHILADELPHIA GAS WORKS
800 WEST MONTGOMERY AVENUE
PHILADELPHIA PA 19122

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held September 15, 2006

Commissioners Present:

Wendell F. Holland, Chairman
James H. Cawley, Vice Chairman
Bill Shane
Kim Pizzingrilli
Terrance J. Fitzpatrick

Carlos Perez

v.

Philadelphia Gas Works

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:
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Docket No. F-01761817

TENTATIVE OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration are the Exceptions of Philadelphia Gas Works (PGW) to the Initial Decision of Administrative Law Judge (ALJ) Mark A. Hoyer that was issued on June 26, 2006. On July 25, 2006, the Commission's Secretary advised the parties in this proceeding that, on July 10, 2006, we exercised our right under Section 332(h) of the Public Utility Code, 66 PA. C. S. § 332(h), to place the ALJ's Initial Decision on a future Public Meeting agenda for full Commission review at Public Meeting. However, on August 3, 2006, Philadelphia Gas Works (PGW) filed a Petition for Leave to File an Exception Out of Time as well as Exceptions to the ALJ's Initial Decision. We shall grant this Petition solely because we have already determined that we would submit the Initial Decision to our full review.

History of the Proceeding

On January 13, 2006, Carlos Perez (Complainant) filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against PGW claiming that he is not responsible or liable for payment of the gas bill for previously unbilled service at 1601 Worrell Street, Philadelphia, Pennsylvania. This Complaint was a timely appeal of the decision on Complainant's informal complaint rendered by the Commission's Bureau of Consumer Services (BCS) at case number 1761817. (I.D. at 1, 4).

On February 2, 2006, PGW filed an Answer to the Complaint requesting that the Commission find against the Complainant and affirm the BCS decision. PGW asserted that Complainant's gas bill was accurate and requested an interim order directing payment by Complainant and authorizing PGW to terminate service if Complainant fails to comply with the order. (I.D. at 1).

The initial hearing was held by telephone from Pittsburgh on Tuesday, April 18, 2006. Complainant appeared *pro se* and testified on his own behalf. He did not present any additional witnesses or evidence. PGW was represented by counsel and presented the testimony of one witness. The resulting hearing record consists of a transcript containing sixty-one pages and three exhibits offered by PGW. No briefs were filed. The record closed on April 18, 2006. (I.D. at 2).

The ALJ issued his Initial Decision on June 26, 2006, wherein the Complaint was sustained, in part, and dismissed, in part. The ALJ approved the BCS payment arrangement which directed the Complainant to pay his budget amount plus \$90 per month on the balance due until the balance is paid in full. The ALJ also found that PGW had failed to provide reasonable service to the Complainant and assessed PGW a

civil penalty of \$500. (I.D. at 13-14). As noted above, PGW filed Exceptions on August 3, 2006. No Reply Exceptions were filed.

Discussion

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a), which provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. 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. Pennsylvania Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

As a preliminary matter, we note that any issue or exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pennsylvania Public Utility Commission*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

The ALJ made eighteen Findings of Fact and reached nine Conclusions of Law. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

A. PGW's Exceptions

PGW objects to the following statement in the ALJ's Initial Decision:

PGW did not present any evidence that corrective measures have been taken to insure that mistakes of this nature are discovered and investigated in a timely manner in the future.

(I.D. at 11).

PGW argues that it did not have the opportunity to present evidence of corrective measures that PGW has taken since 2004 because PGW's corrective measures were not a direct inquiry of the hearing. PGW requests that the Commission permit the record to be opened for PGW to present evidence that the Company implemented corrective measures in 2004 that detect and investigate unbilled usage for service addresses that have been placed in Soft-Off status. (I.D. at 3-4).

