**BEFORE THE**

**PUBLIC UTILITY COMMISSION**

SBG Management Services, Inc. / :

Colonial Garden Realty Co., L.P. :

 :

 v. : C-2012-2304183

 :

Philadelphia Gas Works :

SBG Management Services, Inc. / :

Simon Garden Realty Co., L.P. :

 :

 v. : C-2012-2304324 :

Philadelphia Gas Works :

**INITIAL DECISION**

Before

Eranda Vero

Administrative Law Judge

INTRODUCTION

This decision dismisses the high billing disputes raised in these consolidated Complaints due to the running of the statute of limitations on the claims that predated May 11, 2009, and the Complainants’ failure to carry the burden of proof on the remainder. This decision sustains the consolidated Complaints with regard to their challenge of Respondent’s application of partial payments as it pertains to late payment charges. This decision also sustains the consolidated Complaints with regard to their challenge of Respondent’s application of tariff sanctioned late payment charges to outstanding balances which have been the subject of municipal liens.

HISTORY OF THE PROCEEDING

On May 11, 2012, Phillip Pulley filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) as Director of Operations for SBG Management Services, Inc. on behalf of Colonial Garden Realty Co., L.P. (Colonial or Colonial Garder). The Complaint was filed against Philadelphia Gas Works (PGW or Respondent) and was docketed at Docket No. C-2012-2304183. Also on May 11, 2012, Mr. Pulley filed a formal Complaint with the Commission as Director of Operations for SBG Management Services, Inc. on behalf of Simon Garden Realty Co., L.P. (Simon or Simon Garden). This Complaint was also filed against PGW and was docketed at Docket No. C-2012-2304324.

Although the disputed amounts and their pertaining accounts differed, the allegations contained in both Complaints were identical. In particular, the Complaints disputed the accuracy of the billing, the validity of the meter readings and or estimates, and the calculation of interest and penalties assessed against it by PGW. The Complaints alleged that PGW had refused to address the customers’ concerns about the accuracy of the billings, had failed to mitigate its damages by allowing large unpaid gas debt by tenants to accrue in lieu of gas termination, and had incorrectly collected payments for the accounts is dispute. In addition, the Complaints alleged that PGW refused to address requests for information, acted in bad faith, and wrongfully encumbered the customers’ property with liens causing the customers irreparable harm. The Complaints requested relief in the form of refunds and/or credits for all overpayments made to PGW and adjustments for excessive penalties and interest assessed on the disputed accounts.

On June 4, 2012, PGW filed timely Answers and New Matters to each of these Complaints. In its Answers and New Matters, Respondent denied the material allegations of the Complaints and averred that the City of Philadelphia, as owner of PGW, had filed municipal liens upon the various properties owned by Colonial Garden Realty Co., L.P. and Simon Gardens Realty Co., L.P. since January 2012. Respondent further averred that the disputed amounts were beyond the Commission’s statute of limitations, 66 Pa. C.S. §3314(a), because the gas service underlying the disputed amounts represented balances for gas service rendered and billed more than four years prior to the filing of the Complaints.

Also, on June 4, 2012, Respondent filed Preliminary Objections on both Complaints, challenging the Commission’s jurisdiction over municipal liens and requesting that impertinent matter be stricken in both of the Complaints.

Hearing Notices dated June 13, 2012, notified the parties that an initial hearing was scheduled for August 16, 2012, at 10:00 a.m., and that these cases were assigned to me.

On June 25, 2012, PGW filed “Supplemental Information Regarding Philadelphia Gas Works’ Preliminary Objections and Motions to Strike” (Supplemental Information) against SBG’s Complaints filed at Docket Nos. C-2012-2304324, and C-2012-2304183. Despite their title, these documents were essentially Amended Preliminary Objections and were treated as such by the undersigned.

Complainant’s answers to Respondent’s Amended Preliminary Objections filed at Docket Nos. C-2012-2304324, and C-2012-2304183 were due no later than July 9, 2012. Complainant did not answer either of the Respondent’s Amended Preliminary Objections.

On July 6, 2012, I issued an Order consolidating these two Complaints with three other Complaints filed against PGW by Mr. Pulley as Director of Operations for SBG Management Services Inc.: *SBG Management Services, Inc. / Elrea Garden Realty Co, L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304167; *SBG Management Services, Inc. / Fairmount Manor Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304215; and *SBG Management Services, Inc. / Marshall Square Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304303.

By Order issued July 16, 2012, PGW’s Amended Preliminary Objections were sustained, in part, with regard to the Commission’s lack of subject matter jurisdiction over municipal liens, and were denied, in part, with regard to the billing disputes and the quality of service issues.

On September 17, 2012, David H. Denenberg, Esq. entered his appearance on behalf of the Complainants in the above consolidated cases.

On November 9, 2012, Scott H. DeBroff, Esq., and Alicia R. Duke, Esq., entered their appearances on behalf of the complainants in the five consolidated matters. They replaced David H. Denenberg, Esq., who withdrew his appearance on November 26, 2012.

A Hearing Cancellation/Reschedule Notice dated November 16, 2012, informed the parties that the Prehearing Conference scheduled for Thursday, November 29, 2012, at 2:00 p.m. was cancelled, and that the initial hearing scheduled for December 6, 2012, was changed into a Prehearing Conference.

The Prehearing Conference was held as scheduled on December 6, 2012, at 10:00 a.m. Among other matters discussed at the Prehearing Conference, the parties agreed that, due to the numerous transactions disputed in each of the five consolidated Complaints, the logistics of the consolidated cases would benefit from the separation of the cases into two groups for hearing and adjudication purposes.

Because they involve accounts that are potentially interrelated, the parties agreed that the following Complaints would constitute the first group of consolidated cases:

* *SBG Management Services, Inc. / Elrea Garden Realty Co, L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304167;
* *SBG Management Services, Inc. / Fairmount Manor Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304215; and
* *SBG Management Services, Inc. / Marshall Square Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304303.

The second group would consist of the remaining two consolidated Complaints:

* *SBG Management Services, Inc. / Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183; and
* *SBG Management Services, Inc. / Simon Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304324.

The separation of the five consolidated cases into these two groups was memorialized in my Order dated January 24, 2013.

On December 10, 2012, Scott H. DeBroff, Esq., and Alicia R. Duke, Esq., filed Amended Complaints at Docket Nos. C-2012-2304183, and C-2012-2304324, where, *inter alia*, counsel explained the relationship between SBG Management Services, Inc., Colonial Garden Realty Co., L.P., and Simon Garden Realty Co., L.P. (jointly referred to as SBG or Complainants). In particular, the Amended Complaint in *SBG Management Services, Inc. / Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 specifies that it concerns the real estate property of Colonial Garden Realty Co., L.P., with PGW Account #6128000245. The Complaint identified and coded the disputed transactions as follows: A – Excessive billings (duplicate bills and high meter reads); D – disputed estimated billings; F – disputed late payment charges; and J – disputed meter reads. The total amount in dispute was $60,560.33.

The Amended Complaint in *SBG Management Services, Inc. / Simon Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304324 specifies that it concerns the real estate property of Simon Garden Realty Co., L.P., with PGW Account No. 539547187. The Complaint identified and coded the disputed transactions as follows: C – disputed transfers; H – disputed canceled transactions; and J – disputed meter reads. The total amount in dispute was $184,410.87.

On January 2, 2013, PGW filed Answers to each of SBG’s Amended Complaints denying the material allegations of each Complaint.[[1]](#footnote-1)

In the interim, SBG Management Services Inc. / Colonial Garden Realty Co., LP filed another formal Complaint against PGW on November 2, 2012. This Complaint was docketed at Docket No. C-2012-2334253 and alleged service and billing issues related to a proposed boiler conversion from oil to gas for the property located at 5427 Wayne Avenue, Philadelphia, PA 19144. On December 6, 2012, PGW filed an Answer denying the material allegations of the Complaint.

On December 18, 2012, Scott H. DeBroff, Esq. and Alicia R. Duke, Esq. entered their appearances on behalf of the Complainant in *SBG Management Services Inc. / Colonial Garden Realty Co., LP. v. Philadelphia Gas Works*, at Docket No. C-2012-2334253.

On February 28, 2013, counsel for the Complainant requested that *SBG Management Services Inc. / Colonial Garden Realty Co., LP. v. Philadelphia Gas Works*, at Docket No. C-2012-2334253, be consolidated with *SBG Management Services, Inc. / Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, at Docket No. C-2012-2304183, for discovery, hearing and adjudication purposes. Respondent did not object to this request.

On March 7, 2013, I issued an Order consolidating *SBG Management Services Inc. / Colonial Garden Realty Co., LP. v. Philadelphia Gas Works*, at Docket No. C-2012-2334253 with *SBG Management Services, Inc. / Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, at Docket No. C-2012-2304183, which had been previously consolidated with *SBG Management Services, Inc. / Simon Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304324, by Order issued on January 24, 2013.

A Hearing Notice dated March 18, 2013, notified the parties that the initial hearings were scheduled for April 16-17, 2013, at 10:00 a.m.

A Prehearing Order was issued on March 27, 2013, reminding the parties of the date and time of the scheduled hearings, informing them of the procedures applicable to this proceeding, and directing the submission of documents prior to the hearing.

A Hearing Cancellation/Reschedule Notice notified the parties that the initial hearings scheduled for April 16-17, 2013, at 10:00 a.m. were rescheduled to take place on August 29-30, 2013, at 10:00 a.m.

On August 6, 2013, Scott H. DeBroff, Esq. and Alicia R. Duke, Esq. withdrew their appearances on behalf of the Complainants in these consolidated matters.

On August 14, 2013, Francine Thornton Boone, Esq. entered her appearance on behalf of the Complainants in these consolidated matters.

The initial hearings convened as scheduled. Francine Thornton Boone, Esq. represented the Complainants, and presented the testimonies of Phillip Pulley – who is the Director of Operations for SBG; Kathy Treadwell – who is a senior accountant with SBG; and Eric Lampert – who is the controller for SBG. At the conclusion of the August 30, 2013 hearing, I informed the parties that further hearings were necessary in these consolidated matters.

Following the initial hearings, the parties engaged in extensive discovery proceedings.[[2]](#footnote-2)

On October 16, 2013, Francine Thornton Boone, Esq. withdrew her appearance on behalf of the Complainants in these consolidated matters. On the same day, Donna S. Ross, Esq. entered her appearance on behalf of the Complainants.

A Hearing Notice dated December 31, 2014, notified the parties that further hearings were scheduled for January 29-30, 2015, at 10:00 a.m.

The further hearings convened as scheduled. On the first day of the further hearings, Ms. Ross informed the undersigned of her client’s intention to withdraw the Complaint of SBG Management Services Inc. / Colonial Garden Realty Co., L.P. against PGW, at Docket No. C-2012-2334253. Respondent’s counsel, Laureto Farinas, Esq. had no objection to the withdrawal of the Complaint.[[3]](#footnote-3) The further hearings proceeded according to schedule on the remaining consolidated Complaints, *SBG Management Services, Inc. / Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, at Docket No. C-2012-2304183, and *SBG Management Services, Inc. / Simon Garden Realty Co., L.P. v. Philadelphia Gas Works*, at Docket No. C-2012-2304324.

Donna S. Ross, Esq. represented the Complainants and presented the testimonies of Kathy Treadwell, Jeremy Gabell, and Roger Colton. Jeremy Gabell testified on behalf of the Complaints as a certified public accountant, a certified evaluation analyst, and a certified forensic accountant. Roger Colton testified on behalf of the Complaints as an expert in public utility regulation and regulatory economics. The Complainants sponsored eight exhibits, four of which were admitted into the record. The Complainants withdrew their disputes coded as C – disputed transfers, D – disputed estimated billings, and H – disputed canceled transactions.[[4]](#footnote-4) Ms. Ross made an oral motion to further amend the consolidated Complaints to cover disputes and transactions that occurred after the filing of the Amended Complaints on December 10, 2012. Tr. 693. The motion was denied. Tr. 717-18.

Laureto Farinas, Esq. represented the Respondent, and presented the testimonies of: Bernard Cummings – who is the Vice President of Customer Service and Collections for PGW; Wendy Vacca – who is a senior customer review officer with PGW; Diane Rizzo – who was a consultant analyst for PGW’s customer service at the time of the hearings; and Ralph T. Savage – who is the Director of PGW’s Commercial Resource Center. The Respondent sponsored five exhibits, all of which were admitted into the record.

The Complainants were instructed to submit several late-filed exhibits. The last of the late-filed exhibits were submitted on June 30, 2015. The Respondent has indicated that it has no objections to the admission of these exhibits into the record. Consequently, the Complainants’ late-filed exhibits shall be admitted into the record in these consolidated matters.

On March 27, 2015, a Briefing Order was issued requiring the filing of main briefs on April 27, 2015, and reply briefs on May 11, 2015.

The record consists of the following:

* SBG CG/SG Exhibit 1 – July 8, 2004 bill for Account # 539547187;
* SBG CG/SG Exhibit 2 – Statement of accounts for Account # 539547187, SA #1162925601;
* SBG CG/SG late-filed Exhibit 3 – Statement of accounts for Account ## 539547187, 6128000245, with alternative calculations of late payment charges;
* SBG CG/SG late-filed Exhibit 4 – updated lien interest calculation;
* SBG CG/SG Exhibit 5 –February 6, 2005 bill for Account # 6128000245;
* SBG CG/SG Exhibit 6 – July 8, 2004 bill for Account # 539547187;[[5]](#footnote-5)
* SBG CG/SG late-filed Exhibit 8 – Testimony of Phillip Pulley, August 26, 2013, pp. 52-176; Testimony of Dan McCafferty, August 26, 2013, pp. 177-221; Testimony of Eric Lampert, August 26, 2013, pp. 221-68; Testimony of John Dunn, III, August 27, 2013, pp. 277-428; Testimony of Phillip Pulley, August 28, 2013, pp. 628-68[[6]](#footnote-6);
* SBG CG/SG late-filed Exhibit 9 – Documents referenced by Phillip Pulley, Eric Lampert, Dan McCafferty, and Kathy Treadwell during their testimonies on August 26, 28, 2013; and
* SBG CG/SG late-filed Exhibit 10 – Correspondence;
* PGW Exhibit 1 - 1A Contact history for Account # 539547187, SA #1162325601 and 1B Statement of accounts and analysis for same;
* PGW Exhibit 2 - 2A Contact history for Account # 539547187, SA # 439548077, and 2B Statement of accounts and analysis for same;
* PGW Exhibit 3 - 3A Contact history for Account # 539547187, SA # 8569221069, and 3B Statement of accounts and analysis for same;
* PGW Exhibit 4 - 4A Contact history for Account #6128000245, SA # 1375369694, and 4B Statement of accounts and analysis for same;
* PGW Exhibit 5 - 5A Contact history for Account # 539547187, SA #4018739567, and 5B Statement of accounts and analysis for same;
* Transcripts from the Prehearing Conferences held on December 6, 2012, August 13, 2013, November 7, 2013, July 11, 2014, November 24, 2014;
* Transcripts from the Initial hearings held on August 29-30, 2013; and
* Transcripts from the Further Hearings held on January 29-30, 2015.

The record in these consolidated matters closed on upon the filing of the late-filed exhibits on June 30, 2015. These consolidated matters are now ready for decision.

FINDINGS OF FACT

1. Colonial Garden is a 72-unit garden style walk-up apartment complex, located at 5424-7 Wayne Avenue, Philadelphia, PA. Tr. 38.

2. The heat is provided by the landlord. Tr. 39.

3. The tenants are responsible for their own cooking gas, which is sub-metered from the landlord. Tr. 39, 72-73.

4. Colonial Garden Realty Co. L.P. purchased the property in 1997. Tr. 39-40.

5. SBG is the managing company for Colonial Garden and handles the day-to-day activities of the property, such as maintenance, collection of rents, tenant issues, accounting, etc. Tr. 40.

6. Phillip Pulley is the director of operations for SBG. PGW is the gas service provider for the Complainants. Tr. 41.

7. Colonial Garden has one account (Account # 6128000245) but two separate Service Agreements (SAs) (SA #1375369694 and SA # 4018739567). Tr. 360, SBG CG/SG late-filed Exhibit 9.

8. Charges for Colonial Garden’s two SAs are reflected on the same monthly bill. SBG CG/SG Exhibit 5.

9. On February 18, 2005, PGW performed 10 separate bill transactions on Colonial Garden’s Account # 6128000245, SA # 1375369694, which were reflected on the March 5, 2005 bill as $13,018.58 due for 8,647 CCF of gas. Tr. 167, 171, 175, SBG CG/SG Exhibit 5, PGW Exhibit 4B, at 9, and PGW Exhibit 4A, at 3.

10. On March 5, 2005, PGW billed Colonial Garden, Account # 6128000245, SA # 4018739567, $3,062.12 for 1,797 CCF of gas. Tr. 172-73, 178-79, PGW Exhibit 5B, at 9.

