

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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|-------------------------------|---|-----------------------|
| ALEXANDER SMITH | : | |
| Complainant | : | |
| | : | |
| v. | : | F-2012-2315538 |
| | : | |
| PHILADELPHIA GAS WORKS | : | |
| Respondent | : | |

MAIN BRIEF OF COMPLAINANT ALEXANDER SMITH

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I. STATEMENT OF THE CASE

A. Procedural History

1. Complainant Alexander Smith (“Smith” or “Complainant”) filed an Informal Complaint with the Bureau of Consumer Services on June 8, 2012 in which he disputed the alleged unauthorized use of gas service at 3348 E Street in Philadelphia. After denial of his Informal Complaint, Complainant on or about July 24, 2012, filed a *pro se* Formal Complaint with the Pennsylvania Public Utility Commission (“Commission”). The Complaint alleged that there were incorrect billing charges on Complainant’s bill; that the Philadelphia Gas Works (“PGW” or “Respondent”) had wrongly accused the Complainant of stealing gas service; and that PGW had wrongly reported that there were both a gas service water heater and range on Complainant’s fuel line.

2. On August 14, 2012, PGW filed an Answer denying the material allegations in the Complaint.

3. On October 15, 2012, a Hearing Notice was issued providing for an Initial Hearing on December 7, 2012.

4. On November 30, 2012, Counsel for Complainant filed a Notice of Appearance and a Motion for Continuance of the hearing in order to allow time for settlement negotiations and preparation for the hearing. PGW did not object to the request for a continuance.

5. Complainant’s request for a continuance was granted on December 4, 2012 and on December 6, 2012 a Notice was issued rescheduling the hearing for January 30, 2013.

6. In early December 2012, the parties engaged in settlement discussions, but were unable to reach a settlement.

7. On January 4, 2013, Complainant filed a Motion for Sanctions alleging the failure

of Respondent to respond to Complainant's interrogatories and requests for production of documents. On January 9, 2013, PGW responded to the Motion and admitted that it had not responded to the requested discovery because the appropriate personnel were not available. PGW further stated its intention to produce the remaining discovery by January 14, 2013. PGW provided the remainder of its discovery responses. On January 25, 2013, the parties provided further explanation of their positions to the ALJ and the Complainant stated that the actions of PGW could have impaired Complainant's ability to prepare for the hearing. That same day, Complainant filed a second Motion for Continuance in order to allow Complainant adequate time to complete medical treatment. PGW did not object to the request for an additional continuance. By Order dated January 29, 2013, the Motion for Sanctions was denied based upon the events that unfolded after the Motion was filed and the request for continuance was granted. By Notice dated February 1, 2013, the hearing was rescheduled for April 26, 2013.

8. On April 24, 2013, Respondent PGW filed a Motion for Continuance of the Initial Hearing in order to allow Respondent time to conduct a visit to analyze the usage of appliances at the Complainant's service address. Complainant did not object to PGW's request for a continuance. By Order dated April 25, 2013 the request for continuance was granted and by Notice dated April 29, 2013 the Initial Hearing was rescheduled for July 2, 2013. PGW visited Complainant's service address and the parties continued to engage in settlement discussions in advance of the hearing date but were ultimately unable to reach a settlement.

9. On July 2, 2013, a hearing was held before Administrative Law Judge Angela T. Jones.

10. At the hearing, Complainant requested permission to file a late-filed exhibit

regarding Complainant's PECO Energy Company bills. The request was granted by Order dated July 3, 2013 and a further hearing was granted. Complainant filed the late-filed exhibit on July 15, 2013. Respondent did not object to the late-filed exhibit. By Notice dated July 3, 2013, a Further Hearing was scheduled for October 8, 2013.

11. On October 7, 2013, the parties discussed the need for supporting testimony for the late-filed exhibit to be admitted and concluded that no further testimony was needed. By email the same day, Complainant submitted a request to cancel the hearing to the Administrative Law Judge. The request was granted.

12. On October 8, 2013, a teleconference was held and Complainant requested corrections to the Official Transcript. Complainant was instructed to submit the proposed changes by petition on or before 4:30 PM on October 15, 2013. A briefing schedule was established, which provided that Main Briefs would be due on or before 4:30 P.M. on November 21, 2013 and Reply Briefs on or before 4:30 P.M. on December 6, 2013.

13. Complainant filed a Petition to Correct the Official Transcript on October 15, 2013. PGW filed an answer to the Petition on October 17, 2013. PGW did not object to any of the proposed changes to the transcript.