We will not grant PGW's Exception. It is plain that PGW's service was a matter of direct inquiry in this proceeding and that PGW's corrective measures since 2004 were relevant to the subject matter at hand. It was PGW's responsibility to bring forth any evidence that might apply to the issue at hand. Moreover, the statement in the Initial Decision that is objectionable to PGW is accurate as it stands. While PGW, in fact, may have implemented corrective measures, it did not present any evidence of this at the hearing. We will not permit a record to be reopened merely to allow PGW to add material to the record that could have been submitted at the time of the hearing. Conditions of fact or of law have not changed so as to require the reopening of this proceeding. *See* 52 Pa. Code § 5.571.

B. The Payment Arrangement

The payment arrangement established by the BCS permits the Complainant to pay the accrued account balance over a period of 44 months. The Complainant used gas at the Worrell Street property for a period of only 38 months. Therefore, the BCS payment arrangement permits a longer repayment period than the period for which the previously unbilled gas was used.

Section 56.14 of the Commission's regulations provides, as follows:

When a utility renders a make-up bill for previously unbilled utility service resulting from utility billing error, meter failure, leakage that could not reasonably have been detected or loss of service, or four or more consecutive estimated bills and the make-up bill exceeds the otherwise normal estimated bill by at least 50% and at least \$50:

(1) The utility shall review the bill with the ratepayer and make a reasonable attempt to enter into a payment agreement.

(2) The period of the payment agreement may, at the option of the ratepayer, extend at least as long as:

(i) The period during which the excess amount accrued.

(ii) Necessary so that the quantity of service billed in any one billing period is not greater than the normal estimated quantity for that period plus 50%.

The period over which the Complainant was improperly billed extended from March 6, 2001 until April 30, 2004. The ALJ noted that our Regulations contained in Chapter 56, 52 Pa. Code §§ 56.1 *et seq.*, do not apply to PGW prior to March 31, 2003. However, PGW is now under our jurisdiction, and we will apply Chapter 56 as

appropriate. We note that the ALJ stated that the payment arrangement established by the BCS in this case exceeded the requirements for make-up bills regarding the length of the period of repayment. While this is true under Section 56.14(2)(i), a longer period of repayment is possible under Section 56.14(2)(ii). According to Section 56.14(2)(ii), the period of the payment agreement, *at the option of the ratepayer*, may extend as long as necessary so that the quantity of service billed in any one billing period is not greater than the normal estimated quantity for that period plus 50%. Therefore, we find that the Complainant's repayment period may extend as long as necessary to allow a repayment amount of \$48 which is 50% of his budget amount during the relevant time period. At this time, the application of this section of our Regulations would result in a total payment of \$144, rather than the payment arrangement of \$186 calculated by the BCS. Therefore, we shall order PGW to bill the Complainant his budget amount plus \$48 until the balance due on this account is paid. The Complainant will, of course, have the option of accelerating the repayment period by increasing the size of his monthly payments, if he so desires.

C. Civil Penalty

With respect to the ALJ's recommendation in regard to the civil penalty, we agree with the ALJ that the Company violated both 66 Pa. C. S. § 1501 and 52 Pa. Code § 56.11. We note that in *Rosi*,¹ the Commission established the criteria for consideration when determining the amount of a civil penalty. In this proceeding, the ALJ's recommended total civil penalty of \$500 is not accompanied by an explanation of how the ten standards established by the Commission in *Rosi* were applied.

¹ *Joseph A. Rosi v. Bell Atlantic – Pennsylvania, Inc. and Sprint Communications Company, L.P.*, Docket No. C-00992409, Order entered March 16, 2000.

The ten *Rosi* standards are:

1. Whether the violation was intentional or negligent.
2. Whether the regulated entity promptly and voluntarily took steps to return the customer to the appropriate carrier and credited the customer's account.
3. Whether the regulated entity initiated procedures to prevent future slamming.
4. The number of customers affected and the duration of the violation.
5. Whether the penalty arises from a settlement or a litigated proceeding.
6. The compliance history of the regulated entity, which committed the violation.
7. Whether the regulated entity cooperated with the Commission.
8. The amount necessary to deter future violations.
9. Past Commission decisions in similar situations.
10. Other relevant factors.