11. The $3,062.12 bill was based on actual readings covering a period of 61 days. Tr. 263-65, PGW Exhibit 5B, at 9.

12. Upon receipt of the March 5, 2005 bill, SBG contacted PGW to dispute the bill for Colonial Garden, Account # 6128000245, as abnormally high. Tr. 320-11.

13. On March 21, 2005, PGW responded in writing to SBG’s dispute of the March 5, 2005 bill. SBG CG/SG late-filed Exhibit 10.

14. By letter dated April 11, 2005, SBG rejected the explanation provided by PGW with regard to the March 5, 2005 bill and requested a breakdown of charges on a monthly basis. *Id.*

15. By letter dated June 27, 2005, SBG continued to request that PGW produce a breakdown of charges reflected on the March 5, 2005 bill on a month by month basis. *Id.*

16. On July 12, 2005, PGW exchanged additional information with SBG concerning the March 5, 2005 bill for Colonial Garden. *Id.*

17. By letter dated August 19, 2005, SBG continued to request that PGW produce a breakdown of charges reflected on the March 5, 2005 bill on a month by month basis. *Id.*

18. On May 17, 2007, PGW’s Commercial Resource Center faxed a duplicate of the March 5, 2005 bill to SBG. SBG CG/SG Exhibit 5.

19. SBG disputed Colonial Garden’s March 5, 2005 bill again with PGW on October 13, 2011, as part of SBG’s challenge to the gas liens imposed on Colonial Garden. SBG CG/SG late-filed Exhibit 10.

20. On January 5, 2011, Colonial Garden, Account No. 6128000245, SA # 4018739567, was billed for $1,572.81 representing 1,087 CCF of gas used. Tr. 265, 272.

21. Colonial Garden’s gas bills (Account # 6128000245, SA # 4018739567) issued in the month of January from 2007 to 2011 reveal the following gas consumption history:

|  |  |  |
| --- | --- | --- |
| **Billing Date** | **CCF** | **HDD[[7]](#footnote-7)** |
| **1/5/2011** | **1087** | **1087** |
| 1/6/2010 | 874 | 985 |
| 1/6/2009 | 835 | 899 |
| 1/7/2008 | 563 | 855 |
| 1/8/2007 | 638 | 688 |

See PGW Exhibit 5B.

22. Colonial Garden’s SA # 4018739567 has been served by two meters, Meter # 1906431, and Meter # 2115477. PGW Exhibit 5A, at 11, SBG CG/SG late-filed Exhibit 9.

23. The bill issued on October 4, 2011, was billed to meter reading index of 91468. PGW Exhibit 5B, at 6.

24. On October 17, 2011, Edward Davis from PGW visited the Service Address on a Meter Shop Rotary Inspection Order with Order # 3396076. PGW Exhibit 5A, at 11.

25. Mr. Davis completed the Order by checking differential pressure, completing oil change, and changing the ERT head on Meter # 1906431. *Id.*

26. In his Order notes, Mr. Davis commented on how the ERT head index did not match the index on the mechanical portion of the meter, with the former being found at 91691 and the latter at 93929. *Id.*

27. Mr. Davis programed the new ERT head to match the index from the mechanical portion of the meter. *Id.*

28. On October 19, 2011, PGW removed Meter # 1906431 from the service address, and installed Meter # 2115477. *Id.*

29. On November 2, 2011, the new Meter # 2115477 provided the actual reading of 341 CCF. PGW Exhibit 5A, at 11, PGW Exhibit 5B, at 6.

30. On November 2, 2011, Colonial Garden, Account No. 6128000245, SA # 4018739567, was billed $4,125.80 for 2,815 CCF of gas used under SA # 4018739567. Tr. 196-97, PGW Exhibit 5B, at 6.

31. On November 4, 2011, PGW issued a Revenue Adjustment credit in the amount of $642.60 to SA # 4018739567. PGW Exhibit 5B, at 6.

32. Simon Garden is a 72-unit complex located in three buildings at 6731 Munsgrave Street and 6732 Chew Avenue, Philadelphia, PA. Tr. 399.

33. On January 19, 2005, SBG reached a settlement agreement with PGW on all of its disputes related to Simon Garden. Tr. 423-25, 433.

34. Simon Garden Realty Co., L.P. has one gas account with PGW, Account # 539547187, and three separate SAs: SA ## 1162325601, 4395848077 and 8569221065. Tr. 438, 492, PGW Exhibits 1-3.

35. Charges for Simon Garden’s three SAs are reflected on the same monthly bill. SBG CG/SG Exhibit 1.

36. On April 7, 2005, Simon Garden’s Account # 539547187, SA # 1162325601 was billed $2,709.52 for 1,840 CCF of gas. Tr. 434.

37. The gas bill for April 7, 2005, was based on an actual automatic meter read of 1,840 CCF of gas used for 909 HDD. Tr. 795-96, PGW Exhibit 1B.

38. This bill was not disputed by the Complainant in 2005. Tr. 797, see also PGW Exhibit 1A.

39. On November 7, 2006, Simon Garden’s Account # 539547187, SA # 1162325601 was billed $1,215.34 for 621 CCF of gas. Tr. 434.

40. The gas bill for November 7, 2006, was based on an actual meter read of 621 CCF of gas used for 419 HDD. Tr. 797-98, PGW Exhibit 1B.

41. This bill was not disputed by Simon Garden or SBG in either 2006 or 2007. Tr. 798, see also PGW Exhibit 1A.

42. On May 5, 2008, Simon Garden’s Account # 539547187, SA # 1162325601 was billed for 1026 CCF of gas. Tr. 435.

43. The gas bill for May 5, 2008, was based on an actual meter read of 1,026 CCF of gas used for 305 HDD. Tr. 800, PGW Exhibit 1B.

44. There is no record of Complainants ever filing a formal or informal complaint with the Commission concerning the April 7, 2005, November 7, 2006, and May 5, 2008 bills for Simon Garden’s Account # 539547187.

45. In December 2008, PGW and SBG reached an agreement concerning several properties managed by SBG, including Simon Garden. SBG CG/SG late-filed Exhibit 10.

46. Pursuant to the agreement, PGW would halt all collections efforts on the SBG managed properties while the Respondent completed an investigation of several issues concerning the gas accounts for those properties. SBG, for its part, would continue to pay current bills as rendered, and PGW would go back through the arrears of the accounts and any bill disputes that they were aware of at the time to try and resolve them. SBG CG/SG late-filed Exhibit 8 - Testimony of John Dunn, III, August 27, 2013, at 392-93, SBG CG/SG late-filed Exhibit 10.

47. SBG did not honor its agreement with PGW. It made no payments to its Account # 539547187 with PGW from December 2007 to May 2011. See PGW Exhibit 1B, see also PGW Exhibits 2B and 3B.

48. PGW assesses late payment charges by taking the previous balance on the account, subtracting any new unpaid late payment charges (LPC), and then multiplies that amount by 1.5 percent. Tr. 844.

49. Any partial payments received by PGW are first applied towards any security deposits assessed on the account, “then LPCs, then arrearages.” Tr. 845, 870

Of the “arrearages,” PGW would pay the oldest first and then the newer ones. Tr. 872.

When a payment is made to an account that has multiple SAs, PGW distributes the payment amongst the different SAs based on a weighted average principle. Tr. 847.

50. If for whatever reason there is a credit on one of the SAs, the credit gets distributed over to the other SAs that still show a balance on them. Tr. 848, 854-57.

51. If the customer had questions about the distribution of payments amongst the SAs, a PGW representative would be able to provide them with the breakdown. Tr. 863.

52. Between May 2009 and December 2012, only one payment was made on Colonial Garden’s Account # 6128000245, SA#1375369694. See PGW Exhibit 4B, at 11.

53. The payment was made on November 4, 2011, in the amount of $140,742.25. *Id.*

54. Prior to the November 4, 2011 payment, the current outstanding balance on Colonial Garden’s Account # 6128000245, SA#1375369694, was $145,460.01. *Id.*

55. The transactions immediately before and after the $140,742.25 payment on Colonial Garden’s Account # 6128000245, SA#1375369694, are reflected on the table below:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Date | Transaction Type | Transaction Amount | Current Balance | Unpaid LPC | Calculated Unpaid Balance | Monthly % | Calculated LPC |
| 8/3/2011 | BILL | $871.04 | $138,456.39 | $41,170.92 | $94,989.59 |  |  |
| 9/3/2011 | LPC | $1,424.84 |  |  | $94,989.59 | 0.015 | $1,424.84 |
| 9/3/2011 | BILL | $817.07 | $140,711.36 | $44,033.66 | $96,677.70 |  |  |
| 10/4/2011 | LPC | $1,450.16 |  |  | $96,677.70 | 0.015 | $1,450.16 |
| 10/4/2011 | BILL | $978.82 | $143,140.34 | $45,483.82 | $97,656.82 |  |  |
| 11/2/2011 | LPC | $1,464.84 |  |  | $97,656.82 | 0.015 | $1,464.84 |
| 11/2/2011 | BILL | $854.82 | $145,460.01 | $46,948.66 | $98,511.64 |  |  |
| **11/4/2011** | **PAYMENT** | **$140,742.25** | **$4,717.76** |  |  |  |  |
| **12/02/2011** | **LPC** | **$70.76** |  | **$0.00** | **$4,717.76** | **0.015** | **$70.76** |

See PGW Exhibit 4B, at 11.

56. Between May 2009 and December 2012, only one payment was made on Colonial Garden’s Account # 6128000245, SA#4018739567. See PGW Exhibit 5B, at 6.

57. The payment was made on November 4, 2011, in the amount of $107,921.23 and was followed by a Revenue Adjustment Credit in the amount of $642.60 on the same day. *Id.*

58. Prior to the November 4, 2011 payment, the current outstanding balance on Colonial Garden’s Account # 6128000245, SA#4018739567, was $114,922.16. *Id.*

59. The transactions immediately before and after the $107,921.23 payment and the $642.60 Revenue Adjustment Credit on Colonial Garden’s Account # 6128000245, SA#4018739567, are reflected on the table below:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Date | Transaction Type | Transaction Amount | Current Balance | Unpaid LPC | Calculated Unpaid Balance | Monthly % | Calculated LPC |
| 6/3/2011 | BILL | $803.48 | $102,890.48 | $30,648.62 | $72,241.86 |  |  |
| 7/5/2011 | LPC | $1,083.62 |  |  | $72,241.86 | 0.015 | $1,083.62 |
| 7/5/2011 | BILL | $628.12 | $104,602.22 | $31,732.24 | $72,869.98 |  |  |
| 8/3/2011 | LPC | $1,093.04 |  |  | $72,869.98 | 0.015 | $1,093.05 |
| 8/3/2011 | BILL | $566.66 | $106,261.92 | $32,825.28 | $73,436.64 |  |  |
| 9/3/2011 | LPC | $1,101.55 |  |  | $73,436.64 | 0.015 | $1,101.55 |
| 9/3/2011 | BILL | $535.16 | $107,898.62 | $33,926.82 | $73,971.8 |  |  |
| 10/4/2011 | LPC | $1,109.57 |  |  | $73,971.8 | 0.015 | $1,109.57 |
| 10/4/2011 | BILL | $668.57 | $109,676.76 | $35,036.39 | $74,640.39 |  |  |
| 11/2/2011 | LPC | $1,119.60 |  |  | $74,640.39 | 0.015 | $1,119.60 |
| 11/2/2011 | BILL | $4,125.80 | $114,922.16 |  |  |  |  |
| **11/4/2011** | **PAYMENT****+****REV ADJ** | **$107,921.23****+****$642.60**  | **$6,358.33** |  |  |  |  |
| **12/02/2011** | **LPC** | **$95.37** |  |  | **$6,358.33** | **0.015** | **$95.37** |

See PGW Exhibit 5B, at 6.

60. On November 12, 2003, Mr. Lampert filed an informal complaint with the Commission’s Bureau of Customer Service against PGW concerning another residential property managed by SBG. SBG CG/SG late-filed Exhibit 8 – Testimony of Eric Lampert, August 26, 2013, p. 236-38.

61. On June 30, 2008, Mr. Pulley filed a formal Complaint on behalf of York Road Realty Company, L.P., Ice Skating Rink with the Commission against PECO at Docket No. C-2008-2051797. Tr. 699-700.

62. On December 11, 2008, Mr. Pulley filed a formal Complaint against PECO, again on behalf of York Road Realty Company, L.P., Ice Skating Rink, at Docket No. C-2009-2082365. Tr. 699-700.

63. It is PGW’s long standing practice to assess late payment charges at 1.5% per month on any outstanding balance on an active account, even if the said debt is the subject of a municipal lien filed with the Court of Common Pleas. Tr. 207-216.

64. No other interest charges are assessed on a municipal lien for unpaid gas service. Tr. 207-216.

65. Between July 9, 2009, and November 22, 2010, 15 separate municipal liens were docketed against the property owned by Colonial Garden Realty Co., L.P. for unpaid gas service. SBG CG/SG late-filed Exhibit 4.

66. PGW assessed $94,626.23 in late payment charges at a rate of 18% annual on the outstanding balance or debt represented by these 15 liens. SBG CG/SG late-filed Exhibit 4.

67. Between January 9, 2010, and July 10, 2012, 24 separate municipal liens were docketed against the property owned by Simon Garden Realty Co., L.P. for unpaid gas service. SBG CG/SG late-filed Exhibit 4.

68. PGW assessed $471,351.38 in late payment charges at a rate of 18% annual on the outstanding balance or debt represented by these 24 liens. SBG CG/SG late-filed Exhibit 4.

DISCUSSION

1. **Burden of Proof**

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.A. § 332(a). To satisfy this burden, the Complainant must demonstrate that the Respondent was responsible for the problems alleged in the Complaint through a violation of the Code or a regulation or order of the Commission. This must be shown by a preponderance of the evidence. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990). Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n,* 578 A.2d 600 (Pa.Cmwlth. 1990) *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992). In addition, the Commission’s decision must be supported by “substantial evidence,” which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere “trace of evidence or a suspicion of the existence of a fact” is insufficient. *Norfolk and Western Railway Co. v. Pa. Pub. Util. Comm’n*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant would be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm’n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

1. **Statute of Limitation**

Pursuant to Section 3314 of the Public Utility Code (the Code), 66 Pa.C.S.§ 3314,

No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose, except as otherwise provided in this part.

(Emphasis added). 66 Pa.C.S. § 3314(a). This provision provides a general limitation period of three years for any action under the Code, except as otherwise provided. See, *Duquesne Light Co. v. Pa. PUC, (Duquesne)*, 611 A.2d 370 (Pa.Cmwlth. 1992). The statute of limitations can be tolled by the filing of an informal complaint with the Commission, see *Duquesne*, at 383, and by the doctrine of equitable estoppel, see *Lester Ely v. Pennsylvania American Water Compan*y, C-20055616 (Order entered July 10, 2006). There is no indication that an informal complaint was ever filed by SBG, Colonial or Simon with the Commission concerning any of the properties and issues raised in the present consolidated Complaints.

As for the doctrine of equitable estoppel, in its Final Order in *Lester Ely v. Pennsylvania American Water Compan*y, C-20055616 (Order entered July 10, 2006) the Commission explained,

[The theory of estoppel] provides that a defendant may not invoke the statute of limitations if through fraud or concealment he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine does not require fraud in the strictest sense, but rather, fraud in the broadest sense, which includes an unintentional deception.

*Lester Ely v. Pennsylvania American Water Company*, C-20055616 (Order entered July 10, 2006); see also, *Mary Esther Battle v. PECO Energy Co.*, C-00003804 (Order entered July 16, 2001). According to the Commission, Respondent's repeated assurances that it would restore Complainant's driveway caused the Complainant to essentially "relax his vigilance." *Id.*

*SBG Management Services, Inc. / Colonial Garden Realty Co., LP. v. Philadelphia Gas Works*, at Docket No. C-2012-2304183, and *SBG Management Services, Inc. / Simon Garden Realty Co., LP. v. Philadelphia Gas Works*, at Docket No. C-2012-2304324 were originally filed by Mr. Pulley on May 11, 2012. On June 4, 2012, Respondent filed Answers and New Matters to these Complaints. In the New Matter on each of these Complaints, PGW averred that, although not obvious on the face of the Complaints, “the gas service underlying the disputed amount represents balances for gas service rendered and billed more that (sic) four years ago.” New Matters ¶¶ 9. PGW argued that the disputed amounts were beyond the Commission’s statute of limitations pursuant to Section 3314(a) of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 3314(a), and requested that the Commission dismiss the Complaints. *Id.* On June 25, 2012, PGW filed Preliminary Objections against these Complaints. The Preliminary Objections did not address the statute of limitations. Following my Order dated July 16, 2012 on PGW’s Preliminary Objections, the Complainants filed Amended Complaints on December 10, 2012[[8]](#footnote-8). On January 2, 2012, PGW filed its Answers to the Amended Complaints briefly addressing the statute of limitations issue. See Answers to Amended Complaints ¶¶ 6. This time, however, there were no New Matters, Preliminary Objections or Motions filed by PGW to the Amended Complaints.