B. Facts of the Case

1. At all times relevant, Complainant was a PGW customer for gas service to his residence at 3348 E Street, Philadelphia PA. (Tr. 10). He used gas for his home heater. (Tr. 17). An electric water heater was wired at his house in 1999. (Tr. 12; Smith Exhibit 2). His gas range was taken off of the fuel line in 2006. (Tr. 12; Smith Exhibit 12).

2. Complainant was a PGW customer for at least twenty years. During that time,

Complainant received and paid bills for gas service. Complainant's service was never terminated for nonpayment or any other reason. (Tr. 10-11).

3. From 2007 through 2011, the period of disputed billings, Complainant received bills for actual gas use. (Tr. 1011; PGW Exhibit 1). During that time, Complainant did not receive any notices from PGW stating that there was a problem with either his meter or his bills. (Tr. 11).

4. Complainant's PGW meter includes an Electronic Reporting Transmission (ERT) device that is equipped with a sensor to detect when the meter is tilted or manipulated with magnets and sends a signal to PGW when tampering is detected. (Tr. 205; Smith Exhibit 15). PGW also employs a software program called Detectent that reviews accounts for indication of the meter being moved or removed. (Tr. 207). Between November 15, 2007 and November 15, 2011, no tamper signals were sent from Complainant's meter to PGW. (Tr. 207; Smith Exhibit 16). Between November 15, 2007 and November 15, 2011, Detectent did not identify meter tampering activity at Complainant's property. (Tr. 208; Smith Exhibit 18).

5. Complainant's house was burglarized on January 31, 2010. The burglar broke in through Complainant's basement and dismantled some of Complainant's utility service pipes. (Tr. 42). The police were called to the scene of the burglary and a police report was prepared. The report states that a burglar entered through Complainant's basement; that the burglar was apprehended inside the property; and that a hammer and screwdriver were recovered from the scene. (Smith Exhibit 6). At the time of the break in and at all times relevant to the Complaint, Complainant's gas meter was located on the top wall of the basement, next to the basement window. (Tr. 62-63).

6. On November 15, 2011, PGW technician Philip Farinas entered Complainant's

property during the course of investigating a reported gas leak in the neighborhood. (Tr. 139). Farinas found a gas leak at Complainant's property. (Tr. 140-141). Farinas was not able to finish responding to the leak at Complainant's property because he had to return to the scene of another leak on a different street. (Tr. 145). Farinas did not prepare any documentation about the condition of the meter as he observed it that day. (Tr. 149 – 150). The gas leak was not caused by the condition of the meter. (Tr. 167).

7. Supervisor Hector Rivera arrived on the scene after Farinas arrived. (Tr. 146). Rivera did not enter into Complainant's property and did not see the meter as it was connected. (Tr. 190).

8. A second technician, Michael Rodgers, arrived after Farinas and Rivera. (Tr. 146). Farinas left the scene shortly after Rivera and Rodgers arrived. (Tr. 146). Rivera instructed Rodgers to immediately remove the meter from Complainant's property. (Tr. 167). Rodgers removed the meter from the property and stored it for transport. (Tr. 170). He phoned in a report about the meter after it was removed from the property. (Tr. 180 – 181). Rodgers' report states that there was a gas range on the fuel line at Complainant's property. (PGW Exhibit 5). Less than two hours after arriving at Complainant's property, Rodgers reported the discovery of a tampered meter at nearby 643 East Thayer Street. (Tr. 186; Smith Exhibit 13). Rodgers prepared field information regarding the meter removed from Complainant's property after removing this second meter from East Thayer Street. (Tr. 186; PGW Exhibit 3).

9. PGW has alleged that there was meter tampering on the meter that was removed from Complainant's property on November 15, 2011. (Tr. 144).

10. PGW initially billed Complainant \$6,443.27 in estimated gas use for the period

November 15, 2007 to November 15, 2011 representing gas allegedly supplied but not billed due to tampering of the meter removed from Complainant's property on November 15, 2011. (Tr. 86; PGW Exhibit 1). This initial estimate included estimated gas usage associated with a gas range during the same period. (Tr. 87). PGW subsequently revised that estimate to \$5,150.05 after crediting payments to Complainant's account and determining that the gas range was not in use between 2007 to 2011. (PGW Exhibit 1; Tr. 87). Complainant has been without gas service to his home since November 15, 2011 because PGW refuses to restore gas service to Complainant's property until all estimated charges are paid. (PGW Exhibit 2).

11. The estimated bill for November 15, 2007 to November 15, 2011 is based on Complainant's actual use from July 5, 2001 to June 3, 2002. (Tr. 101). Complainant was enrolled in PGW's Customer Assistance Program ("CAP" or "Customer Responsibility Program" or "CRP") during all of 2001 and through July 2002. (PGW Exhibit 1).