Pursuant to the first standard under *Rosi*, the civil penalty in this case should be between a minimum of zero and a maximum of \$500.00 per violation because the violations of the law and regulation were due to negligence. If the violation were intentional, the first standard of *Rosi* provides that the Commission should start with the presumption that the penalty will be in the range of \$500.00 to \$1,000.00. Based on our review of the record, it appears that PGW's actions were not intentional. (Findings of Fact Nos. 14, 15). Since we conclude that the PGW's actions were negligent, we shall start with the presumption that the penalty will be in the range of "zero dollars to \$500.00" consistent with the first *Rosi* standard.

Applying the remaining *Rosi* standards, we note that the second and third standards are inapplicable in this instance and that one customer was affected by PGW's negligence for a period of thirty-eight months. We further note that this is a litigated proceeding and, with regard to the sixth *Rosi* standard, no information concerning the compliance history of PGW relative to its violation of our billing regulations is included in this record. With regard to the seventh *Rosi* standard, we note that PGW has cooperated with the BCS in setting up a reasonable payment arrangement.

As stated previously, the ALJ recommended a total civil penalty of \$500.00. We are of the opinion that this is not an adequate incentive to motivate the Company to operate more responsibly. The time that no monthly bill is issued should be as short as possible. The Commission places great significance on the need for monthly billing, as is evidenced by the fact that the Commission's regulations² require natural gas distribution companies to report on a monthly basis the number of accounts that did not receive bills. The failure to render accurate monthly bills is unacceptable and is the basis for appropriate civil penalties necessary to "deter future violations."

Pursuant to the eighth standard, the amount of the civil penalty should be increased to deter future violations and to reflect the severity of the violations of the statute and regulation. In this regard, we believe that a civil penalty of \$250.00 per month for each month that the customer was not billed is more appropriate than the \$500.00 penalty recommended by the ALJ in this instance. We are of the opinion that a \$500 penalty is not an adequate incentive to motivate PGW to operate more responsibly. Since PGW was under our jurisdiction for just thirteen of the thirty-eight months over which this under-billing accrued, we shall impose a civil penalty of \$250 per month for thirteen months or \$3250.

² See 52 Pa. Code § 62.33(b) (2).

In regard to the ninth *Rosi* standard, we make this determination based on two recent complaint proceedings where we assessed PGW and another gas company penalties of \$250 per month for their failure to submit accurate monthly bills to specific customers.³

The last *Rosi* standard applicable here is whether other relevant factors exist. All factors necessary to reach this conclusion have been considered.

It is important to note that since the penalty we are imposing on PGW represents a revision to the ALJ's Initial Decision, we shall issue this Order as a Tentative Order to allow for any comments regarding the amount of the civil penalty. If no comments are received by the Commission within ten days of the entry of this Tentative Order, this Tentative Order will become final without any further action by the Commission.

Conclusion

Based upon the foregoing discussion, we shall: (1) deny PGW's Exceptions for failure to meet our criteria for reopening the record; (2) adopt the ALJ's Initial Decision to grant the Complaint, in part, and deny it, in part, as modified by this Opinion and Order; and (3) increase the amount of the ALJ's recommended civil penalty from total penalty of \$500 to \$3250 or \$250.00 per month for each of the thirteen months that PGW violated our regulations by failing to submit a accurate monthly bill to the Complainant for service rendered. In addition, this Order shall be issued as a Tentative Opinion and Order, which will become final without further Commission action on the

³ See, *Eugene Allen v. Philadelphia Gas Works*, Docket No. F-01551573, (Order entered August 22, 2006); *Jeanette Hennon v. The Peoples Natural Gas Company d/b/a Dominion Peoples*, Docket No. F-01612844 (Order entered July 10, 2006).