At the initial and further hearings on these consolidated matters, Complainants’ witnesses testified on several transactions which fell outside the statute of limitations. Complainants’ attorneys argued that the doctrine of estoppel tolled the statute of limitations for these transactions and they were allowed to enter both testimony and exhibits into the record to substantiate the claim, in addition to submitting Main and Reply Briefs on the issue. In this Initial Decision, disputed transactions of a particular kind shall be addressed together first for Colonial and then for Simon.

1. **High billing disputes / disputed meter reads - J Code**

In *Waldron v. Philadelphia Electric Company, (Waldron)*, 54 Pa. PUC 98 (1980), the Commission adopted the Michigan Public Service Commission’s (PSC’s) policy annunciated in *Hallifax v. O & A Electric Co-Op*, Case No. U-5825 (May 1979), which stated that, while the accuracy of the meter is an important factor in resolving billing disputes, it is not the sole criterion. The Michigan PSC stated that it will also consider the following factors: the billing history of the complainant; any change in the number of occupants residing at the household; the potential for energy utilization; and any other relevant facts or circumstances that are brought to light during the complaint proceeding. *Waldron* at 100.

While a comparison of the disputed monthly bill to the Complainant’s billing history and the consistency of his usage pattern are important criteria to consider, they alone do not resolve the issue of the Complainant’s disputed high bill. *Waldron* does not limit the establishment of a prima facie case to the above two elements alone. Rather, the Commission may consider the billing history of the account, any change in usage patterns (such as a change in the number of occupants residing in the household or potential energy utilization), and any other relevant facts or circumstances that come to light during the proceeding. See *Charisse Bennett v. Peoples Natural Gas Co.*, Docket No. C-2009-2122979 (Order entered October 13, 2010); *Thomas v. PECO Energy Company*, Docket No. C-2010-2187197 (Order entered November 15, 2011).

Thus, a complainant in a high bill case has the opportunity to present any other relevant evidence which, if sufficient to establish a prima facie case, can be used to sustain the burden of proof. There is no specific requirement as to what particular facts the complainant must offer. This will likely vary from case to case. In *Waldron*, for example, the complainant did not provide a comparison of prior billing, but asserted that the apartment was uninhabited during the billing period in question and that the only operating appliances were a clock and a refrigerator; that two air conditioners were disconnected; and that, even if the latter had been connected, the complainant could not possibly have used the energy reflected in the billing. The Commission remanded the complaint in *Waldron* reasoning that, had the record been properly developed, those facts may have established a prima facie high bill case, and then the Company would have had to introduce evidence to overcome the prima facie case. *Waldron* at 101. Therefore, to establish a prima facie case under *Waldron*, a complainant must show the disputed bill was abnormally high when compared to prior usage patterns and that his or her pattern of usage has not changed or must provide other relevant evidence showing that the disputed bill is unreasonably high.

As set forth in *Waldron*, evidence proffered by a utility relating to the accuracy of a meter test alone, in response to a high bill complaint, is not conclusive evidence and would not, by itself, require a finding against a complainant and in favor of a company. *Id.* In other words, evidence of a meter test showing that the meter worked within the acceptable degree of accuracy can be overcome with circumstantial evidence that otherwise indicates that a bill was too high.

1. **Colonial Garden – Account No. 6128000245 – SA #1375369694, Meter # 1987516**

Mr. Pulley testified that Colonial Garden is a 72-unit garden style walk-up apartment complex, located at 5424-7 Wayne Avenue, Philadelphia, PA. Tr. 38. The heat is provided by the landlord. Tr. 39. The tenants are responsible for their own cooking gas, which is sub-metered from the landlord. Tr. 39, 72-73. Colonial Garden Realty Co. L.P. purchased the property in 1997 from Press Echard. Tr. 39-40. SBG is the managing company for Colonial Garden. SBG handles the day-to-day activities of the property, including maintenance, collection of rents, oversees tenant issues, collection of moneys, receivables, payables, and the like. Tr. 40. Phillip Pulley is the director of operations for SBG. PGW is the gas service provider for the Complainants. Tr. 41. It has one account (Account No. 6128000245) reflecting two separate Service Agreements (SAs) (SA #1375369694 and SA # 4018739567). Tr. 360.

Ms. Treadwell testified that, based on the statement of accounts provided by PGW, on February 18, 2005, PGW appears to have performed 10 separate bill transactions for a total of $13,018.58 for 8,647 CCF of gas. Tr. 167, 171, 175. She did not believe this to represent a normal meter read and challenged the large consumption of gas recorded in those bills. Tr. 168. “It was large consumption of gas in that particular period when compared to all of the other periods listed on this account statement.” Tr. 168. She stated that she performed a gas usage analysis based on historical data for this SA and concluded that the February 8, 2005 bills reported an abnormally high gas usage. Tr. 175. “For the most part with exception of the 2005, the February transaction, the gas consumption is relatively consistent with the exception of that transaction.” Tr. 167.

1. **Colonial Garden – Account No. 6128000245 – SA # 4018739567, Meter ## 1906431 / 2115477**

Ms. Treadwell testified that on March 5, 2005, the Complainant was billed $3,062.12 for 1,797 CCF of gas. Tr. 172-73, 178-79. She stated that she reviewed the historical gas usage at SA # 4018739567and concluded that the March 5, 2005 bill reported an abnormally high gas usage. Tr. 173-74, 179, SBG CG/SG late-filed Exhibit 9. During cross-examination, she admitted that unlike the other bills included in her usage analysis, the March 5, 2005 bill covered a period of 61 days. Tr. 263-65.

These disputed transactions predate the statute of limitations period on the Colonial Complaint by over four years. The Complainants argued that the statute of limitations should be tolled for these specific transactions because PGW’s actions and statements induced the Complainant not to file a formal complaint in time. See Tr. 47-49, see also SBG Main Brief at 25. Mr. Pulley testified that SBG has inquired about this bill:

“over and over again, even as recent as 2011 asking Dan Murray, let’s just take one item and explain this bill to me. Just explain this one bill, because if that bill is that basis of all these liens and it goes back to that and they’re wrong, that all their liens are wrong.

Tr. 49. Mr. Pulley testified that SBG had asked questions about the account in question “in 2006, 2007, 2008, 2009….” Tr. 77. He described SBG’s relationship with PGW on the Colonial account, at least until 2009, as follows: “We were trying to work through the issues. We were having good dialogue.” Tr. 126. Mr. Pulley testified that, despite SBG’s persistent inquiries and requests for explanations, SBG did not receive an answer from PGW until October 27, 2011, when SBG was informed that “no bills were generated through a clerical error; however, the meter was still recording actual gas consumption. After discovering this problem a bill was generated on the recorded usage.” Tr. 79, 84, 89, 90-91. Mr. Pulley testified that PGW’s explanation of the March 5, 2005 bill was not satisfactory. Tr. 89.

During cross examination, Mr. Pulley again asserted that neither he personally, nor SBG’s accounting department were able to understand PGW’s explanation of the March 5, 2005 bill provided by PGW in October of 2011, were “dissatisfied with it” and “threw [their] hands up.” Tr. 116-117. He also admitted that instead of filing a complaint with the Commission, he probably raised the issue in one of the future meetings with PGW regarding the liens placed on Colonial by PGW. Tr. 117.

 Next, Mr. Lampert testified that he disputed the March 5, 2005 bill directly with PGW representative, John Dunn, III, in 2005. Tr. 320-21. He did not elaborate on the response that he received from Mr. Dunn. During cross examination, Mr. Lampert was asked whether SBG had received a bill transaction and meter reading history for the account in question that PGW generated, faxed and mailed to SBG on March 21, 2005. Tr. 325. Mr. Lampert responded that, if he had received such information, it “would have just been a duplicate of the bills, which I received prior, and that’s why I still had questions.” Tr. 325-327. When asked about his knowledge with regard to a duplicate of the March 5, 2005 bill which appeared to have been faxed by PGW’s Commercial Resource Center to SBG on May 17, 2007, Mr. Lampert testified that the facsimile may have been part of the ongoing correspondence between SBG and PGW on this particular issue. Tr. 332-33.

A careful review of the evidence entered into the record by the Complainants, shows that the information faxed and mailed to SBG on March 21, 2005 and again faxed on May 17, 2007, were not the only communications between SBG and PGW regarding this disputed bill. On a letter dated April 11, 2005, addressed to John Dunn, III by Philip Pulley regarding Account No. 6128000245, Mr. Pulley writes:

We are in receipt of your March 21, 2005, correspondence which arrived after we received another ridiculous bill from PGW which made no sense…

Whether you claim that we are stealing gas, bypasses are left open, meter get changed and $80,000 bills come in and it’s always out fault. Here we go again with a dispute with PGW as a result of the deficiencies and incompetence of your meter division….

In addition, the bill just states as amount with no breakdown of charges on month by month assessment. When the price of gas is an all time high, how are we to know what you are in fact charging us. Is it based on today’s exuberant high rates or should we have been charged periods when the price was lower?

Are you aware we received a phone call demanding payment and threats of shut off one day after the bill was received by us? Again, very professional conduct. NOT.

SBG CG/SG late-filed Exhibit 10. In another letter from Mr. Pulley to Mr. Dunn, dated June 27, 2005 regarding Colonial Garden, Mr. Pulley writes:

We have sent you numerous correspondence requesting a full breakdown by month of the ridiculous bill that we have received for the [Colonial] property. To refresh your memory, this again was another error by [PGW] meter reading division due to their inability to read meters for more than two years….

At this time, any attempt by [PGW] to shut off service at this property as a result of the outstanding balance related to this matter will be met with a lawsuit including a claim for damages in excess of 2 million dollars.

We do not know why your company is arrogant and will not respond, but usually when the lawyers get involved, the voice of reason prevails.

SBG CG/SG late-filed Exhibit 10. In a third letter from Mr. Pulley to Mr. Dunn, dated August 19, 2005 regarding Colonial Garden it appears that PGW sent SBG information concerning the bill in question on July 12, 2005. Mr. Pulley writes:

After review of this information the following is necessary:

1. Breakdown by month of the billing. This should include the CCF charges, connection fees, usage, distribution fees, and the like for each purported read.
2. …why do we have additional gas usage and consumption in the summer?

We need more detailed information…. These bills do not make sense and moreover based on the CCF consumption rates that have been previously reviewed with Tom Murphy, these are exorbitant, the CCFs are out of whack.

SBG CG/SG late-filed Exhibit 10.

The letter dated August 19, 2005, is the last contact on the record between SBG and PGW about the bill in question in 2005. In addition, Mr. Pulley’s testimony that SBG contacted PGW about the March 5, 2005 bill in “2006, 2007, 2008, 2009” is not substantiated by additional evidence. The duplicate of the March 5, 2005 bill which appeared to have been faxed by PGW’s Commercial Resource Center to SBG on May 17, 2007 is the only additional piece of evidence indicating that this issue was being pursued by SBG in 2007. No other document or correspondence between SBG and PGW in the period 2006-2010 evidences ongoing discussions, inquiries, or disputes with regard to the March 5, 2005 bill. It was only in 2011 that the issue of the March 5, 2005 bill was picked up again by SBG, first in an e-mail dated October 13, 2011, from Mr. Lampert to Mr. Pulley, and then in an e-mail from Mr. Pulley to Daniel Murray on the same date – this time in the context of SBG’s challenge to the gas liens imposed on Colonial. SBG CG/SG late-filed Exhibit 10.

In addition, the three 2005 letters from Mr. Pulley to Mr. Dunn *supra* show a customer that is very dissatisfied with the service he is getting from PGW. This renders Mr. Pulley’s testimony describing SBG’s positive relationship with PGW on the Colonial account, at least until 2009, as contradictory. See Tr. 126. Moreover, Mr. Pulley’s testimony also contradicts Mr. Lampert’s description of his experience with PGW. The e-mail that Mr. Lampert sent to Mr. Pulley on October 13, 2011, discusses the March 5, 2005 bill as follows: “...so why all of a sudden is there an adjustment, if they fixed the problem and we receiving bills for actual meter readings (and according to PGW reps, their meter readings are always correct).” Mr. Lampert continues, “I have disputed bills in the past…. The reply I received [from PGW] is that “They have reviewed the account and the Meters are working and the Readings are correct”, no explanation as to why….” SBG CG/SG late-filed Exhibit 10.

The preponderance of the evidence collected with regard to the March 5, 2005 bill indicates that the Complainants knew the essential facts underlying their high billing dispute as early as March or April of 2005. The record demonstrates that: they engaged in a series of inquiries with PGW about the same bill, first in 2005 and then in 2007; they received a response from PGW on March 21, 2005, then again on July 12, 2005, and again on May 17, 2007; and they were obviously dissatisfied with the responses but failed to file a timely formal or informal complaint disputing the bill in question within the statute of limitations. Complainants have failed to show by a preponderance of the evidence that PGW’s actions or statements with regard to the March 5, 2005 bill caused the Complainants to essentially relax their vigilance. *Lester Ely v. Pennsylvania American Water Company*, C-20055616 (Order entered July 10, 2006). Unlike in *Ely,* in the present case there were no assurances by the Respondent that the bill would be corrected or that the issue would be settled or resolved in the Complainant’s favor. See Complainants’ Main Brief at 26-26, citing *Nesbitt v. Erie Coach Company*, 416 Pa. 89 (1964) (where plaintiff was misled by defendant’s agents that her case would be settled when all the facts were in, thus lulling her into sleeping on her rights). In view of the above, the high billing or high meter reading disputes concerning the March 5, 2005 bill for Colonial are dismissed as barred by the statute of limitations.

1. **Colonial Garden – Account No. 6128000245 – SA # 4018739567, Meter ## 1906431 / 2115477**

Ms. Treadwell challenged the gas bill issued on January 5, 2011, for $1,572.81 representing 1,087 CCF of gas used. Tr. 265, 272, SBG CG/SG late-filed Exhibit 9. Ms. Treadwell testified that when she compared this bill with that of January 6, 2010, gas usage in the former bill was higher than in the latter. Tr. 265-266. During cross-examination by Mr. Farinas, Ms. Treadwell admitted that the heating degree days (HDD) during the billing period in question was also 1,087. Tr. 274. She also admitted that her historical usage analysis did not take HDD into consideration, because Colonial Garden is heated with heating oil and gas is used only for cooking. Tr. 176, 274-76, 293-94.

Ms. Treadwell testified that on November 2, 2011, the Complainant was billed $4,125.80 for 2,815 CCF of gas used under SA # 4018739567. Tr. 196-97, SBG CG/SG late-filed Exhibit 9. She stated that she reviewed the historical gas usage for SA # 4018739567reported in the November bills for the years 2007, 2008, 2009, and 2010 and concluded that the November 2, 2011 bill was abnormally high. Tr. 197-98. She also admitted that her historical usage analysis did not take HDD into consideration, only CCF usage. Tr. 277-78.

Ms. Treadwell was unable to testify as to the occupancy of the service address during the periods in question. Tr. 176, see also Tr. 837.

PGW did not put testimony on the record with regard to January 5, 2011, and November 2, 2011 bills, but entered into the record the account statements and contact history for Colonial Garden, Account No. 6128000245. Tr. 810, see also PGW Exhibits 4 and 5, and Tr. 916.

With regard to the disputed January 5, 2011 bill, Colonial’s gas bills issued in the month of January from 2007 to 2011 reveal the following gas consumption history:

|  |  |  |
| --- | --- | --- |
| **Billing Date** | **CCF** | **HDD** |
| **1/5/2011** | **1087** | **1087** |
| 1/6/2010 | 874 | 985 |
| 1/6/2009 | 835 | 899 |
| 1/7/2008 | 563 | 855 |
| 1/8/2007 | 638 | 688 |

See PGW Exhibit 5B. Even without looking at the HDD’s column, it appears that the bill issued January 5, 2011 reports 213 CCF more than the January 6, 2010 bill, and 252 CCF more that the January 6, 2009 bill. However, the January 2010 and 2011 bills themselves are 200 or more CCF above the January bills for the two previous years (2007 and 2008). The January 2010 and 2011 bills were not considered abnormally high by the Complainant either when they were received or during the evidentiary hearings. There is no evidence on the record that explains why the approximately 200 CCF increase was acceptable and normal in 2009-2010, but abnormal when it occurred in 2011. The Complainants were unable to provide information with regard to the occupancy or condition of the service address through the years. Without additional information, the Complainants cannot carry the burden of proving by a preponderance of the evidence that the increase in gas consumption was caused by PGW’s violation of a Commission statute, regulation or order.