12. PGW has no record of prior history of theft of service at Complainant's property prior to November 15, 2011. (Smith Exhibit 7).

13. During the pendency of this Formal Complaint, PGW refurbished the meter that was removed from Complainant's property on November 15, 2011 and installed it into a new property. (Tr. 121).

II. SUMMARY OF ARGUMENT

On November 15, 2011, PGW terminated gas service to Complainant's home based upon an erroneous determination that there was meter tampering at Complainant's home. PGW has billed Complainant \$5,150.05 for estimated gas use covering the period November 15, 2007 to November 15, 2011, even though PGW has no evidence to show that unauthorized use occurred during that period. PGW calculated the amount of estimated gas used during the disputed period

by determining the historical amount of gas used from July 2001 to June 2002, a period when Complainant was enrolled in PGW's Customer Assistance Program, and multiplying by four. PGW has demanded that the entire \$5150.05 be paid before gas service will be restored.

Under Section 1501 of the Public Utility Code, a utility is required to provide accurate bills and service which is "reasonably continuous and without unreasonable interruption or delay." PGW's Tariff Section 8.3.C prohibits PGW from refusing service to an Applicant who is "not responsible for ... the unauthorized use of Gas." The Complainant has shown by a preponderance of the evidence that he did not engage in or allow unauthorized use or meter tampering at his home and he has been wrongly billed for the charges. Complainant cannot be denied service or billed for charges purportedly linked to meter tampering if he can prove that he is not responsible for unauthorized use at his home.

Complainant has met his burden by presenting substantial evidence to show that there has been no unauthorized use of gas at his home. Specifically, the Complainant has proved that PGW employs systems to detect meter tampering via ERT manipulation and these systems did not detect any meter tampering at Complainant's property; PGW's finding of meter tampering is insufficiently supported; and the decrease in gas service use over the life of Complainant's PGW account is due to changes in his consumption habits and reliance on non-gas appliances and not unauthorized use of gas service. Further, Complainant has shown that any alteration or change to the position of his meter was most likely caused by a third party without his consent.

PGW has not presented evidence of co-equal weight to rebut Complainant's evidence that he did not engage in or allow unauthorized use. The Complainant therefore requests that the Commission find that he has satisfied his burden of proof and that he is not responsible for charges linked to alleged unauthorized use of gas service at his property.

III. ARGUMENT

A. THE COMPLAINANT HAS PROVED BY A PREPONDERANCE OF EVIDENCE THAT THERE HAS BEEN NO UNAUTHORIZED USE OF GAS AT HIS HOME

Section 1501 of the Public Utility Code imposes a duty on every public utility to provide service that is “reasonably continuous and without unreasonable interruptions or delay.” 66 Pa.C.S. § 1501. The definition of service includes, “any and all acts done, rendered, or performed ... by public utilities” 66 Pa. C.S. § 102. Service includes the provision of proper billing. Mullins v. PGW, PUC Docket Number C-2011-2266040 (Rewrite Opinion and Order entered on October 2, 2012), 2012 Pa. PUC LEXIS 901. PGW’s Tariff Section 8.3.C prohibits PGW from refusing service to an Applicant who is “not responsible for ... the unauthorized use of Gas.” Respondent’s actions violated these legal provisions.

The Complainant bears the burden of proof pursuant to 66 Pa. C.S. § 332(a). To prevail, he must establish by a preponderance of the evidence that the Respondent terminated service and issued a bill in violation of the Code or a regulation or order of the Commission. Patterson v. Bell Telephone Company of Pennsylvania, 72 Pa. P.U.C. 196 (1990). Preponderance of the evidence means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. Se-Ling Hoisery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950). Preponderance does not depend on the number of witnesses testifying on either side but rather on the credibility of the testimony in light of all the evidence in the case. Burch v. Reading Co., 240 F.2d 574 (3d Cir. 1957) cert. denied, 353 U.S. 965 (1957).

In a complaint contesting responsibility for billing charges arising from alleged unauthorized use, the complainant has the burden of proving that it is more likely than not that the respondent wrongfully billed for unauthorized gas use. Rivera v. PGW, PUC Docket Number C-2010-2164222 (Opinion and Order entered January 12, 2012), 2011 Pa. PUC LEXIS 137. While the burden of proof remains with the party seeking relief from the Commission, the burden of persuasion may shift back and forth during a proceeding. Milkie v. Pa. PUC, 768 A.2d 1217 (Pa. Cmwlth. 2001). When a complainant presents evidence that is sufficient to satisfy the burden of proof, the burden shifts to the respondent to rebut the complainant's *prima facie* case. Burleson v. Pa. PUC, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1093). If the respondent presents evidence of co-equal weight, then the complainant is required to provide additional evidence to rebut the evidence of the respondent. *Id.* Finally, the Commission's decision must be supported by "substantial evidence" and not simply a "trace of evidence or a suspicion of the existence of a fact." Norfolk and Western Railway Co. v. Pa. PUC, 489 Pa. 109, 413 A.2d 1037 (1980). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.*

1. PGW employs systems to detect meter tampering via ERT manipulation and these systems did not detect any meter tampering at Complainant's property.