condition that no comments are received within ten days from the date of entry of this tentative Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of PGW to the Initial Decision of Administrative Law Judge Mark Hoyer are denied consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Mark Hoyer in the above referenced proceeding is adopted, as modified, by this Opinion and Order.
3. That the Complaint of Carlos Perez against Philadelphia Gas Works is hereby granted, in part, and denied, in part.
4. That Carlos Perez is directed to pay Philadelphia Gas Works the budget amount of his bill each month, plus \$50.00 each month to satisfy the arrearage for unbilled natural gas service that accrued on this account. These payments shall continue until the unbilled arrearage has been fully satisfied.
5. That as long as Carlos Perez adheres to the terms of this Order, Philadelphia Gas Works shall not assess any late payment charges nor shall Philadelphia Gas Works terminate service to him, except for valid safety and/or emergency reasons.
6. That if Carlos Perez fails to adhere to the terms of this Order, PGW is hereby authorized to terminate the Complainant's service pursuant to the provisions of the Public Utility Code, 66 Pa. C.S. § 101, *et seq.*, and the Commission's regulations, 52 Pa. Code §56.1, *et seq.*

7. That the Philadelphia Gas Works is directed to pay a civil penalty of three thousand two hundred fifty dollars (\$3250) pursuant to Sections 3301 and 3315 of the Public Utility Code, 66 Pa. C.S. §§ 3301 and 3315, by sending a certified check or money order, within twenty (20) days after notice of a Final Commission Order in this proceeding is issued, to:

Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

8. That the Philadelphia Gas Works Dominion Peoples is directed to cease and desist from further violations of the Public Utility Code, 66 Pa. C.S. § 101, *et seq.*, and the regulations of this Commission, 52 Pa. Code § 1.1, *et seq.*

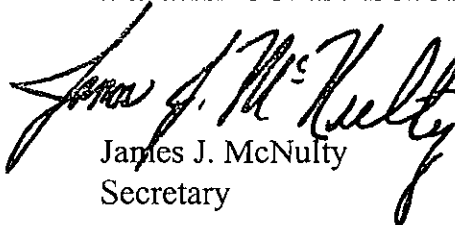
9. That within ten days of the entry date of this Tentative Opinion and Order, Parties shall have the opportunity to file written comments with regard to the civil penalty of \$3,250 imposed on the Philadelphia Gas Works by this Tentative Opinion and Order. Comments shall be filed with the Secretary, with a copy to the Office of Special Assistants, Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, PA 17105-3265.

10. That if no comments in opposition to the civil penalty of \$3,250 imposed on the Philadelphia Gas Works by this tentative Opinion and Order are filed in accordance with Ordering Paragraph No. 9, above, this Tentative Order shall become final without further Commission action.

11. That a copy of this Opinion and Order shall be served upon the Commission's Financial and Assessments Chief, Office of Administrative Services.

12. That this proceeding be marked closed if the Tentative Order becomes final.

BY THE COMMISSION,



James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: September 15, 2006

ORDER ENTERED: SEP 19 2006

2. Article Number



7160 3901 9843 1138 2899

3. Service Type **CERTIFIED MAIL**

4. Restricted Delivery? (Extra Fee) Yes

1. Article Addressed to:

CARLOS PEREZ
F-01761817 0/0

| COMPLETE THIS SECTION ON DELIVERY | |
|--|--|
| A. Received by (Please Print Clearly) | B. Date of Delivery |
| C. Signature X | <input type="checkbox"/> Agent <input type="checkbox"/> Addressee |
| D. Is delivery address different from item 1? If YES, enter delivery address below. | |
| <input type="checkbox"/> Yes <input type="checkbox"/> No | |

PS Form 3811, March 2005

Domestic Return Receipt

2. Article Number



7160 3901 9843 0839 8728

3. Service Type **CERTIFIED MAIL**

4. Restricted Delivery? (Extra Fee) Yes

1. Article Addressed to:

GREGORY J. STUNDER
F-01761817 0/0

| COMPLETE THIS SECTION ON DELIVERY | |
|--|--|
| A. Received by (Please Print Clearly) | B. Date of Delivery |
| C. Signature X | <input type="checkbox"/> Agent <input type="checkbox"/> Addressee |
| D. Is delivery address different from item 1? If YES, enter delivery address below: | |
| <input type="checkbox"/> Yes <input type="checkbox"/> No | |

PS Form 3811, March 2005

Domestic Return Receipt