Concerning the November 2, 2011 bill, Colonial’s gas bills issued in the month of November from 2007 to 2011 reveal the following gas consumption history:

|  |  |  |
| --- | --- | --- |
| **Billing Date** | **CCF** | **HDD** |
| **11/2/2011** | **2815** | **219** |
| 11/2/2010 | 569 | 219 |
| 11/2/2009 | 561 | 257 |
| 10/31/2008[[9]](#footnote-9) | 482 | 259 |
| 11/2/2007 | 394 | 123 |

See PGW Exhibit 5B. The November 2011 bill for 2815 CCF of gas is indeed abnormally high when compared with gas bills issued in the month of November from 2007 to 2010. A closer review of the statement of accounts for SA # 4018739567 shows that this SA has been served by two meters: Meter # 1906431, and Meter # 2115477. It also shows that two days after the November 2, 2011 bill was issued, PGW issued a Revenue Adjustment credit in the amount of $642.60 to this SA. In addition, the prior bill issued on October 4, 2011, was billed to meter reading index of 91468, whereas the November 2, 2011 bill was billed to meter reading index of 341. The contact history for this SA shows that on October 17, 2011, Edward Davis from PGW visited the Service Address on a Meter Shop Rotary inspection order with order # 3396076. He completed the Order with the following activities “(Meter Shop orders – Check Differential Pressure, Complete Oil Change, ERT Head Change, Pressure Check, Verify with Read One Pro),” and the following comments: “[Meter] # 1906431 c - 93929 u 95827 ert 19469114 pro read 91691 tried to put counts on ert. changed per j.r. ert new ert 35856101 programmed index 93929 completed oil change.” PGW Exhibit 5A, at 11. (Ephasis added). Two separate entries in the contact history for this SA show that on October 19, 2011, PGW removed Meter # 1906431 from the service address and installed Meter # 2115477. On November 2, 2011, it was the new Meter # 2115477 which provided the actual reading of 341 CCF.

The difference between the 91468 reading received from the old ERT head # 19469114 in October 4, 2011, and the 93929 reading which Edward Davis programmed in the new ERT head #35856101 during the October 17, 2011 visit based on readings from the mechanical portion of the meter, is 2461 CCF. Add to this number the 341 index reading/CCF reported by the new Meter # 2115477 installed on October 19, 2011, and the total billed usage is 2802 CCF. Gas consumption recorded between October 17, 2011 and October 19, 2011 can account for the difference between the 2802 CCF and the 2815 CCF for which the SA was billed on November 2, 2011. The evidence submitted on the record indicates that the November 2, 2011 bill consists in part of a make-up bill for previously unbilled services.

The record in these consolidated matters bears no indication that theft of service was behind the make-up bill. Utilities are expressly permitted to issue make-up bills for service pursuant to 52 Pa.Code § 56.14 (“Previously Unbilled Utility Service”), which permits the issuance of make-up bills for “previously unbilled utility service resulting from utility billing error, meterfailure, leakage that could not reasonably have been detected or loss of service....” Therefore, PGW was authorized to issue the makeup bill. In cases regarding backbilling in the absence of theft of service or the complainant's culpability, the amount of time that a utility may rebill is limited to four years. See 66 Pa.C.S. § 1312, [*Angie's Bar v. Duquesne Light Company,* 72 Pa. PUC 213, 217 (1990),](https://www.lexis.com/research/buttonTFLink?_m=547c132556b0e0eaef81904a99c36d6f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20734%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=9&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b72%20Pa.%20PUC%20213%2cat%20217%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=2&_startdoc=1&wchp=dGLbVzt-zSkAz&_md5=328017b0fdfe7574c49c5b507e10101d) [*Pa. Pub. Util. Comm'n. v. Duquesne Light Company,* 50 Pa. PUC 555 (1977).](https://www.lexis.com/research/buttonTFLink?_m=547c132556b0e0eaef81904a99c36d6f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20734%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=10&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b50%20Pa.%20PUC%20555%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=2&_startdoc=1&wchp=dGLbVzt-zSkAz&_md5=1ae32be364ebd1d51e43b224f0febdfc) Consequently, the amount of time that PGW could rebill Colonial’s SA # 4018739567 is limited to four years. The record is devoid of any information regarding PGW’s compliance with the Commission’s order in *Angie's Bar v. Duquesne Light Company*, 72 Pa. PUC 213, 217 (1990). In view of the above, I find that the Complainants have failed to carry their burden of proving by the preponderance of the evidence that Respondent has violated a Commission statute, regulation or order by issuing the November 2, 2011 bill for 2815 CCF of gas.

1. **Simon Garden - Account # 539547187, SA # 1162325601, Meter # 1944659**

Mr. Pulley testified that Simon Garden is a 72-unit complex located in three buildings at 6731 Munsgrave Street and 6732 Chew Avenue, Philadelphia, PA. Tr. 399. On January 19, 2005, SBG reached a settlement agreement with PGW on all of its disputes related to Simon Garden. Tr. 423-25, 433. Consequently, any and all disputed transactions, which predate January 19, 2005, and concern Simon Garden shall be dismissed.

Ms. Treadwell testified that on April 7, 2005, the Complainant was billed $2,709.52 for 1,840 CCF of gas. Tr. 434. She stated that this gas usage seems high when compared with usage during the same period in prior years. Tr. 434, SBG CG/SG late-filed Exhibit 9.

Similarly, she testified that on November 7, 2006, the Complainant was billed $1,215.34 for 621 CCF of gas. Tr. 434. She stated that this gas usage seems “out of range” when compared with usage during the same period in prior years. Tr. 434, SBG CG/SG late-filed Exhibit 9.

She testified that on May 5, 2008, the Complainant was billed for 1026 CCF of gas. Tr. 435. According to Ms. Treadwell when you compare this gas usage to that of the May 2006 and May 2007 bills, the gas consumption is larger than expected. Tr. 434, SBG CG/SG late-filed Exhibit 9.

In response to Ms. Treadwell’s testimony, PGW’s witness, Ms. Vacca, testified that the gas bill for April 7, 2005, was based on an actual automatic meter read. Tr. 795-96, PGW Exhibit 1B. The total gas used during this billing period was 1,840 CCF, the number of heating degree days was 909, and the transaction amount was $2,709.52. Tr. 796. She testified that this bill was not disputed by the Complainant in 2005. Tr. 797, see also PGW Exhibit 1A. According to PGW, this bill is correct as rendered. Tr. 797*.*

Ms. Vacca testified that the gas bill for November 7, 2006, was based on an actual meter read. Tr. 797, PGW Exhibit 1B. The total gas used during this billing period was 621 CCF, the number of heating degree days was 419, and the transaction amount was $1,215.34. Tr. 797-98. She testified that based on the customer contacts for the Service Address this bill was not disputed by the Complainant in either 2006 or 2007. Tr. 798, see also PGW Exhibit 1A. According to PGW, this bill is correct as rendered. Tr. 798.

With regard to the May 5, 2008 bill, Ms. Vacca testified that the gas bill for May 5, 2008, was based on an actual meter read. Tr. 800, PGW Exhibit 1B. The total gas used during this billing period was 1,026 CCF, the number of heating degree days was 305, and the actual bill was $2,039.46. Tr. 800. According to PGW, this bill is correct as rendered. *Id.*

The three gas bills disputed by the Complainants as abnormally high fall outside the statute of limitations for these consolidated Complaints. There is no record of Complainants ever filing a formal or informal complaint with the Commission concerning the three bills in question. See, *Duquesne Light Co. v. Pa. PUC, (Duquesne)*, 611 A.2d 370 (Pa.Cmwlth. 1992). The record is also devoid of any evidence that SBG ever disputed these bills with PGW and there is no evidence that PGW made any actions or statements that could cause SBG to relax its vigilance. *Lester Ely v. Pennsylvania American Water Company*, C-20055616 (Order entered July 10, 2006). As part of his testimony on *SBG Management Services, Inc. / Simon Garden Realty Co., LP. v. Philadelphia Gas Works*, at Docket No. C-2012-2304324, Mr. Pulley testified at length on a chain of e-mails between SBG and PGW from September 3, 2008 to December 2, 2008 trying to set up a conference call between the two parties. The conference call concerned Simon Garden and several other properties managed by SBG. Tr. 410, 411. However none of these e-mails specifically mentioned the April 7, 2005, November 7, 2006 and May 5, 2008 bills for Simon Garden, Account # 539547187, SA # 1162325601, nor do they hint, even in general terms, to a high meter reading or gas usage dispute or inquiry. SBG’s request to PGW, as stated in Mr. Pulley’s e-mails regarding several properties managed by SBG, including Simon Garden, was for a breakdown between “principal, interest and penalties.” Tr. 404, SBG CG/SG late-filed Exhibit 10.

Mr. Pulley testified that the 2008 e-mails about the conference call were followed by another e-mail from Mr. Pulley to David Hyman dated January 23, 2009, concerning his dealings with Mr. Dunn. In his e-mail Mr. Pulley reported that, “We are having dialogue. Dialogue is good. We are communicating.” Tr. 416-17. Again, the January 23, 2009 e-mail does not reference the three disputed bills or even Simon Garden in particular. *Id.* The record contains another e-mail from Mr. Pulley to Mr. Dunn dated December 7, 2008, which puts Mr. Pulley’s e-mail to David Hyman on January 23, 2009, in a better perspective. On his e-mail to Mr. Dunn dated December 7, 2008, Mr. Pulley writes in pertinent part,

In follow up of our agreement of the other evening the following is to transpire in regards to the SBG Management managed properties. We shall pay the current usage charges. If there is a dispute with those charges we are to immediately contact you and advise accordingly of our concern.

SBG CG/SG late-filed Exhibit 10. Mr. Dunn in turn testified at length regarding the nature of the agreement referenced in Mr. Pulley’s December 8, 2008 e-mail. According to Mr. Dunn, he agreed on behalf of PGW to put a hold on all collection efforts by PGW while he completed an investigation of accounts belonging to SBG Management managed properties. SBG on its part “was going to continue to pay current bills as rendered, and PGW was going back through the arrears of the accounts and any bill disputes that we were aware of at the time to try and resolve them.” SBG CG/SG late-filed Exhibit 8 – Testimony of John Dunn, III, at 392. The agreement therefore concerned only PGW’s collection activities against the SBG Management managed properties while PGW investigated concerns raised by SBG in relation to the properties it managed. The record is, at best, unclear as to whether the three disputed bills (April 7, 2005, November 7, 2006, and May 5, 2008) were part of the issues raised by SBG for investigation by PGW. However, the record is very clear that SBG did not honor its agreement with PGW. It made no payments whatsoever to its Account # 539547187 with PGW from December 2007 to May 2011. See PGW Exhibit 1B, see also PGW Exhibits 2B and 3B.

In view of the above, I find that the Respondent did not, through actions, statements or concealment, cause the Complainants to relax their vigilance with regards to their high billing disputes in relation to April 7, 2005, November 7, 2006, and May 5, 2008 bills.The Complaint at S*BG Management Services, Inc. / Simon Garden Realty Co., L.P. v. Philadelphia Gas Works*, at Docket No. C-2012-2304324 is dismissed with regard to these high billing disputes due to the running of the statute of limitations.

The Complainants did not provide any testimony concerning high billing / meter reading disputes (J Code) pertaining to Simon Garden Realty Co., L.P., 6731 Musgrave Street, Apt. # A, Philadelphia, PA 19119, Account # 539547187, SA ## 4395848077 and 8569221065. See Tr. 453, 480, 836-37. Any and all such disputes in connection with Simon Garden Account # 539547187, SA ## 4395848077 and 8569221065 shall be dismissed due to Complainants’ failure to carry their burden of proof.

At the evidentiary hearings, the Complainants made numerous attempts to bring forth several claims which were not part of the original or Amended Complaints in these consolidated proceedings, (e.g. information included in PGW’s bills, and the five-day grace period). All such claims are dismissed and shall not be addressed in this Initial Decision.

1. **Late payment charges – Application of partial payments**

Although late payment charges were identified as one of the issues in each of the consolidated Complaints, the Complainants did not articulate the nature of their challenge to PGW’s late payment charges either in their original or amended Complaints. During the initial hearings, the Complainants, through the testimony of Ms. Treadwell, explained that SBG was disputing the imposition and payment of any late payment charges at a percentage rate different than 1.5% monthly. Tr. 249. In particular, Ms. Treadwell testified that she understood that “PGW is allowed to charge late payment charges of 1.5 percent or they applied 1.5 percent to [the] balance.” Tr. 171. She further testified that she had performed her own calculations in order to figure out the percentage rate of late payment charges SBG was charged per month: “I took essentially the current balance of that account and I divided the late payment charge on that account by the current balance to get a percentage of what the actual LPC [is].” Tr. 170, see also 249-62. According to her analysis, the percentage rate of PGW’s late payment charges fluctuates from month to month: “They go from 1.5[%] as far down to 0.9[%].” Tr. 184. She testified that the fluctuating percentage rate does not comply with PGW’s tariff which specifically states that late payment charges will be assessed at a rate of 1.5 % per month, and makes it difficult for Complainants’ accountants to reconcile the accounts. Tr. 185.

At the further hearings, Ms. Treadwell articulated another aspect of Complainant’s issue with regard to late payment charges imposed by PGW. She explained that during the extensive discovery conducted against PGW, SBG had learned that PGW applied partial payments first to late payment charges and then to “principal gas charges.” Tr. 510. According to the Complainants this method of applying partial payments contravenes the Commission’s regulations at 52 Pa.Code § 62.74, which the Complainants understood to establish a hierarchy in applying partial payments: “They should apply first to commodity charges, second, to distribution charges. Third, customer. Fourth, gas cost adjustments. Fifth, to interstate transition cost surcharges. Sixth, to taxes and seventh to late payment charges.” Tr. 508-509, see also Tr. 511, 567. Ms. Treadwell performed her own calculations based on the Complainants’ understanding of 52 Pa.Code § 62.74, “…we said, as payments were coming in, if PGW would have applied it to principal first, not the cumulative late payment charges, what would the difference be in the late payment charge itself and also in the principal balance on the account.” Tr. 519, SBG CG/SG late-filed Exhibit 3 (Emphasis added). Applying the Complainants’ method described above on Simon Gardens’ Account # 539547187, SA # 4395848077 from the account’s inception on April 9, 2001 to December 6, 2012, Ms. Treadwell calculated that PGW had not only overcharged the Complainants $19,099.35 in late payment charges but had also overcharged them $142,612.67 in gas charges as well - simply as the result of PGW’s practice of paying off late payment charges first. Tr. 518-536, SBG CG/SG late-filed Exhibit 3. Applying the same method to all of the Simon Gardens’ SAs, Ms. Treadwell testified that, by December 2012, PGW had overcharged the Complainants $61,106.16 in late payment charges and $194,156.29 in gas charges for Account # 539547187, SA # 8569221065, and $28,274.34 in late payment charges and $133,890.19 in gas charges for Account # 539547187, SA #1162325601. Tr. 537-546, SBG CG/SG late-filed Exhibit 3. For the Colonial Garden’s Account # 6128000245, SA ##114472580 and 1375369694 combined, Complainants maintain that, by December 2012, PGW had overcharged them $13,778.67 in late payment charges and $58,160.70 in gas charges; whereas for SA# 4018739567 under the same account Complainants maintain that, by December 2012, PGW had overcharged them $9,630.43 in late payment charges and $132,467.01 in gas charges. SBG CG/SG late-filed Exhibit 3.

Jeremy Gabell testified on behalf of the Complaints as a certified public accountant, a certified evaluation analyst, and a certified forensic accountant. Tr. 575. Mr. Gabell admitted that he had no experience with public utilities accounting or finance. Tr. 578. He explained his understanding of PGW’s calculation of late payment charges as follows:

[PGW is] taking the late payment charges and adding them to the late payment or past due amount and then [it] charge[s] one and a half percent on the past due amount in effect you’re compounding the interest rate; so, in other words, it’s no longer 18 percent simple rate, but it become somewhat higher.

Tr. 583, see also 587-88, 602-603. When asked about the kind of impact that PGW’s application of partial payments to late payment charges first has on the customer’s account, Mr. Gabell stated, “Yes, it’s compounding. It’s no longer simple interest rate of 18 percent, it goes to a simple interest rate of 19.562 percent.” Tr. 584-85, see also 592-93. According to Mr. Gabell, this practice increases PGW’s revenue from the account,

[I]f you take a payment and apply it to the interest first and then to the service, what you wind up doing is increasing the amount that’s not beneficial to the customer but to the company, because you’re not reducing the amount you can collect interest on. You are increasing the amount you can collect interest on.

Tr. 586, see also 592, 608. Mr. Gabell supported Ms. Treadwell’s calculations, *supra* at 37, as using the correct accounting methodology and as being the only way of applying partial payments to an account based on Mr. Gabell’s understanding of Commission regulation. Tr. 594, 599-600. During cross examination, Mr. Gabell stated that the compound interest in late payment charge is the effect or outcome of PGW’s ordering of payments to pay off late payment charges first and service charges later. Tr. 606.

Roger D. Colton testified on behalf of the Complaints as an expert witness in public utility regulation and regulatory economics. Tr.611-12. He testified as follows:

Bills are comprised of two components. You have the principal component,…on which a utility may charge a late payment charge and you have the late payment charge component on which no additional late payment charge can be imposed.

When a customer or should a customer not pay their bill for a number of months in a row, you have a growing balance of principal and you have a growing balance of late payment charges. The reordering of payments says that when a customer then makes a payment, that the company …will apply or post those payments out of time.