The Complainant has proved that he did not engage in unauthorized use of gas service at 3348 E Street by showing that he could not have engaged in meter tampering that PGW has alleged. PGW claims that there were 24 tamper counts on Complainant's meter and cites these counts as part of the basis for its determination that unauthorized use occurred at Complainant's property between 2007 and 2011. (Answer to Complaint at Pg. 2; PGW Exhibit 2 at Pg. 4; Smith Exhibit 10). PGW maintains that the tampering at issue was effectuated by someone at the

property systematically manipulating the ERT device to stop the meter from registering usage. (Tr. 205). In response to Complainant's discovery request, PGW described a tamper count as follows:

A tamper count is described as an "anomaly" that triggers a report generated by PGW's Itron's software, which can then be investigated for possible meter tampering. There are 2 switches mounted in the ERT device which can sense a magnetic field or Tilt/Tamper detection when someone attempts to remove or bypass the meter to avoid registration.

(Smith Exhibit 15).

At the hearing, PGW presented the testimony of Timothy Sullivan, superintendent of revenue protection. On cross examination, Sullivan testified that when the ERT detects that someone is tilting the ERT or manipulating it with magnets, the ERT sends a signal to PGW and PGW's software reports it. (Tr. 205 – 207). Sullivan admitted that no tamper counts were reported from Complainant's property between 2007 to 2011 (Tr. 207). PGW's records show that in each of the monthly reports generated by Complainant's meter between 2007 and 2011, there was not a single instance of a change in the tamper count. (Tr. 206; Smith Exhibit 16). Sullivan went on to testify that PGW has a program called Detectent, which was in use at the time of the alleged tampering at Complainant's property and which specifically reviews accounts for indication of the meter being moved or removed, and admitted that this program also did not identify a problem with the meter at Smith's property. (Tr. 207 – 208).

The evidence completely undermines PGW's contention that the ERT at Complainant's property was frequently manipulated in order to reduce the amount of gas being registered. If Complainant engaged in the type of unauthorized use that PGW contends, then PGW's tamper count system or its Detectent software would have identified Complainant's account. PGW has not offered any evidence or explanation for why the programs, which it employs systematically

to detect the kind of theft of gas service that it alleges, failed to do so, in this case. Finally, Sullivan acknowledged in his testimony that there is a reasonable non-theft explanation for the tamper counts that were discovered on Complainant's meter. Sullivan conceded that the tamper counts were not detected until two months after the meter was removed from Complainant's home and "most of that was probably from the transport of the meter" out of Complainant's home to PGW's facilities (Tr. 210). This admission totally undermines the claim that some changes in tamper counts had occurred before the meter was removed.

Perhaps recognizing the weakness of its tamper count evidence, PGW attempted to rehabilitate Sullivan and he testified that PGW's determination of unauthorized use did not rest on the tamper count evidence alone but other "indications." (Tr. 211). PGW cannot simply minimize the significance of the lack of tamper count activity during the disputed period. PGW has worked backward from its determination of meter tampering to conclude that the decrease in Complainant's gas usage is attributable to unauthorized use; however, absent the tamper count evidence or some other evidence of theft from 2007 to 2011, PGW cannot sufficiently rebut Complainant's claim that there was a lawful explanation for the decrease in gas service usage over the life of his account with PGW. PGW has already conceded in response to Complainant's discovery request that prior to 2011 there is no history of theft on Complainant's account. (Smith Exhibit 7). The Complainant has presented substantial evidence to show that he could not have engaged in the kind of unauthorized use that PGW alleges without alerting PGW to the unauthorized use and PGW has failed to present evidence of co-equal weight to rebut Complainant's evidence.