So, for example, if somebody didn’t pay their April, May, June, July bills, they’ll have their four months of principal that’s been growing, and they will have four months of late payment charges that have been growing, and the reordering of payments states that the utility will pay the most recent noninterest bearing late payment charge before they pay the older, but interest bearing principal.

Tr. 614-15, see also 625, 626. This PGW practice does not conform to the Commission’s statutes and regulations for a variety of reasons. Tr. 616. He explained that the Title 66 of the Pennsylvania Consolidated Statutes says that a rate consists of any rule or regulation or practice of the public utility that might affect the compensation paid to the public utility. Tr. 616.[[10]](#footnote-10) The ordering of payments is a practice that affects compensation paid to PGW so it is a rate, and as a rate, it needs to be just and reasonable in accordance with 66 Pa.C.S. §1301.[[11]](#footnote-11) Tr. 616. Mr. Colton continued his testimony explaining that the primary issue of just and reasonableness is whether a practice is dictated by costs or reflects costs. According to Mr. Colton, PGW’s practice of reordering payments is not cost-based. “There is no difference in the staff people that [PGW uses] for collection processes based upon the composition of an unpaid bill. There’s no difference in the cost of money. There is no difference in the time that’s expended.” Tr. 617. Mr. Colton testified that PGW’s posting process is also in violation of 66 Pa.C.S. §1303, which prohibits a utility from directly or indirectly by any means or device whatsoever charge a customer more than what their tariff provides. Tr. 618. PGW’s tariff provides that the Company will charge a late payment charge of 1.5 percent, not to exceed 18 percent simple interest annually; however, Mr. Colton’s expert opinion is that through the reordering of payments practice, PGW is in effect, or indirectly, charging and collecting more than 18% simple interest on outstanding service charges. Tr. 618-19, see also 620-22, 626, 632-633.

Mr. Colton summarized the conclusion he reached upon reviewing the Complainants’ account statements and bills from PGW as follows: 1) PGW reorders customer payments in order to reduce more recent noninterest bearing balances while leaving older interest bearing balances; 2) PGW does not manage bills so as to minimize customers’ arrears; 3) payment reordering constitutes a rate because it is a practice which affects the compensation to be paid to PGW; 4) as a rate payment reordering has not been presented to the Commission for review and approval; 5) as a rate payment reordering is not cost based or mandated by any costs incurred by PGW; and 6) the reordering of payments has been found to be an unreasonable commercial practice in analogous circumstances (referring to the banking and credit card industry). Tr. 620, 660.

Mr. Colton testified that the reordering of payments practice affects any residential customer who is in arrears with PGW. Tr. 662. And based on the Bureau of Consumer Service’s annual reports on collections performance, PGW has roughly 80,000 residential customers in arrears in any given month. Tr. 662.

Mr. Colton agreed with the methodology used in Ms. Treadwell’s calculations *supra at 37,* although he was unable to tell whether the calculations themselves were correct. Tr. 619.

Bernard Cummings is the Vice President of customer service and collections for PGW. Tr. 718-19. He testified that PGW applies payments first to basic charges then nonbasic charges. Tr. 719-20, 722-723. Basic charges include late payment charges, security deposits, commodity charges and distribution charges. Tr. 720. Nonbasic charges include the parts and labor plan, meter change and meter repair charges, warranties, and miscellaneous charges. Tr. 722. He testified that late payment charges are an incentive for customers to pay their bills on time. Tr. 724, 776. He explained that PGW is not in the business of floating other businesses with interest free loans, and it does not want to increase its bad debt expense, which puts the burden on the rest of PGW’s customer base. Tr. 725, 728. In response to Mr. Colton’s testimony, Mr. Cummings explained that the impact of PGW’s reordering of payments practice would be small or minimal for a smaller usage customer or one with a better payment history than the Complainants. Tr. 730-32. He admitted that PGW applies partial payments to late payment charges first. Tr. 753-54. He testified that according to Commission regulation, absent written instructions by the customer, all partial payments should be applied to basic charges first, and LPCs are basic charges, so PGW has not violated any Commission regulation with its current application of partial payments. Tr. 732-33. He testified the Commission regulations do not specify a hierarchy in the order of payments within the basic charges themselves. Tr. 753.

He also testified that PGW complies with Commission regulations regarding the information that appears on its gas bills. Tr. 734. PGW’s bills include information on the price of commodity, any type of charges that are basic and nonbasic and any bill messages that need to be placed on the bill. *Id.* The Commission does not require utilities to provide the method in which they apply payments as part of the information included in their bills. Tr. 735, 776.

Diane Rizzo worked for PGW for 32 years. Tr. 841. Her last full time position as an employee of PGW was as a project manager supporting and maintaining PGW’s billing system and information systems. *Id.* At the time of the hearing, she was a consultant analyst for PGW’s customer service. Tr. 841-42. She testified that PGW assesses late payment charges at 1.5% per month. Tr. 843. She explained that:

[O]n the night of the billing, … before the bill is even calculated, we take the unpaid balance. We then subtract out any unpaid LPC and that amount is than multiplied by the 1.5 percent to get the current LPC that should be charged…. The next month, we take that previous balance, we subtract any new unpaid LPC, and then multiply that amount by the 1.5 percent.

Tr. 844. She used a bill issued to Complainants on September 3, 2007 to illustrate PGW’s method of calculating late payment charges. Tr. 844.

Ms. Rizzo testified that any partial payments are first applied towards any security deposits assessed on the account, “then LPCs, then arrearages.” Tr. 845, 870. When asked how PGW would apply a $1,000.00 payment to an account balance that consisted of $1,000.00 in arrears, and another $1,000.00 in LPC, all accumulated during several months, she explained that the unpaid LPC would be zeroed out. Tr. 873, see also Tr. 872. She testified that PGW has never been told by the Public Utility Commission or the Gas Commission before it that it was doing something wrong with regard to its method of applying partial payments. Tr. 846. She testified that she has not done any kind of analysis to see what the actual Annual Percentage Rate (APR) is when partial payments are applied the way PGW applies them. Tr. 865-66.

She explained that when a payment is made to an account that has multiple SAs, PGW distributes the payment amongst the different SAs based on a weighted average principle. Ms. Rizzo explained the weighted average distribution as follows: if there is one SA that constitutes 20% of the total balance, another SA that is 50% of the total and a third SA is 30% of the total amount owed, when a payment comes in, it is distributed amongst the SAs in the same manner. Twenty percent of that payment will go towards the first SA, 50% to the second SA, and 30% to the third SA. Tr. 847. The process of distributing the payments amongst SAs is automated and the purpose behind the process is to keep the arrears as low as possible in all of the SAs. Tr. 847, 863, 879-80. If for whatever reason there is a credit on one of the SAs, the credit gets distributed over to the other SAs that still show a balance on them. Tr. 848, 854-57. She testified that, if the customer had questions about the distribution of payments amongst the SAs, a PGW representative would be able to provide them with the breakdown. Tr. 863.

The Commission’s regulations at 52 Pa.Code § 56.22 govern the accrual of late payment charges. Section 56.22 states in pertinent part:

§ 56.22. Accrual of late payment charges.

(a) Every public utility subject to this chapter is prohibited from levying or assessing a late charge or penalty on any overdue public utility bill, as defined in § 56.21 (relating to payment), in an amount which exceeds 1.5% interest per month on the overdue balance of the bill. These charges are to be calculated on the overdue portions of the bill only. The interest rate, when annualized, may not exceed 18% simple interest per annum.

(b) An additional charge or fixed fee designed to recover the cost of a subsequent rebilling may not be charged by a regulated public utility.

(c) Late payment charges may not be imposed on disputed estimated bills, unless the estimated bill was required because public utility personnel were willfully denied access to the affected premises to obtain an actual meter reading.

52 Pa.Code § 56.22. The regulation sets the maximum rate of interest of 1.5% per month or 18% per year that a public utility may charge on the overdue balance of the bill.

Section 56.23 of the regulations governs the application of partial payments between public utility and other service. This section reads in its entirety:

Payments received by a public utility without written instructions that they be applied to merchandise, appliances, special services, meter testing fees or other nonbasic charges and which are insufficient to pay the balance due for the items plus amounts billed for basic utility service shall first be applied to the basic charges for residential public utility service.

52 Pa.Code § 56.23.

Section 56.24 of the regulations governs the application of partial payments between among several bills for public utility service. This section reads in its entirety:

In the absence of written instructions, a disputed bill or a payment agreement, payments received by a public utility which are insufficient to pay a balance due both for prior service and for service billed during the current billing period **shall first be applied to the balance due for prior service.**

52 Pa.Code § 56.24 (Emphasis added). Finally, pursuant to regulations at 52 Pa.Code §§ 56.2 and 62.74, late payment charges are defined and identified as basic charges, along with commodity charges, distribution charges, customer service charges, reconnection fees, gas cost adjustment charges, interstate transition cost surcharges, taxes and security deposits.

A careful review of the Complainants’ statements of accounts and of the various analyses and calculations performed by the parties on the information included in those statements of accounts reveals the following: 1) PGW is calculating late payment charges in the manner described by Ms. Rizzo. Every month PGW takes the previous balance, subtracts any new unpaid LPC, and then multiplies that amount by 1.5 percent; and 2) PGW applies partial payments to pay off any late payment charges accumulated in the account (regardless of the time when they accrued), before applying any leftover amount to the arrearages. See PGW Exhibit 4B.

1. **Colonial Garden, Account # 6128000245, SA#1375369694**

ForColonial Garden, Account # 6128000245, SA#1375369694, there was only one payment made during the entire period covered by the statute of limitations for these consolidated Complaints. The payment was made on November 4, 2011, in the amount of $140,742.25.

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Date | Transaction Type | Transaction Amount | Current Balance | Unpaid LPC | Calculated Unpaid Balance | Monthly % | Calculated LPC |
| 8/3/2011 | BILL | $871.04 | $138,456.39 | $41,170.92 | $94,989.59 |  |  |
| 9/3/2011 | LPC | $1,424.84 |  |  | $94,989.59 | 0.015 | $1,424.84 |
| 9/3/2011 | BILL | $817.07 | $140,711.36 | $44,033.66 | $96,677.70 |  |  |
| 10/4/2011 | LPC | $1,450.16 |  |  | $96,677.70 | 0.015 | $1,450.16 |
| 10/4/2011 | BILL | $978.82 | $143,140.34 | $45,483.82 | $97,656.82 |  |  |
| 11/2/2011 | LPC | $1,464.84 |  |  | $97,656.82 | 0.015 | $1,464.84 |
| 11/2/2011 | BILL | $854.82 | $145,460.01 | $46,948.66 | $98,511.64 |  |  |
| **11/4/2011** | **PAYMENT** | **$140,742.25** | **$4,717.76** |  |  |  |  |
| **12/02/2011** | **LPC** | **$70.76** |  | **$0.00** | **$4,717.76** | **0.015** | **$70.76** |

See PGW Exhibit 4B, at 11. Because the $140,742.25 payment was only a partial payment to the current outstanding balance on November 4, 2011, PGW applied it to pay off $46,948.66 representing all the late payment charges accumulated as of November 4, 2011, before applying the remainder of the payment to the accumulated “Unpaid Balance” of $98,511.64, leaving and outstanding balance of $4,717.76 consisting entirely of gas service charges or “Unpaid Balance.” The result is what Mr. Colton described in his testimony: PGW is applying payments out of order. In this case, PGW is paying off late payment charges for November 2011[[12]](#footnote-12) before it is even addressing the service charges from the August 3, 2011 bill. This is in direct violation of Commission regulation at 52 Pa.Code §56.24, which requires that partial payments “shall first be applied to the balance due for prior service.” The effect of this violation (in this particular example) is that it zeroes out any non-interest bearing balance whenever they may have been assessed, while inappropriately leaving prior interest bearing charges unpaid. The interest bearing charges are now improperly inflated at $4,717.76, and as a result any late payment charges calculated on them will be inflated and incorrect.

Pursuant to Commission regulations at 52 Pa.Code §§ 56.2 and 62.74, late payment charges, along with commodity charges, distribution charges, customer service charges, reconnection fees, gas cost adjustment charges, interstate transition cost surcharges, taxes and security deposits are all basic service charges. Together they constitute the balance due for basic service each month and should be all addressed simultaneously when partial payment is applied to the balance due for prior service. In the table above, the remaining outstanding balance of $4,717.76 does not consist entirely of interest bearing gas service charges. Taking under consideration the order of service and charges related to it, the $4,717.76 balance consists of $854.82 in gas service charges from the November 2, 2011 bill, $1,464.84 in late payment charges assessed on November 2, 2011, and $978.82 in gas service charges from the October 4, 2011 bill. The remaining $1,419.28[[13]](#footnote-13) of that balance represents the unpaid portion of the August 3, 2011 gas service charges of $871.04, and of the late payment charges of $1,424.84 assessed on September 3, 2011. Applying 38% of the $1,419.28 to the gas service charges ($871.04)[[14]](#footnote-14) and 62% to the late payment charges ($1,424.84), it appears that after the $140,742.25 payment was made on November 4, 2011, $539.32 of the $871.04 gas service charge and $879.85 of the $1,424.84 late payment charge had remained unpaid. These calculations show that PGW’s compliance with 52 Pa.Code § 56.24 would have resulted in the following:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Date | Transaction Type | Transaction Amount | Current Balance | Unpaid LPC | Calculated Unpaid Balance | Monthly % | Calculated LPC |
| 11/4/2011 | PAYMENT | $140,742.25 | $4,717.76 | $2,344.79[[15]](#footnote-15) | $2,372.96[[16]](#footnote-16) |  |  |
| 12/02/2011 | LPC | **$35.59** |  | **$2,344.79** | **$2,372.96** | **0.015** | **$35.59** |

Consequently, I find fault with PGW’s method of applying partial payments as described by Ms. Rizzo. I also disagree with SBG’s proposed method of applying partial payments which, as described by Ms. Treadwell, is for all intents and purposes a mere reversal of PGW’s method. Where PGW would apply partial payments to late payment charges first, despite of their order of accrual, SBG would apply partial payments to gas service charges first, ignoring accumulated late payment charges. See SBG CG/SG late-filed Exhibit 3.

There were no payments made on Colonial Garden Account # 6128000245, SA#1375369694 between November 2011 and December 2012, and PGW calculated monthly late payment charges on the improperly inflated gas service balance of $4,717.16 on eight (8) separate occasions. In view of the above calculations and analysis, PGW shall issue a refund to Colonial Garden Account # 6128000245, SA#1375369694 in the amount of $281.36[[17]](#footnote-17).

1. **Colonial Garden, Account # 6128000245, SA#4018739567**

For Colonial Garden, Account # 6128000245, SA#4018739567, there was only one payment made during the entire period covered by the statute of limitations for these consolidated Complaints. The payment was made on November 4, 2011, in the amount of $107,921.23 and was followed by a Revenue Adjustment Credit in the amount of $642.60 on the same day. Because the $107,921.23 payment and the Revenue Adjustment Credit constituted only partial payments to the current outstanding balance of $114,922.16, PGW applied them to pay off $35,036.39 representing all the late payment charges accumulated as of November 4, 2011, before applying the remainder of the payment to the accumulated unpaid balance of $74,640.37. These transactions left an outstanding balance of $6,358.33, which according to PGW’s method of applying partial payments consisted entirely of gas service charges or “Unpaid Balance.” In this case, PGW is paying off late payment charges for November 2011[[18]](#footnote-18) before it is even addressing the service charges from the June 3, 2011 bill. See PGW Exhibit 5B, at 6.

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Date | Transaction Type | Transaction Amount | Current Balance | Unpaid LPC | Calculated Unpaid Balance | Monthly % | Calculated LPC |
| 6/3/2011 | BILL | $803.48 | $102,890.48 | $30,648.62 | $72,241.86 |  |  |
| 7/5/2011 | LPC | $1,083.62 |  |  | $72,241.86 | 0.015 | $1,083.62 |
| 7/5/2011 | BILL | $628.12 | $104,602.22 | $31,732.24 | $72,869.98 |  |  |
| 8/3/2011 | LPC | $1,093.04 |  |  | $72,869.98 | 0.015 | $1,093.05 |
| 8/3/2011 | BILL | $566.66 | $106,261.92 | $32,825.28 | $73,436.64 |  |  |
| 9/3/2011 | LPC | $1,101.55 |  |  | $73,436.64 | 0.015 | $1,101.55 |
| 9/3/2011 | BILL | $535.16 | $107,898.62 | $33,926.82 | $73,971.8 |  |  |
| 10/4/2011 | LPC | $1,109.57 |  |  | $73,971.8 | 0.015 | $1,109.57 |
| 10/4/2011 | BILL | $668.57 | $109,676.76 | $35,036.39 | $74,640.39 |  |  |
| 11/2/2011 | LPC | $1,119.60 |  |  | $74,640.39 | 0.015 | $1,119.60 |
| 11/2/2011 | BILL | $4,125.80 | $114,922.16 |  |  |  |  |
| **11/4/2011** | **PAYMENT****+****REV ADJ** | **$107,921.23****+****$642.60**  | **$6,358.33** |  |  |  |  |
| **12/02/2011** | **LPC** | **$95.37** |  |  | **$6,358.33** | **0.015** | **$95.37** |

See PGW Exhibit 5B, at 6.