2. PGW's finding of meter tampering is insufficiently supported.

The Complainant has proved that PGW failed to sufficiently document the condition of the meter that was removed from Complainant's property on November 15, 2011. PGW contends that it discovered a tampered meter at Complainant's property. At the Initial Hearing, PGW presented the testimony of two witnesses who were at Complainant's property on November 15, 2011, service technician Philip Farinas and supervisor Hector Rivera. Farinas testified that he entered Complainant's property during the course of investigating a gas leak in the neighborhood. (Tr. 139). He stated that he found a gas leak at Complainant's property, but he was not able to finish responding to the leak at Complainant's property because he had to return to the scene of another leak on a different street. (Tr. 140; Tr. 145). The gas leak at Complainant's property was not caused by the condition of the meter. (Tr. 167). Farinas testified, supposedly from memory, that at the time of shut off on November 15, 2011, he observed that the ERT was "cocked" on Complainant's meter (Tr. 144). On cross examination Farinas conceded that he did not take any photographs of the ERT; he did not prepare any contemporaneous reports or otherwise document the condition of the ERT; and that there was a level ten emergency due to a gas leak at the property and his primary responsibility was to shut off the gas service. (Tr. 147 - 152). There was no testimony that the meter was not functioning correctly at the time when Farinas was in the property. PGW did not introduce any other supporting documentary evidence to substantiate Farinas' claim about the condition of the ERT on the meter that was removed from Complainant's property.

PGW also offered the testimony of Hector Rivera. Rivera testified that he arrived on the scene after Farinas and Farinas informed him that the meter was "compromised." (Tr. 157). Rivera instructed a second service technician, Michael Rodgers (who did not testify), to

immediately remove the meter from the property, but Rivera did not enter into Complainant's property and did not see the meter when it was connected. Rivera saw the meter for the first time only after it had been removed from the property. (Tr. 190). Rivera testified, supposedly from memory, that when he saw the meter after it was removed from the property the ERT head was not connected to the meter. (Tr. 164). Rivera did not photograph the meter or otherwise document what he observed. PGW did not offer any other supporting contemporaneous documentary evidence to substantiate Rivera's claim about the condition of the ERT.

Michael Rodgers was the second service technician on the scene on November 15, 2011 and the only PGW employee who documented what he observed that day. PGW did not call Rodgers to testify as a witness at the hearing. PGW introduced field information and a theft reporting sheet reflecting the activity of Rodgers on the day the meter was removed. (PGW Exhibits 3-5). These documents and the testimony of PGW's witnesses reveal that Rodgers removed the meter from the property and stored it for transport. (Tr. 170). After the meter was removed from the property, he phoned in a theft reporting sheet, which contained only conclusory details about the condition of the meter. (Tr. 180 – 181). Rodgers' report states that there was a gas range on the fuel line at Complainant's property. (PGW Exhibit 5). Less than two hours after arriving at Complainant's property, Rodgers reported the discovery of a tampered meter at nearby 643 East Thayer Street. (Tr. 186; Smith Exhibit 13). Rodgers prepared field information regarding the meter removed from Complainant's property only after removing this second meter from East Thayer Street. (Tr. 186; PGW Exhibit 3). PGW claims that its meter shop found that the meter was missing red caps (Tr. 97) but this information was not included in Rodgers' theft reporting sheet or field information and he is the only one who prepared any documents regarding the meter. There is no evidence that the red caps were missing at the time

the meter was removed from the basement. The record also reflects that during the pendency of this Formal Complaint, PGW refurbished the meter that was removed from Complainant's property and installed it into a new property. (Tr. 121).

The Complainant has proved that PGW's finding of meter tampering is insufficiently supported by showing that two of the three PGW employees on the scene failed to document what they observed. Rodgers was the only PGW employee who did document what he observed that day; however, his documentation does not contain any information about the actual condition of the meter or ERT. While the theft reporting sheet, generated supposedly upon Rodgers' call to PGW, generally states that there was an inlet to outlet tamper on the meter, it does not include any specific information about how the technician reached that conclusion and does not include any mention of missing red caps. (PGW Exhibit 5). Rodgers' documents also lack credibility because they were prepared only after the meter was removed from the property (Tr. 170) and they falsely report that a gas range was on the fuel line when PGW's own records show that the range was removed in 2006. (Smith Exhibit 12).

Further, Complainant's evidence shows that Rodgers discovered another allegedly tampered meter on the same day, in the same neighborhood, less than two hours after removing the meter from Complainant's property. (Smith Exhibit 13). PGW's witness Rivera testified that Rodgers did not prepare field information regarding the condition of Complainant's meter until 12:40 PM but the evidence shows that Rodgers was already preparing documents at the second property by 12:23 PM (Tr. 185 – 186; Smith Exhibit 13). PGW could not explain why Rodgers was able to provide specific details about the alleged tampered meter at this other property (“Tampered meter bypass inlet to outlet *ERT head removed & found on top of the meter*”)(emphasis added) but not for Complainant's property. (Smith Exhibit 13). PGW also

failed to explain how Rodgers was able to discover a second bypass during the time that he was supposedly preparing field information documents regarding Complainant's meter. The evidence shows that Rodgers prepared the documents for these two houses in the same timeframe and that he inaccurately reported at least one material detail about conditions at Complainant's property, i.e., the existence of a gas range on the fuel line, in the process.