Taking under consideration the order of service and charges related to it, the $6,353.33 balance consists of $4,125.80 in gas service charges from the November 2, 2011 bill, and $1,119.60 in late payment charges assessed on November 2, 2011. The remaining $1,112.93[[19]](#footnote-19) of that balance represents the unpaid portion of the October 4, 2011 bill, which consisted of $668.57 in gas service charges, and of $1,109.57 in late payment charges. Applying 37% of the $1,112.93 to the gas service charges ($668.57)[[20]](#footnote-20) and 63% to the late payment charges ($1,109.57), it appears that after the $107,921.23 payment and $642.60 Revenue Adjustment credit were applied to the SA on November 4, 2011, $411 of the $668.57 gas service charge and $701.93 of the $1,109.57 late payment charge remained unpaid from the October 4, 2011 bill. These calculations show that PGW’s compliance with 52 Pa.Code § 56.24 would have resulted in the following:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| Date | Transaction Type | Transaction Amount | Current Balance | Unpaid LPC | Calculated Unpaid Balance | Monthly % | Calculated LPC |
| 11/4/2011 | PAYMENT +REV ADJ | $140,742.25+$642.60 | $6,358.33 | $1,821.53[[21]](#footnote-21) | $4,536.8[[22]](#footnote-22) |  |  |
| 12/02/2011 | LPC | **$68** |  |  | **$4,536.8** | **0.015** | **$68.052** |

Because of its methodology of applying partial payments, PGW instead calculated the late payment charges on the entire $6,358.33 outstanding balance, at a rate of $95.37 per month on eight (8) separate occassions between December 2011 and December 2012. See PGW Exhibit 5B, at 6-7. In view of the above calculations and analysis, PGW shall issue a refund to Colonial Garden Account # 6128000245, SA#4018739567 in the amount of $218.96[[23]](#footnote-23).

1. **Simon Garden, Account # 539547187, SA#1162325601**

For Simon Garden, Account # 539547187, SA#1162325601, there were only three partial payments made during the entire period covered by the statute of limitations in these consolidated matters. Two payments were made on May 20, 2011: one for $28.54 and another of $91.67 for a total of $120.21. See PGW Exhibit 1B, at 19. The bill issued on May 6, 2011 showed $1,532.36 in gas service charges and $2,113.88 in late payment charges. PGW Exhibit 1B, at 18-19. The total outstanding balance was $228,130.97. PGW’s analysis shows that the entire amount of $120.21 was applied towards the late payment charges. The Commission statutes and regulations do not contain any provisions with regard to the order of application of partial payments amongst the various basic charges assessed during the same billing period. See 52 Pa.Code §§ 56.23, 56.24. SBG’s contention that section 64.72 of the Commission’s regulations contains such an order or hierarchy is incorrect. Section 64.72 concerns the bill format for residential and small business customers. In particular, section 64.72(b)(3)(i)-(xi) which Ms. Treadwell referenced to in her testimony, *supra* at 37, lists the various basic charges that must appear on a bill for gas service. With the exception of commodity charges and customer charges, the list does not indicate any type of sequential order for these charges. Again, section 64.72 concerns the information and various charges that must appear on the residential and small business customers’ bills, not the order of applying partial payments amongst the basic charges. In view of the above, no corrections are warranted for these transactions.

The third payment onSA#1162325601 was made on August 20, 2011, in the amount of $28.55. The bill issued on August 3, 2011 showed $634.10 in gas service charges and $2,161.24 in late payment charges. PGW Exhibit 1B, at 19. The total outstanding balance was $236,690.24. PGW’s analysis shows that the entire amount of $28.55 was applied towards the late payment charges. In view of my analysis above, no corrections are warranted for these transactions.

1. **Simon Garden, Account # 539547187, SA#1162325601**

For Simon Garden, Account # 539547187, SA#4395848077, there were only three partial payments made during the entire period covered by the statute of limitations in these consolidated matters. Two payments were made on May 20, 2011: one for $35.58 and another of $114.28 for a total of $149.86. See PGW Exhibit 2B, at 7. The bill issued on May 6, 2011 showed $3,043.62 in gas service charges and $2,855.73 in late payment charges. PGW Exhibit 2B, at 7. The total outstanding balance was $288,065.18. PGW’s analysis shows that the entire amount of $149.86 was applied towards the late payment charges. In view of my analysis above, no corrections are warranted for these transactions.

The third payment onSA#4395848077 was made on August 20, 2011, in the amount of $35.58. The bill issued on August 3, 2011 showed $79.02 in gas service charges and $2,938.41 in late payment charges. PGW Exhibit 2B, at 7. The total outstanding balance was $299,941.13. PGW’s analysis shows that the entire amount of $35.58 was applied towards the late payment charges. In view of my analysis above, no corrections are warranted for these transactions.

1. **Simon Garden, Account # 539547187, SA#8569221065**

For Simon Garden, Account # 539547187, SA#8569221065, there were only three partial payments made during the entire period covered by the statute of limitations in these consolidated matters. Two payments were made on May 20, 2011: one for $35.81 and another of $114.82 for a total of $150.63. See PGW Exhibit 3B, at 18. The bill issued on May 6, 2011 showed $459.46 in gas service charges and $2,485.71 in late payment charges. PGW Exhibit 3B at 18. The total outstanding balance was $281,495.61. PGW’s analysis shows that the entire amount of $150.63 was applied towards the late payment charges. In view of my analysis above, no corrections are warranted for these transactions.

The third payment onSA#8569221065 was made on August 20, 2011, in the amount of $35.33. The bill issued on August 3, 2011 showed $73.46 in gas service charges and $2,495.62 in late payment charges. PGW Exhibit 3B, at 18. The total outstanding balance was $289,561.66. PGW’s analysis shows that the entire amount of $35.33 was applied towards the late payment charges. In view of my analysis above, no corrections are warranted for these transactions.

1. **Transactions predating May 11, 2009**

During the evidentiary hearings, the Complainants sought to dispute late payment charges assessed on transactions predating the statute of limitations (May 11, 2009). They contended that the statute of limitations on these claims should be tolled all the way to the date of the creation of the accounts for Simon and Colonial based on the doctrine of estoppel. In particular, they argued that their communications with the Respondent through the years had caused them to relax their vigilance or deviate from their right of inquiry into the facts. They were allowed to enter into the record testimony and exhibits on their communications with PGW through the years. In addition, they were asked to submit main and reply briefs analyzing the tolling of the statute of limitations based on the evidence collected in these consolidated matters.

After reviewing all of the evidence collected in these consolidated Complaints and considering the arguments in parties’ briefs, I find that PGW did not cause the Complainants to relax their vigilance or deviate from their right of inquiry into the facts as they pertain to the late payment charges. The first communications between the parties occurred as early as 2002, but there is no indication that late payment charges were ever the topic of inquiries or disputes. See PGW Exhibits 1A, 2A, 3A, 4A, and 5A, and SBG CG/SG late-filed Exhibit 10. This continued until late 2008, when in an e-mail dated November 19, 2008, Mr. Pulley refers to a request made by the Complainants to PGW for a “breakdown between principle(sic) interest and penalties.” A meeting between the parties in December of 2008 resulted in an agreement where PGW would halt collection activities against SBG and SBG would pay current usage charges, see *supra* at 35, and on December 10, 2008, Mr. Dunn wrote to Mr. Pulley “I know I am behind but I will get caught up on all of your matters. For now this termination Notice has been cancelled.” SBG CG/SG late-filed Exhibit 10. It is unclear from this e-mail whether or not the “matters” concerned Simon and Colonial or whether they included a challenge to late payment charges. On January 16, 2009, Mr. Dunn sent a similar e-mail to Mr. Pulley where he stated: “I want to start working next week on all of SBG management accounts and I want to know when Eric [Lampert] will be available to meet with us here at PGW to start our review.” SBG CG/SG late-filed Exhibit 10. In another email from John Dunn to Phillip Pulley, dated April 15, 2009, Mr. Dunn writes that the parties had scheduled to meet at SBG’s office on Welsh Road on May 5, 2009 “to start the review of all of the SBG Management Services Inc. natural gas accounts with PGW.” SBG CG/SG late-filed Exhibit 10. In an e-mail dated May 13, 2009, from Mr. Dunn to Raquel Guzman, it appears that the meeting took place on May 12, 2009, where the parties reviewed accounts for ten properties and Mr. Dunn was provided with a list of issues to investigate. SBG CG/SG late-filed Exhibit 10. This last e-mail brings the parties’ communications within the period of the statute of limitations, and there is nothing in these communications to indicate that, either through its actions or its assertions, PGW caused the Complainants to relax their vigilance in terms of their claims and not seek legal or administrative recourse.

The Complainants maintained that, prior to 2011, PGW never told them that they could bring their disputes to the Commission for resolution. This attempt at charging PGW with fraud or concealment in order to achieve the tolling of the statute of limitations is unsuccessful in view of Mr. Pulley’s and Mr. Lampert’s testimonies. When asked by the undersigned “Why didn’t SBG address each problem as it started rather than address them all together?” Mr. Pulley responded:

The first is not trying to be litigious and just sue people and sue people. If you can work through things without suing people, that’s always my preference. Let’s resolve things, let’s move on with life and do with that standpoint.

Because I have always found that when you have litigation, nobody wins in these things. It just costs money, and the lawyers do very, very well.

So trying to get the help and reach out to the external people to help us resolve this….

SBG CG/SG late-filed Exhibit 8 - Testimony of Phillip Pulley, August 26, 2013, pp. 166-67. When I asked the same question to Mr. Lampert, his response was:

Be honest with you, they’re a big organization.

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To take them with lawsuits and the other staff, you know, I don’t think we were ready for that.

SBG CG/SG late-filed Exhibit 8 – Testimony of Eric Lampert, August 26, 2013, p. 263.

In view of these testimonies, it is clear that the Complainants’ failure to bring forth their claims in a timely manner was the result of a calculated business decision rather than the result of ignorance or concealment. Whether or not PGW informed the Complainants of their right to file informal and formal complaints with Commission when dissatisfied with the Company’s resolution of an inquiry or dispute is irrelevant when the existence of the Commission as a forum for adjudicating consumer complaints against utilities was well known to the Complainants. See SBG CG/SG late-filed Exhibit 8 - Testimony of Phillip Pulley, August 26, 2013, pp. 118-19. On November 12, 2003, Mr. Lampert filed an informal complaint with the Commission’s Bureau of Customer Service against PGW concerning another residential property managed by SBG. SBG CG/SG late-filed Exhibit 8 – Testimony of Eric Lampert, August 26, 2013, p. 236-38. Also, on June 30, 2008, Mr. Pulley filed a formal Complaint on behalf of York Road Realty Company, L.P., Ice Skating Rink with the Commission against PECO at Docket No. C-2008-2051797. Tr. 699-700. On December 11, 2008, Mr. Pulley filed a second Complaint against PECO, again on behalf of York Road Realty Company, L.P., Ice Skating Rink, at Docket No. C-2009-2082365. Tr. 699-700. Finally, information on the Commission as a forum for adjudicating consumer complaints against utilities is included on PGW’s termination notices, and SBG received such notices as early as June 24, 2002. See PGW Exhibit 1A, at 10.

In view of the above, the statute of limitations shall not be tolled for any disputes concerning late payment charges assessed prior to May of 2009. The portion of the consolidated Complaints concerning late payment charges assessed prior to May of 2009 is dismissed due to the running of the statute of limitations.

1. **Late payment charges on outstanding balances that were the subject of municipal liens for unpaid gas service**

During her testimony at the initial hearings, Ms. Treadwell challenged the application of the 18% annual or 1.5% monthly late payment charges that PGW applies to outstanding balances on which PGW has filed a lien. Tr. 206-207. Ms. Treadwell testified that because the lien is a judgement it should accumulate the legal rate of interest of 6% annual as opposed to the PGW’s tariffed rate of 18% annual. *Id.* The Complainants based their position on case law from the Superior Court of Pennsylvania, *Equitable Gas v. Wade*, 812 A.2d 715 (Pa.Super. 2002), which held that once Equitable Gas obtained a final judgment in the Court of Common Pleas on an outstanding balance for gas service, it was no longer entitled to charge 18% per year pursuant to the tariff. Instead, it could only charge the legal rate of interest of 6% annual in accordance with 42 Pa. C.S. § 8101 (concerning interest on judgements). Tr. 208-12.

PGW argued that the Municipal Code does not authorize the imposition of interest charges on municipal liens for gas service. Tr. 207. It insisted that since “municipal interest is not charged on municipal liens [for gas service],” it will continue to charge PGW’s tariff rate on them until the outstanding balance represented by the liens is paid off. Tr. 209. It further maintained that,

[W]hen an account is an active account, [the lien] continues to be not a judgment. A lien is just a marker to state, on this date, we have said this amount is owed to PGW. If the account is active, [the lien] continues to accrue interest under the tariff. Under no circumstances is the municipal lien interest rate applied at all, whether the account has been finalized and remains as a lien or while it remains an active account, and part of it is just as a marker lien.

Tr. 212-13, see also Tr. 216.

The Complainants responded that,

“…once you become a lien, you’ve now moved from the PUC…and you’ve entered into the court system. So, that court judgement, that lien, now becomes a judgment and you are at the 6 percent annually.

Now where this kind of gets mixed up or messy, is that PGW is keeping a statement of accounts that’s a running tab. Because the account isn’t closed, it’s a running tab, and instead of having documents that say a lien was placed on this day, this portion of the debt is now at 6 percent, we just get … LPC.

Tr. 214.

It is well-settled that the Commission does not have jurisdiction over the placement of municipal liens. *See*, *Josephine Pitt v. Philadelphia Gas Works*, Docket No. C-2009-2140025 (Order entered April 29, 2010). In *See Dennis J. Vicario v. Philadelphia Gas Works*, C-2010-2213955 (Opinion and Order entered November 16, 2011), the Commission recognized its lack of subject matter jurisdiction over the placement of municipal liens, but explained that it retains jurisdiction over the utility’s service and billing practices reflected in the outstanding balance on which the municipal lien was filed. See *Viccario*, Opinion and Order at 5.

The interest rate at which late payment charges are accrued on an outstanding balance is a billing issue, which lies squarely within the jurisdiction of this Commission, even if the outstanding balance in question is the subject of a municipal lien filed against the Complainants’ property for unpaid gas service. The situation faced by the Complainants is as follows. First, the Complainants have an outstanding balance on their account with PGW which at a certain point becomes the subject of a municipal lien against their property for unpaid gas service. From then on, regardless of the existence of the lien, the outstanding balance continues to appear on the Complainants’ accounts and bills with PGW and continues to accrue an interest rate of 18% annual or 1.5% monthly in late payment charges pursuant to PGW’s tariff and Commission regulation at 52 Pa.Code §56.15 (regarding accrual of late payment charges). After some time has passed, another municipal lien is filed against the Complainants’ property for the unpaid balance that accumulated after the first lien was filed. The unpaid balance, which is the subject of the second lien, includes the late payment charges that have accrued on the outstanding balance, which was the subject of the first lien at a rate of 18% annual. See SBG CG/SG late-filed Exhibit 3, SBG CG/SG late-filed Exhibit 4, PGW Exhibits 1B, 2B, 3B, 4B, and 5B, see also Complainants’ Main Brief, at 38. [[24]](#footnote-24) It is the Complainants’ position that, if PGW has applied the incorrect interest rate (18% annual instead of 6% annual) on the late payment charges accrued on the outstanding balance which was the subject of the first lien, then the outstanding balance which became the subject of the second lien was also incorrect.

On March 27, 2015, I issued a Briefing Order in these consolidated matters asking the parties to brief, *inter alia*, the following questions:

1. *Does the Commission have jurisdiction to determine whether PGW has applied the correct interest rate in late payment charges to the portion of an outstanding balance that is also the subject of a lien filed by the City of Philadelphia? Provide legal grounds for your position.*
2. *Explain whether or not a lien filed by the City of Philadelphia for unpaid gas service is considered a judgement under 42 Pa.C.S. § 8101? If yes, explain when a lien becomes a judgement. Provide legal grounds for your position.*
3. *What is the correct interest rate in late payment charges that should be applied on that portion of an outstanding balance which is the subject of a municipal lien (or unpaid gas service ) filed by the City of Philadelphia? Provide legal grounds for you position.*

In their Main and Reply Briefs, the Complainants answered the first question in the affirmative. See Complainants’ Main Brief, at 37-38, Complainants’ Reply Brief, at 14. They argued that the Commission not only has jurisdiction to examine PGW’s application of the interest rate applied to outstanding balances that are the subject of municipal liens, but it also has a compelling duty to act in the public interest to ensure that PGW’s accounting practices are just and reasonable and comport with the regulations and Pennsylvania state law. Complainants’ Reply Brief at 14. According to the Complainants, the Pennsylvania legislature has granted the Commission the express authority to regulate municipally owned natural gas distribution operations, such as PGW. 66 Pa.C.S. § 2212(a)-(b). The Commission has direct authority over PGW’s utility rates, billing and collection practices and ensures that the utility does not usurp its bounds and exceeds its Tariff. Complainants’ Reply Brief, at 16. Pursuant to 52 Pa.Code § 56.1, PGW has an obligation to effectively manage customer accounts to prevent the accumulation of large, unmanageable arrearages. It has an obligation of good faith, honesty and fair dealing in the performance of its duties. Complainants’ Reply Brief, at 16.