Complainant has proved that PGW failed to sufficiently and accurately document the condition of the ERT and meter that were removed from Complainant's property on November 15, 2011. PGW has prevented any further investigation that might be conducted concerning the meter by refurbishing the meter and placing it in a new property during the pendency of this litigation. The Complainant has alleged that he is not responsible for meter tampering at his property and PGW has failed to present credible evidence that the meter was actually tampered.

3. Complainant did not tamper with the gas meter and the decrease in gas service use over the life of Complainant's PGW account is due to changes in his consumption habits and reliance on non-gas appliances and not unauthorized use of gas service.

In tampering/theft of service cases, the complainant must show that he/she did not directly commit tampering or theft and did not allow some other person to commit such actions. Complainant has met his burden of proof and has established by a preponderance of the evidence that he did not tamper with the meter at his home and is therefore not responsible for unauthorized use at 3348 E Street. This burden was satisfied in Mullins v. PGW, PUC Docket Number C-2011-2266040 (Rewrite Opinion and Order entered on October 2, 2012), 2012 Pa. PUC LEXIS 901. In Mullins, the complainant prevailed because she "was credible in her testimony and the weight of the evidence establish[ed] that the Respondent should not have charged her for gas service [...]." Id. at 11. When a complainant fails to meet this burden in an

unauthorized use case, it is typically because the complainant admitted to the unauthorized use, like the complainant in Odom v. PGW, PUC Docket Number F-2012-2284230 (Order entered November 6, 2012), 2012 Pa. PUC LEXIS 1359; failed to dispute the alleged theft, like the complainant in Rivera v. PGW, PUC Docket Number C-2010-2164222 (Opinion and Order entered January 12, 2012), 2011 Pa. PUC LEXIS 137; or because the complainant offered only uncorroborated evidence in support of his complaint, like the complainant in Roosevelt Taylor v. PGW, PUC Docket Number C-2009-2140196 (Order entered April 4, 2011), 2011 Pa. PUC LEXIS 741.

In Odom, the complainant's testimony regarding the inaccuracy of her bill was discredited because she admitted during the hearing that she resided at the property during the period of alleged theft and that she used gas service during this period knowing that PGW had never authorized for service to be turned back on at the service address following a shut off. Odom v. PGW, PUC Docket Number F-2012-2284230 (Order entered November 6, 2012), 2012 Pa. PUC LEXIS 1359, at 10-11.

In Rivera, the complainant did not rebut the allegations of meter tampering. Rivera v. PGW, PUC Docket Number C-2010-2164222 (Opinion and Order entered January 12, 2012), 2011 Pa. PUC LEXIS 137, at 11. The ALJ noted:

Complainant did not rebut these allegations. Nor did he suggest any method to arrive at the amount for unauthorized gas use. He merely asserted that he did not use gas, that he used electricity instead, but that he could not introduce any corroborating evidence to support his assertions, such as electric bills or something showing the purchase of an electric heater. He did not explain away the missing of the two red caps on the meter, the dirt behind the meter and the ERT head, the smell of the pure gas in the fuel line, and the on position of the valve at the curb.

Id. In Taylor, the complainant testified without additional corroboration that he used only electricity and kerosene or that he had only appliances that were unable to use gas during the

period of alleged unauthorized use, but the ALJ found his testimony unconvincing because, “it was of a general nature and contain[ed] only assertions.” Roosevelt Taylor v. PGW, PUC Docket Number C-2009-2140196 (Order entered April 4, 2011), 2011 Pa. PUC LEXIS 741, at 7.

Unlike the complainants in Odom, Rivera, and, Taylor, Smith has denied the allegations of meter tampering and has presented substantial evidence in support of his claim that he is not responsible for unauthorized use. At his Initial Hearing, Smith introduced eighteen exhibits in support of his Complaint (Smith Exhibit 1 – Smith Exhibit 18). He testified that he was a PGW customer for approximately 20 years; that during that time he had never received any notices from PGW stating that there was a problem with his meter or his bills; and specifically denied that he had engaged in or authorized any form of meter tampering. (Tr. 10-11; Tr. 42). This testimony is compelling because PGW’s tamper detection equipment and programs would have alerted PGW to tampering/theft associated with Complainant’s meter. (Smith Exhibit 15; Smith Exhibit 18).