The Complainants answered in the affirmative to the question whether or not a lien filed by the City of Philadelphia for unpaid gas service is considered a judgement under 42 Pa.C.S. § 8101. See Complainants’ Main Brief, at 39-40, Complainants’ Reply Brief, at 17-18. The Complainants rely on the Pennsylvania Rules of Civil Procedure on judgements and liens, Pa.R.C.P. Rule 3001, 3021, 3022, 3023, and Section 8142(e) of the Judicial Code, 42 Pa.C.S. § 8142(e) for their position that a judgement become a lien on real property when it is entered in the Judgment Index by the court’s prothonotary. Complainants’ Main Brief, at 39-40. They also argue that, pursuant to the Municipal Liens Act, 53 P.S. §7106(b), all lawfully imposed or assessed municipal claims are liens on the property by operation of law. Complainants’ Main Brief, at 40. Based on these two legal premises, they conclude that “in accordance with statutory rules of construct in the Pennsylvania Rules of Civil Procedure … **a lien imposed by the City of Philadelphia constitutes a judgment which is entered by operation of law with the prothonotary upon proper docketing, much like a child support judgment.**” *Id.* (Emphasis added). They reiterate their position in their Reply Brief stating, “[A municipal claim] shall be a lien only against the said property after the lien has been docketed by the prothonotary. The docketing of the lien shall be given the effect of a judgment against the said property only with the respect to which the claim is filed as a lien. The prothonotary shall enter the claim the judgment index.” Complainants’ Reply Brief, at 17-18, citing 53 P.S. §7106(b).

The Complainants’ answer to the third questions relied on the Superior Court’s ruling on *Equitable Gas v. Wade*, 812 A.2d 715 (Pa.Super. 2002), which held that once Equitable Gas obtained a final judgment in the Court of Common Pleas on an outstanding balance for gas service, it was no longer entitled to charge 18% per year pursuant to the tariff. Instead, it could only charge the legal rate of interest of 6% annual in accordance with 42 Pa. C.S. § 8101 (concerning interest on judgements). Complainants’ Main Brief, at 42-47. In response to PGW’s Main Brief, the Complainants conceded that the interest rate assessed as late payment charges on the liened amount should be 10% and not 6% annually. Complainants’ Reply Brief, at 17. The Complainants’ position, however, remained unchanged concerning the application of the 18% interest rate on the liened amounts.

PGW’s interest in securing indebtedness is protected because the lien serves as a judgment against the property for which they have the right to foreclose upon and be made whole and recoup their monies owed.

Furthermore, PGW exercised their remedy to recoup on it judgments entered against the property interest by instituting foreclosure proceedings on Complainant’s properties with the Court of Common Please. The matters are still pending before the court until the Commission decides on the underlying accounts issues presented in these consolidated cases.

While the foreclosure proceedings are stayed before the Court of Common Pleas, Complainants accounts continue to accrue pre-judgment interest. Therefore, it is disingenuous for PGW to assert that the lien is not a judgment, but rather a marker as alleged by PGW…. If the judgment were only a marker, then PGW would not be able to enter the judgment by operation of law with an instant property right vested for the creditor. It is fundamentally unfair to institute an action in foreclosure to deprive a property owner of his property and still collect pre-judgment interest when the judgment creditor has the remedy at law to take the property securing the amount of the indebtedness. It amounts to a double dip and unjust enrichment.

Complainants’ Main Brief, at 43.

In its Main and Reply Briefs, PGW addressed the above questions out of order. First, PGW argued that 42 Pa.C.S.A. § 8101 does not control the imposition of interest on municipal liens.[[25]](#footnote-25) 42 Pa.C.S.A. § 8101 states,

§ 8101. Interest on judgments.

Except as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.

(Emphasis added). PGW further argues that the imposition of interest on a municipal lien is governed by another statute. In fact, PGW states that the Municipal Lien Act governs all aspects of liens filed for municipal claims under the act. PGW’s Main Brief, PGW Reply Brief, at 12-14. According to 53 P.S. § 7143, the legislature has enabled the charges of interest on municipal liens to be capped at the maximum rate of interest to be charged on a lien for a municipal claim at a rate not to exceed 10%.

The Municipal Lien Act at 53 P.S. § 7143 states in pertinent part,

Interest as determined by the municipality at a rate not to exceed ten per cent per annum shall be collectible on all municipal claims from the date of the completion of the work after it is filed as a lien, and on claims for taxes, water rents or rates, lighting rates, or sewer rates from the date of the filing of the lien therefor: Provided, however, That after the effective date of this amendatory act where municipal claims are filed arising out of a municipal project which required the municipality to issue bonds to finance the project interest shall be collectible on such claims at the rate of interest of the bond issue or at the rate of twelve per cent per annum, whichever is less. Where the provisions of any other act relating to claims for taxes, water rents or rates, lighting rates, power rates, sewer rents or rates or for any other type of municipal claim or lien utilizes the procedures provided in this act and where the provisions of such other act establishes a different rate of interest for such claims or liens, the maximum rate of interest of ten per cent per annum as provided for in this section shall be applicable to the claims and liens provided for under such other acts….

53 P.S. § 7143 (Emphasis added). PGW argues that, since the question of the applicable interest rate is governed by the Municipal Liens Act, it follows that the question of the applicable interest rate is also a question for the Court of Common Pleas and outside of the Commission’s jurisdiction. PGW’s Main Brief, PGW Reply Brief, at 15-16.

Next, PGW explains that it is not charging LPC’s on all amounts that are the subject of a municipal lien, but rather only to those amounts that are owed on an active PGW account. According to PGW, “**The fact that the amount was liened for non-payment should have no effect on the assessment of LPCs**.”[[26]](#footnote-26) PGW’s Main Brief, PGW Reply Brief, at 16. (Emphasis added).

I agree with PGW’s position that the Commission does not have jurisdiction to decide whether the correct rate of interest on a municipal lien should be set at 6% or 10%. That determination would require this Commissions to interpret statutes that fall outside its area of purview. However, it is within this Commission’s powers to determine whether PGW has correctly calculated the outstanding balance in its customers’ accounts, and that only the correct outstanding debt claims receive the protection of the Public Utility Code, the Commission’s regulations and orders.

It is an undisputed fact in these consolidated matters that, as part of its regular practice, PGW does not distinguish in its application of the late payment charges between an outstanding balance that is the subject of a municipal lien and one that is not. As stated *supra*, according to PGW “The fact that the amount was liened for non-payment should have no effect on the assessment of LPCs.” PGW’s Main Brief, PGW Reply Brief, at 16. Through this practice PGW is maintaining two separate claims on the same amount of outstanding debt: one claim under the PGW’s Tariff and Commission regulation at 52 Pa.Code § 56.22 (reflected in its imposition of 18% interests rate of late payment charges on the outstanding balance or debt), and a second claim under the Municipal Lien Act in the form of a lien, an *in rem* judgement against the Complainants’ property. Relying on the doctrine of “merger” and the Restatement (Second) of Judgements § 18, courts in Pennsylvania have already held such a practice to be illegal.

In *Equitable Gas v. Wade*, 812 A.2d 715 (Pa.Super. 2002), Equitable Gas sought judgment in the amount of $ 5,992.43 for unpaid gas service, in addition to pre-judgment interest and post-judgment interest both at the rate of 18% annual pursuant to its tariff with the Pennsylvania Public Utility Commission. The Superior Court of Pennsylvania held that the provisions of 42 Pa.C.S.A. § 8101 (which generally sets the legal rate of post-judgment interest at 6% annual) preempted both the Commission’s regulation on late payment charges, 52 Pa.Code § 56.22, and Equitable Gas’ tariff on same.[[27]](#footnote-27)

The Court also held that Equitable Gas “was certainly entitled to charge 18% per year pursuant to the tariff until and unless it obtained a final judgment in the Court of Common Pleas. At that point, the doctrine of merger applies.” The Court explained the doctrine as follows:

"When a valid and final personal judgment is rendered in favor of the plaintiff, the plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment." Restatement (Second) of Judgments § 18. After the plaintiff recovers a final judgment, his original claim is extinguished and rights upon the judgment are substituted for it. "The plaintiff's original claim is said to be 'merged' in the judgment." Restatement (Second) of Judgments § 18 comment a. *Kessler v. Old Guard Mut. Ins. Co.*, 391 Pa.Super. 175, 570 A.2d 569, 573 (Pa.Super. 1990).

Under this doctrine, [Equitable Gas’] choice to take recourse with the court system required it to be governed by the rules governing actions at law, including statutory provisions governing post-judgment interest. Under the merger doctrine, after [Equitable Gas] recovered a final judgment, it may no longer pursue "part of the claim" (*i.e.*, a claim for 18% interest from the date of judgment until the bill is paid). Because the judgment extinguishes any claims with respect to the overdue bill, and because the only legal rate of interest on a judgment is set forth at § 8101, we conclude that the trial court did not err in dismissing [Equitable Gas’] claim for 18% interest after the judgment was entered.

*Wade*, 718-19. (Emphasis added). The only differences between *Wade* and the present consolidated Complaints are that: (1) Equitable Gas is a private company whereas PGW is a municipally owned one; and (2) Wade’s account with Equitable Gas was finalized, whereas the Complainants’ gas accounts that were or still are the subject of municipal liens are active. The former is not relevant to the Commission’s ruling on these consolidated matters because, as PGW argued, this Commission has no jurisdiction to determine whether 42 Pa.C.S.A. § 8101 or 53 P.S. § 7143 should apply to post-judgment interest on the municipal liens.

The latter difference also has no bearing on the Commission’s ruling on these consolidated matters because the status of the account does not change the fact that PGW maintains two separate claims on the same amount of outstanding debt. By doing so, PGW improperly creates and avails itself of the option to apply the high annual interest rate of 18% provided for by Commission regulation and PGW’s own Commission approved tariff. The incorrect treatment of liened indebted amounts leads to inflated late payment charges, which in turn are included in incorrect and inflated outstanding balances, which in their turn result in incorrectly calculated future liens.

In its briefs, PGW did not address the question of when a municipal lien becomes a judgment. Nor did it counter the Complainants’ argument that a lien imposed by the City of Philadelphia constitutes a judgment which is entered by operation of law with the prothonotary upon proper docketing. Pursuant to the rulings of a court of appropriate jurisdiction, PGW’s claim on an outstanding debt under the Public Utility Code, 66 Pa.C.S. §§ 101, et seq., is extinguished the moment a municipal lien on that same outstanding debt is filed with Court of Common Pleas of the City of Philadelphia and docketed by the Court’s prothonotary.

In these consolidated Complaints, Complainants have entered evidence in the record showing that between July 9, 2009, and May 23, 2012, 15 separate municipal liens were docketed against the property owned by Colonial Garden Realty Co., L.P. for unpaid gas service. PGW assessed $94,626.23 in late payment charges at a rate of 18% annual on the outstanding balance or debt represented by these 15 liens. SBG CG/SG late-filed Exhibit 4.

Complainants have entered evidence in the record showing that between January 9, 2010, and July 10, 2012, 24 separate municipal liens were docketed against the property owned by Simon Garden Realty Co., L.P. for unpaid gas service. PGW assessed $471,351.38 in late payment charges at a rate of 18% annual on the outstanding balance or debt represented by these 24 liens. SBG CG/SG late-filed Exhibit 4.

In accordance with the discussion above, PGW has improperly assessed pre-judgment or pre-lien interest rates to the liened amounts. While it is outside this Commission’s jurisdiction to determine the post-judgment or the post-lien interest rate to be applied on the liened amounts, PGW must refund $94,626.23 to Complainant Colonial Garden Realty Co., L.P. and $471,351.38 to Complainant Simon Garden Realty Co., L.P. These amounts represent late payment charges improperly assessed within the statute of limitations period for these consolidated Complaints, 66 Pa.C.S. § 3314(a), and were satisfied or paid by the Complainants at different points in time. See SBG CG/SG late-filed Exhibit 4. Consequently, the refunds must comply with Public Utility Code, Section 1312(a), 66 Pa. C.S. § 1312(a), which governs refunds.

Section 1312(a) provides in pertinent part as follows:

If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was...in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron...within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment...

The legal rate of interest is fixed by law at 6 percent. Act of January 30, 1974, P.L. 13, No. 6, § 202, 41 P.S. § 202.” *The Electric Materials Company v. North East Heat & Light Company*, Docket No. C-00913544, 1992 Pa. PUC LEXIS 175.

1. **Civil Penalty**

It is every public utility’s duty to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities” in conformity with the regulations and orders of the Commission. 66 Pa.C.S.A. § 1501. “The term "service" is [u]sed in its broadest and most inclusive sense, [and] includes any and all acts done, rendered or performed and any and all things furnished or supplied, and any and all facilities used, furnished or supplied...in the performances of their duties...." 66 Pa.C.S. § 102. The statutory definition of "service" is to be broadly construed. *Country Place Waste Treatment Co., Inc. v. Pa. Public Utility Commission*, 654 A.2d 72 (Pa.Cmwlth. 1995). Thus, the term "service" is clearly broad enough to include the billing and collection practices of a public utility, and also the conduct of its employees towards its customers.

PGW’s application of partial payments out of order so that the most recent late payment charges are paid before the gas charges due for prior service constitutes a failure to provide adequate and reasonable service in accordance with 66 Pa.C.S.A. § 1501, as well as a violation of 52 Pa.Code 56.22. In addition, PGW’s improper inclusion of liened amounts in the outstanding balance under PGW’s tariff also constitutes a failure to provide adequate and reasonable service in accordance with 66 Pa.C.S.A. § 1501.

Under Public Utility Code Sections 3301(a) and (b), “the Commission may levy a fine of up to $1,000 per day for continuing violations of the Public Utility Code.” 66 Pa.C.S.A. § 3301.

The Commission has set forth, in a statement of policy, the factors and standards for evaluating proceedings involving violations of the Public Utility Code for purposes of determining appropriate civil penalty amounts. See, 52 Pa.Code § 69.1201(c). These factors and standards are as follows:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision.  The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa.Code § 69.1201(c). These factors, relative to these consolidated proceedings, are examined below.

 The first factor is whether the conduct was of a serious nature. There is not sufficient evidence on the record to conclude that PGW’s application of partial payments in the manner described *supra,* at 40-51, was willful, fraudulent or a misrepresentation. By all accounts, the practice appears to be the remnant of a time before PGW came under the Commission’s jurisdiction. Ms. Rizzo testified that, with the exception of late payment charges, PGW applies partial payments to the oldest basic charges first, then the newer ones. Tr. 872. Therefore, the practice, which Mr. Colton described as a “reordering of payments,” is more of an administrative or technical error than a willful conduct. The same cannot be said about PGW’s improper inclusion of liened amounts in Complainants’ outstanding balance under PGW’s tariff. PGW’s arguments, both oral and in writing, in defense of this practice indicate a willful choice on the part of the Company to improperly place the liened amounts under the protection and terms of its Commission-approved tariff instead of treating it as an in rem judgment under the appropriate law.

The second factor is whether the consequences of the utility’s conduct were of a serious nature resulting in damages to property or injury to persons. There is no evidence that PGW’s failure to comply with 66 Pa.C.S.A § 1501 had any consequences of a serious nature. There were also no damages to property or injury to persons.

The third factor is whether the offending conduct was intentional or negligent. There is no substantial evidence in the record to indicate that PGW’s “reordering of payments” was an intentional billing practice. On the other hand, the application of the 18% interest rate to in rem judgment of the municipal lien is a highly profitable practice for PGW, which can hardly go unnoticed in the Company’s accounting books and cannot be explained by negligence. See SBG CG/SG late-filed Exhibit 4. This is even more so, when one considers that *Equitable Gas v. Wade*, 812 A.2d 715 (Pa.Super. 2002) on which the Complainants base their challenge of the 18% late payment charge applied to liened amounts and on which I base my decision on the same issue appears on every annotated version of 52 Pa.Code § 56.22. Complainants Main Brief, at 43-44.

The fourth factor is whether the utility has modified its internal practices and procedures to address the offensive conduct at issue to deter and prevent similar conduct in the future. In these cases, PGW strongly defended both practices which this Initial Decision finds to be in violation of Commission’s statutes and regulations.