PGW attempted to support its claim of tampering by citing the Complainant’s diminished use of gas service in the years between 2007 and 2011. However, Smith offered evidence which reasonably explained why his gas service usage decreased over the life of his account with PGW. Smith testified that he used the most gas when he was enrolled in PGW’s Customer Assistance Program (“CAP”); that he used less gas when he removed himself from the CAP program, and less still when he began to experience economic instability as a result of losing employment in 2005 (Tr.17-19; Tr. 41-42). In support of this testimony he offered into evidence a letter from a former employer confirming loss of employment in 2005 (Smith Exhibit 3).

Complainant’s testimony concerning his usage is supported by PGW’s own data. PGW Exhibit 1 shows that Smith was enrolled in PGW’s CAP prior to August 2002. The Exhibit

shows that Smith used 994 CCFs of gas in 2001 when he was enrolled in PGW's CAP. PGW's CAP is also known as the Customer Responsibility Program (CRP). CRP customers receive discounted gas bills, which are based on a percentage of the customer's income and do not vary based on actual consumption. (Tr. 128). Not surprisingly, when Smith lost the benefit of CRP in 2002, he reduced his actual consumption. This is also borne out in PGW Exhibit 1, which shows an annual reduction in usage in the years following Smith's removal from CRP (590 CCFs of gas in 2004; 432 CCFs of gas in 2005).¹ Finally, the exhibit shows that the most significant reductions in usage occurred after 2005, which is when Smith testified that he first began to experience economic instability (106 CCFs of gas in 2006; 315 CCFs of gas in 2007; 105 CCFs of gas in 2008; 293 CCFs of gas in 2009; 71 CCFs of gas in 2010; and 15 CCFs of gas in 2011).

Unlike the complainants in Rivera and Taylor, Smith did not merely assert that he did not use gas service but offered substantial corroborating evidence in support of his assertions. Smith testified that beginning in 2005 he used very little gas heat to heat his home and instead heated with an electric radiator in the bedroom and a kerosene heater in the living room. (Tr. 17 – 41). In support of this testimony, he offered into evidence pictures of the non-gas appliances that he used in lieu of gas appliances (Smith Exhibit 1); bank statements showing multiple kerosene purchases during the winter of 2009-2010 (Smith Exhibit 4 Unredacted); and PECO electric usage data covering the period of alleged theft and showing increased electrical consumption every winter (Late-filed Smith Exhibit 5). The following tables summarize the usage data contained in Late-filed Smith Exhibit 5:

¹ 2002 and 2003 are not included in this analysis because in both of these years the Complainant received some bills that were based on estimates.

PECO Monthly KwH Usage 2007 – 2013

(Cold Weather Months Highlighted)

| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
|-----------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| January | 648 | 554 | 742 | 152 | 462 | 63 | 358 |
| February | 534 | 592 | 522 | 138 | 498 | 759 | 628 |
| March | 504 | 664 | 353 | 126 | 328 | 675 | 972 |
| April | 445 | 508 | 1022 | 86 | 168 | 581 | 707 |
| May | 421 | 315 | 2911 | 72 | 51 | 470 | 319 |
| June | 359 | 336 | 1500 | 137 | 155 | 44 | 109 |
| July | 387 | 397 | 138 | 258 | 244 | 75 | |
| August | 396 | 377 | 165 | 176 | 171 | 81 | |
| Sept | 389 | 378 | 228 | 116 | 91 | 55 | |
| October | 392 | 374 | 195 | 65 | 62 | 140 | |
| November | 425 | 367 | 156 | 51 | 205 | 419 | |
| December | 464 | 618 | 157 | 518 | 160 | 592 | |

Complainant's Average Electric KwH Use in Cold Weather v. Warm Weather Months²

2007 – 2012

| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 |
|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| Cold | 503 | 551 | 492 | 179 | 304 | 514 | Incomplete |
| Warm | 391 | 363 | 856 | 137 | 129 | 144 | Incomplete |

² Cold weather months – November through April; Warm weather months – May through October

These tables reveal a consistent increase in electrical consumption during the cold weather months of the year.³ This data supports Smith's testimony that in lieu of his gas heater to heat his home during the cold weather months, he used a single, strategically located electric radiator. The lower than normal use during the winter 2009-2010 is consistent with Smith's testimony and Smith Exhibit 4 Unredacted, which show kerosene purchases being made during that time. In addition, the PECO usage data supports Smith's testimony that he began to reduce his gas heat use prior to the disputed period and has maintained the same energy usage habits since his gas service was terminated in November 2011. (Tr. 45-46). Taken together, this evidence corroborates Complainant's assertion that he was not stealing gas during the period in question but was instead conserving gas and using non-gas appliances.

B. COMPLAINANT HAS PROVED THAT ANY ALTERATION TO THE METER WAS CAUSED BY A THIRD PARTY WITHOUT COMPLAINANT'S CONSENT.

In Mullins v. PGW, the complainant prevailed in part because she was able to show that a third party was engaged in criminal activity at her home during the period of alleged theft. Mullins introduced evidence to show that there were squatters residing in her property during the period of theft. Mullins v. PGW, PUC Docket Number C-2011-2266040 (Rewrite Opinion and Order entered on October 2, 2012), 2012 Pa. PUC LEXIS 901, at 12. Mullins did not contest that unauthorized use had occurred. In this case, Complainant submits that there is no evidence that any alteration of the meter arising from the break-in actually resulted in unauthorized use.

In the alternative, Complainant has shown that any alteration of the meter can be explained by actions taken by a third party without the Complainant's knowledge or consent. Smith testified that during the period of alleged unauthorized use, "there was a burglary in my

³ The electric use anomaly in 2009 is not repeated during any other year for which data was provided and suggests an isolated spike in electric use.

house [...] where police apprehended a burglar who was in my basement dismantling pipes.” (Tr. 42-43). In support of his testimony, he introduced a police report to show that a burglary did in fact occur at his home in 2010; that the burglar broke into his basement; that the burglar was apprehended inside the home, and that a hammer and screwdriver were recovered from the scene. (Smith Exhibit 6). Smith further testified that at the time of the break in, the gas meter was located on the top wall of the basement, next to the basement window. (Tr. 62-63).

PGW did not introduce evidence of co-equal weight to rebut Complainant’s evidence that a burglar had access to Complainant’s meter during the period of alleged unauthorized use. Although PGW’s witness Timothy Sullivan initially testified that the ERT has no salvage value, under cross examination he testified that there are people who steal meters (“people at times may go into a vacant property and take the meter out and put it up in their house”) and that if the ERT remains on a stolen meter one of PGW’s vans may be able to pick up a signal if the ERT is not damaged. (Tr. 213). This testimony establishes that there is both a market for stolen meters and an incentive for a thief to remove an ERT device. Complainant has provided a credible explanation for any alteration or displacement of the meter or the ERT device that might raise an inference of tampering.

C. RESPONDENT HAS NOT PRESENTED EVIDENCE OF CO-EQUAL WEIGHT TO REBUT COMPLAINANT’S CASE.

Once Complainant has established a *prima facie* case in support of his Complaint, the next step in determining whether he has carried his burden is whether the Respondent has presented evidence of co-equal weight to rebut the Complainant’s evidence. PGW has not presented evidence of co-equal weight and has failed to rebut Complainant’s *prima facie* case; however, even if PGW’s evidence is found to be of co-equal weight, Complainant has

sufficiently rebutted PGW's evidence by presenting substantial and credible evidence that he did not engage in or allow unauthorized use.

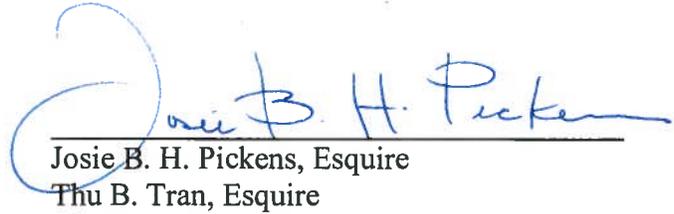
Specifically, Complainant has called into question the credibility of PGW's determination that the meter was tampered and that unauthorized use was accomplished by periodic manipulation of the ERT device. Complainant has also produced evidence to show that he was the victim of a burglary during the period of alleged unauthorized use, including removal of pipes in the basement where the gas meter is located, and that his reduction in gas use was a direct result of his efforts to consume less gas and use non-gas appliances. Complainant has therefore proved by a preponderance of the evidence that he did not engage in or allow unauthorized use of gas service at his property.

IV. CONCLUSION

For all the foregoing reasons, Complainant requests that the Commission:

- (a) declare that the Complainant has proved by a preponderance of evidence that he is not responsible for unauthorized use at 3348 E Street in Philadelphia;
- (b) declare that in erroneously billing Complainant for alleged unauthorized use Respondent has violated its duty to provide reasonably continuous service under 66 Pa.C.S. § 1501;
- (c) declare that in requiring Complainant to pay billing charges linked to alleged unauthorized use as a precondition to restoring service, PGW has violated Section 8.3(c) of its Tariff and 66 Pa.C.S. § 1501;
- (d) remove the \$5150.05 in billing charges linked to unauthorized use from Complainant's gas service account with PGW;
- (e) grant such other relief as is appropriate, just and in the public interest.

Respectfully submitted,



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