 The fifth factor is the number of customers affected and the duration of the violation. Both practices in question are applied on all PGW’s residential and small business customers. However, the only time PGW would be in violation of 52 Pa.Code § 56.22 is when a customer has not paid his or her gas bill for two or more consecutive months and send a partial payment which is more than the most recent late payment charge. Also, PGW is in violation of 66 Pa.C.S. § 1501 with regard to the application of the 18% late payment charge on the liened amounts only in instances when the liened amount is part of an active account.

 The sixth factor is the compliance history of the offender, PGW. The record does not include a history of PGW’s past offenses. Neither party provided evidence of a compliance history.

 The seventh factor is whether the actions of the regulated entity were cooperative or discordant with a Commission investigation. This standard is not applicable to this proceeding because the Commission did not conduct an investigation.

The eighth, ninth and tenth factors are inter-related in this case and they are, respectively: the amount of a civil penalty required to deter future violations; prior Commission decisions in similar cases; and the catch-all “other relevant factors.”

These consolidated Complaints are cases of first impression with regard to the two issues concerning the late payment charges described above. It was the Complainants’ unique circumstances and payment history which allowed for these two issues to come to light and be crystalized. Under these circumstances, I conclude that a civil penalty in the amount of $2,000 is appropriate for PGW’s violation of 52 Pa.Code § 56.22. However, a civil penalty in the amount of $25,000 is appropriate to deter PGW from applying its tariff and rates to liened indebted amounts – an improper practice which has proved highly profitable for the Company. This civil penalty is in the public interest for reasons set forth above.

For the reasons stated above, the Respondent shall issue the following credits and refunds to the Complainants’ accounts: PGW shall credit the Colonial Garden Account # 6128000245, SA#1375369694 in the amount of $281.36; PGW shall credit the Colonial Garden Account # 6128000245, SA#4018739567 in the amount of $218.96; PGW must refund $94,626.23 to Complainant Colonial Garden Realty Co., L.P., Account # 6128000245, plus interest at the legal rate from the date of each such excessive payment; PGW must refund $471,351.38 to Complainant Simon Garden Realty Co., L.P., Account # 539547187, plus interest at the legal rate from the date of each such excessive payment.

Within 30 days of the Commission's Final Order in this case, PGW shall pay a civil penalty in the amount of $ 27,000.00 by sending a certified check or money order payable to the Commonwealth of Pennsylvania. In addition, PGW shall cease and desist from further violations of the Public Utility Code, 66 Pa.C.S.A. §§ 101 *et seq.,* and the regulations of the Pennsylvania Public Utility Commission, 52 Pa.Code §§ 1.1 *et seq*.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S.A. § 701.

2. The Complainant seeking affirmative relief from the Commission has the burden of proving the Complaint allegations by producing evidence which established material facts by a preponderance of the evidence. 66 Pa.C.S.A. § 332(a).

3. To satisfy the burden of proof, the Complainant must demonstrate that the Respondent was responsible for the problems alleged in the Complaint through a violation of the Code or a regulation or order of the Commission. This must be shown by a preponderance of the evidence. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990).

4. Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n,* 578 A.2d 600 (Pa.Cmwlth. 1990) *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992).

5. The Commission’s decision must be supported by “substantial evidence,” which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere “trace of evidence or a suspicion of the existence of a fact” is insufficient. *Norfolk and Western Railway Co. v. Pa. Pub. Util. Comm’n*, 489 Pa. 109, 413 A.2d 1037 (1980).

6. No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose. 66 Pa.C.S. § 3314(a).

7. The statute of limitations can be tolled by the filing of an informal complaint with the Commission, and by the doctrine of equitable estoppel. *Duquesne Light Co. v. Pa. PUC*, 611 A.2d 370 (Pa.Cmwlth. 1992), *Lester Ely v. Pennsylvania American Water Compan*y, C-20055616 (Order entered July 10, 2006).

8. In establishing whether a “high bill” has been demonstrated, while the accuracy of the meter is an important factor in resolving billing disputes, the Commission will also consider the billing history of the Complainant; any change in the number of occupants residing at the household; the potential for energy utilization; and any other relevant facts or circumstances that are brought to light during the complaint proceeding. *Waldron v. Philadelphia Electric Co.,* 54 Pa. PUC 98, 100 (1980).

9. Utilities are expressly permitted to issue make-up bills for previously unbilled utility service pursuant to 52 Pa.Code § 56.14.

10. In the absence of theft of service or the complainant's culpability, the amount of time that a utility may rebill is limited to four years. See 66 Pa.C.S. § 1312, [*Angie's Bar v. Duquesne Light Company,* 72 Pa. PUC 213, 217 (1990),](https://www.lexis.com/research/buttonTFLink?_m=547c132556b0e0eaef81904a99c36d6f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20734%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=9&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b72%20Pa.%20PUC%20213%2cat%20217%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=2&_startdoc=1&wchp=dGLbVzt-zSkAz&_md5=328017b0fdfe7574c49c5b507e10101d) [*Pa. Pub. Util. Comm'n. v. Duquesne Light Company,* 50 Pa. PUC 555 (1977).](https://www.lexis.com/research/buttonTFLink?_m=547c132556b0e0eaef81904a99c36d6f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20PUC%20LEXIS%20734%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=10&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b50%20Pa.%20PUC%20555%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=2&_startdoc=1&wchp=dGLbVzt-zSkAz&_md5=1ae32be364ebd1d51e43b224f0febdfc)

11. Every public utility is prohibited from levying or assessing a late charge or penalty on any overdue public utility bill in an amount which exceeds 1.5% interest per month on the overdue balance of the bill. These charges are to be calculated on the overdue portions of the bill only. The interest rate, when annualized, may not exceed 18% simple interest per annum. 52 Pa.Code § 56.22(a).

12. In the absence of written instructions, a disputed bill or a payment agreement, payments received by a public utility which are insufficient to pay a balance due both for prior service and for service billed during the current billing period shall first be applied to the balance due for prior service. 52 Pa.Code § 56.24.

13. Late payment charges are defined and identified as basic charges, along with commodity charges, distribution charges, customer service charges, reconnection fees, gas cost adjustment charges, interstate transition cost surcharges, taxes and security deposits. 52 Pa.Code §§ 56.2 and 62.74.

14. The Commission does not have jurisdiction over the placement of municipal liens. *See*, *Josephine Pitt v. Philadelphia Gas Works*, Docket No. C-2009-2140025 (Order entered April 29, 2010).

15. The Commission does not have jurisdiction to decide the rate of interest on a municipal lien.

16. While the Commission lacks subject matter jurisdiction over the placement of municipal liens, it retains jurisdiction over the utility’s service and billing practices reflected in the outstanding balance on which the municipal lien was filed. See *See Dennis J. Vicario v. Philadelphia Gas Works*, C-2010-2213955 (Opinion and Order entered November 16, 2011).

17. Once a utility has obtained a final judgment in the Court of Common Pleas on an outstanding balance for utility service, it is no longer entitled to charge 18% per year pursuant to its Commission-approved tariff. Instead, it could only charge the legal rate of interest of 6% annual in accordance with 42 Pa. C.S. § 8101 (concerning interest on judgements). *Equitable Gas v. Wade*, 812 A.2d 715 (Pa.Super. 2002).

18. The provisions of 42 Pa.C.S.A. § 8101 (which generally sets the legal rate of post-judgment interest at 6% annual) preempt both the Commission’s regulation on late payment charges, 52 Pa.Code § 56.22, and a utility’s tariff on same. *Equitable Gas v. Wade*, 812 A.2d 715 (Pa.Super. 2002).

19. When a valid and final personal judgment is rendered in favor of the plaintiff, the plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment. Restatement (Second) of Judgments § 18.

20. After the plaintiff recovers a final judgment, his original claim is extinguished and rights upon the judgment are substituted for it. "The plaintiff's original claim is said to be 'merged' in the judgment." Restatement (Second) of Judgments § 18 comment a. *Kessler v. Old Guard Mut. Ins. Co.*, 391 Pa.Super. 175, 570 A.2d 569, 573 (Pa.Super. 1990).

21. If, in any proceeding involving rates, the Commission shall determine that any rate received by a public utility was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. 66 Pa. C.S. § 1312(a).

22. The legal rate of interest is fixed by law at 6 percent. Act of January 30, 1974, P.L. 13, No. 6, § 202, 41 P.S. § 202.” *The Electric Materials Company v. North East Heat & Light Company*, Docket No. C-00913544, 1992 Pa. PUC LEXIS 175.

23. It is every public utility’s duty to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities” in conformity with the regulations and orders of the Commission. 66 Pa.C.S.A. § 1501.

24. The term "service" is used in its broadest and most inclusive sense, and includes any and all acts done, rendered or performed and any and all things furnished or supplied, and any and all facilities used, furnished or supplied in the performances of their duties. 66 Pa.C.S. § 102.

25. The Commission may levy a fine of up to $1,000 per day for continuing violations of the Public Utility Code. 66 Pa.C.S.A. § 3301.

26. The formal consolidated Complaints are sustained, in part and denied, in part pursuant to the preceding Discussion and Conclusions.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Complainants’ late-filed Exhibits 3, 4, 8, 9, and 10 are admitted into the record in these consolidated matters.

2. That the consolidated Complaints of *SBG Management Services, Inc. / Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183; and *SBG Management Services, Inc. / Simon Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304324, shall be dismissed, in part, with regard to the high billing disputes raised in them.

3. That Philadelphia Gas Works shall credit the Colonial Garden Realty Co., L.P.’s Account # 6128000245, SA # 1375369694, in the amount of $281.36.

4. That Philadelphia Gas Works shall credit the Colonial Garden Realty Co., L.P.’s Account # 6128000245, SA#4018739567, in the amount of $218.96.

5. That Philadelphia Gas Works shall refund $94,626.23 to Colonial Garden Realty Co., L.P., Account # 6128000245, plus interest at the legal rate from the date of each excessive payment.

6. That Philadelphia Gas Works shall refund $471,351.38 to Simon Garden Realty Co., L.P., Account # 539547187, plus interest at the legal rate from the date of each excessive payment.

7. That Philadelphia Gas Works is hereby assessed the penalty of Twenty-seven Thousand Dollars ($27,000.00) for its repeated violations of the Public Utility Code and the Commissions’ regulations.

8. That Philadelphia Gas Works shall pay a civil penalty in the amount of Twenty-seven Thousand Dollars ($27,000.00) by sending a certified check or money order payable to the Commonwealth of Pennsylvania, within thirty (30) days from the entry of the Final Commission Order to:

Secretary

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

9. That Philadelphia Gas Works cease and desist from further violations of the Public Utility Code, 66 Pa.C.S.A. §§ 101 *et seq*., and the regulations of the Pennsylvania Public Utility Commission, 52 Pa.Code §§ 1.1 *et seq*.

10. That these consolidated proceedings be marked closed.

Dated: August 21, 2015 /s/

 Eranda Vero

 Administrative Law Judge

1. Like the original five consolidated Complaints, each of the Amended Complaints alleges improper billing on the part of PGW and raises quality of service issues. They have identical parties and involve common questions of both law and fact. For these reasons, the Amended Complaints were left consolidated in the two groupings determined at the December 6, 2012 Prehearing Conference. [↑](#footnote-ref-1)
2. For a detailed history of discovery proceedings during this period, please see my Discovery Order dated July 23, 2014, as well as my Orders dated October 28, 2014, October 29, 2013, November 3, 2014, and December 1, 2014, on various discovery motions filed by the Complainants in these consolidated matters. [↑](#footnote-ref-2)
3. On March 17, 2015, Ms. Ross filed a Petition for Leave to Withdraw the Complaint of SBG Management Services Inc. / Colonial Garden Realty Co., L.P. against Philadelphia Gas Works stating that the complainant no longer wished to pursue its claims against the Respondent. By letter dated March 23, 2015, the Respondent confirmed that it had no objections to the Complainant’s Petition. On June 24, 2015, I issued an Initial Decision granting SBG Management Services Inc./Colonial Garden Realty Co., LP’s Petition to Withdraw its formal Complaint against Philadelphia Gas Works filed November 2, 2014, at Docket No. C-2012-2334253. [↑](#footnote-ref-3)
4. See Tr. 481-84, 790. See also Complainants Main Brief, at 9 (“The pivotal issue in [these consolidated cases] involves PGW’s underlying payment posting reordering accounting scheme and accuracy of the interest rate and late payment charges imposed on all account, and PGW’s pricing decision to ignore application of the legal statutory post-judgment interest rate of 6% simple per annum to unpaid sums filed as lien judgment by the PGW with the Court under the authority of the Municipal Claim and Tax Lien Law…)” [↑](#footnote-ref-4)
5. There is no SBG CG/SG Exhibit 7. [↑](#footnote-ref-5)
6. These testimonies were provided during the initial evidentiary hearings in the consolidated matters of *SBG Management Services, Inc. / Elrea Garden Realty Co, L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304167; *SBG Management Services, Inc. / Fairmount Manor Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304215; and *SBG Management Services, Inc. / Marshall Square Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304303. [↑](#footnote-ref-6)
7. Heating Degree Day (HDD) - A unit measuring the extent to which the outdoor mean (average of maximum and minimum) daily dry-bulb temperature falls below (in the case of heating) or rises above (in the case of cooling) an assumed base. The base is normally taken as 65°F for heating and for cooling unless otherwise designated. One degree-day is counted for each degree of deficiency below (for heating) or excess over (for cooling) the assumed base, for each calendar day on which such deficiency or excess occurs. James H. Cawley and Norman Kennard, *Rate Case Handbook, A Guide to Utility Ratemaking before the Pennsylvania Public Utility Commission*, Glossary of Terms, Appendix Q (Pa. PUC 1983). [↑](#footnote-ref-7)
8. The first sentence of paragraph three in Colonial Amended Complaint reads “SBG started contacting PGW about the accounts associated with the Complex listed above in or about 2001.” The same sentence in Simon Amended Complainant reads “2003”. Besides these sentences, there is nothing on the face of these two Amended Complainants which raises concerns with regard to the statute of limitations. [↑](#footnote-ref-8)
9. There was no bill issued in November of 2008 because PGW’s billing cycle caused two bills to be issued in October of 2008. [↑](#footnote-ref-9)
10. *"Rate."* --Every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility, or contract carrier by motor vehicle, made, demanded, or received for any service within this part, offered, rendered, or furnished by such public utility, or contract carrier by motor vehicle, whether in currency, legal tender, or evidence thereof, in kind, in services or in any other medium or manner whatsoever, and whether received directly or indirectly, and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental.

66 Pa.C.S. § 102. [↑](#footnote-ref-10)
11. § 1301. Rates to be just and reasonable.

 Every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable… [↑](#footnote-ref-11)
12. Late payment charges assessed in September, October and November 2011 were $1,464.84, $1,450.16, and $1,464.84, respectively, or roughly $4,380 total. [↑](#footnote-ref-12)
13. $4,717.16 - $854.82 - $1,464.84-$978.82 = $1,419.28. [↑](#footnote-ref-13)
14. $871.04 / ($871.04 + $1,424.84) = 0.38 [↑](#footnote-ref-14)
15. $1,464.84 + ($1,419.28 x 0.62) = $2,344.79 [↑](#footnote-ref-15)
16. $854.82 + $978.82 + ($1,419.28 x 0.38) = $2,372.96 [↑](#footnote-ref-16)
17. ($70.76 x 8) – ($35.59 x 8) = $281.36. [↑](#footnote-ref-17)
18. Late payment charges assessed in September, October and November 2011 were $1,464.84, $1,450.16, and $1,464.84, respectively, or roughly $4,380 total. [↑](#footnote-ref-18)
19. $6,358.33 - $4,125.80 - $1,119.60 = $1,112.93 [↑](#footnote-ref-19)
20. $668.57 / ($668.57 + $1,109.57) = 0.37 [↑](#footnote-ref-20)
21. $1,119.6 + $701.93 = $1,821.53 [↑](#footnote-ref-21)
22. $4,125.8 + $411 = $4,536.8 [↑](#footnote-ref-22)
23. ($95.37 - $68) x 8 = $218.96 [↑](#footnote-ref-23)
24. PGW in the ordinary course of its daily business activities files unpaid gas debt with the City of Philadelphia. If the liened debts are unpaid, PGW readily admits its practice is to continue to charge finance charges (late payment fees) on the outstanding balance of the account at a rate of 1.5 % monthly until they are satisfied. The liened indebted amount remains included in the customer’s outstanding balance and, as new charges accrue, the entire balance is subject to the 1.5% monthly finance charge, if the amounts remain unpaid.

Complainants’ Main Brief, at 38. [↑](#footnote-ref-24)
25. The pages of PGW’s Main Brief are not numbered. [↑](#footnote-ref-25)
26. I note that PGW does not address in its briefs the question of when a municipal lien becomes a judgment, nor does it reiterate its argument that a lien is simply a “marker.” [↑](#footnote-ref-26)
27. “…regulation and the tariff were not enacted by the Pennsylvania Legislature. Rather, both were issued by the Pennsylvania Public Utility Commission.” *Wade*, at 718. [↑](#footnote-ref-27)