**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

|  |  |
| --- | --- |
|  | Public Meeting held December 8, 2016 |
|  |  |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman  John F. Coleman, Jr.  Robert F. Powelson  David W. Sweet |  |

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

**OPINION AND ORDER**

TABLE OF CONTENTS

[I. Introduction 1](#_Toc468871948)

[II. Background 4](#_Toc468871949)

[III. History of the Proceedings 8](#_Toc468871950)

[A. Complainant Colonial Garden Realty Co., L.P. – Docket No. C-2012-2304183 – Account No. 6128000245 8](#_Toc468871951)

[B. Complainant Simon Garden Realty Co., L.P. - Docket No. C-2012-2304324 23](#_Toc468871952)

[IV. Discussion 26](#_Toc468871953)

[A. ALJ’s Recommendations 26](#_Toc468871954)

[1. Burden of Proof 27](#_Toc468871955)

[2. Claims Precluded Based on Statute of Limitations 28](#_Toc468871956)

[a. Colonial Garden 29](#_Toc468871957)

[b. Simon Garden 32](#_Toc468871958)

[3. Late payment charges – Application of partial payments 33](#_Toc468871959)

[4. Late Payment Charges on Outstanding Balances That Were the Subject of Municipal Liens For Unpaid Gas Service 45](#_Toc468871960)

[5. Civil Penalty for Violations of the Code and Commission Regulations 50](#_Toc468871961)

[B. Exceptions, Replies and Dispositions 51](#_Toc468871962)

[1. PGW Introduction to Exceptions, Exception No. 1 and Exception No. 2 51](#_Toc468871963)

[a. Positions of the Parties 51](#_Toc468871964)

[b. Disposition (Introduction; Exception Nos. 1 and 2) 58](#_Toc468871965)

[(1) Request to Strike Exceptions and Request for Sanctions 59](#_Toc468871966)

[(2) The Commission Has Inherent Authority to Determine the Scope of its Jurisdiction in the First Instance 60](#_Toc468871967)

[(3) Legal Process to Collect on a Debt for Unpaid Utility Service Preempts Applicability of a Commission-Approved Tariff for the Same Debt 61](#_Toc468871968)

[(4) Modification of the Reasoning Supporting the Conclusions that a Municipal Lien Has a Preemptive Effect on a Commission Tariff 70](#_Toc468871969)

[(5) *Equitable Gas v. Wade*, *supra*, and *Gasparro*, *supra*,Counsel in Favor of Affirmance 74](#_Toc468871970)

[(6) Policy Considerations Do Not Support PGW’s Position 82](#_Toc468871971)

[2. PGW Exception No. 3 86](#_Toc468871972)

[a. Positions of the Parties 86](#_Toc468871973)

[b. Disposition 89](#_Toc468871974)

[3. PGW Exception No. 4 96](#_Toc468871975)

[a. Positions of the Parties 96](#_Toc468871976)

[b. Disposition 97](#_Toc468871977)

[4. PGW Exception No. 5 100](#_Toc468871978)

[a. Positions of the Parties 100](#_Toc468871979)

[b. Disposition 101](#_Toc468871980)

[V. CONCLUSION 109](#_Toc468871981)

# I. Introduction

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Philadelphia Gas Works (PGW or Company) filed on October 7, 2015, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Eranda Vero, issued September 17, 2015. Replies to the Exceptions were received from SBG Management Services, Inc./Colonial Garden Realty Co., L.P., and SBG Management Services, Inc./Simon Garden Realty Co., L.P., (collectively, SBG) on October 19, 2015. By letter of October 6, 2015, SBG advised that it would not file Exceptions to the Initial Decision.

This proceeding involves five (5) formal complaints (Complaints) filed by certain large commercial customers of PGW challenging, *inter alia*, the accuracy of utility bills and the lawfulness of PGW’s billing methodology for the gas service PGW provides.[[1]](#footnote-1) The Complaints were consolidated by Order of the presiding ALJ dated July 6, 2012. *See* I.D. at 3. By Order dated July 24, 2013, the five proceedings were further divided into two discrete groups for adjudication and disposition purposes owing to the numerous transactions involved and common questions of law and fact presented. I.D. at 4-5. As explained in more detail below, SBG is a designated real estate management agent for the PGW commercial customers who are the Complainants.

The present group of cases for disposition involves Colonial Garden Realty Co., L.P. (Colonial Garden) and Simon Garden Realty Co., L.P., (Simon Garden). In these complaint proceedings, the Initial Decision dismissed the high billing disputes raised in the Complaints due to the running of the Public Utility Code’s (Code) statute of limitations on claims that predated May 11, 2009. *See* I.D. at 1, 21-22; *also* 66 Pa. C.S. § 3314. The Initial Decision also recommended the dismissal of certain allegations of high bills based on the failure of the customers to meet their burden of proof under the Code. *See* I.D. at 1, 36; I.D. Ordering ¶ 2; 66 Pa. C.S. § 331(a).

The Initial Decision sustained the Complaints with regard to challenges concerning PGW’s application of partial payments for utility bills that resulted in PGW’s imposition of late payment charges on the disputed accounts. The decision also sustained the Complaints’ challenges to PGW’s application of tariff sanctioned late payment charges to outstanding utility account balances accrued for past due bills that additionally resulted in the imposition of municipal liens on the subject properties by the City of Philadelphia. The City of Philadelphia imposed municipal liens on the subject properties according to the provisions of the Municipal Claim and Tax Lien Law, Act 153 of 1923, P.L. 207, 53 P.S. §§ 7101, *et seq.* (MCTLL). [[2]](#footnote-2)

Finally, the Initial Decision directed that PGW issue a refund to Colonial Garden and Simon Garden pursuant to the Commission’s authority found at Section 1312 of the Code, 66 Pa. C.S. § 1312, and additionally recommended the imposition of a civil penalty because:

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.

*See* I.D. at 64.

On consideration of the record, the Initial Decision, the Exceptions and Replies, we shall adopt the Initial Decision of ALJ Vero in substantial part, as modified by our reasoning that disposes of the Exceptions of PGW, and grant and deny the Exceptions of PGW, consistent with the discussion in this Opinion and Order.

# II. Background

As noted, there are five (5) consolidated formal complaints involving PGW and its commercial customers that are before the Commission in these proceedings. The complaints are identified below:

* *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;
* *SBG Management Services, Inc./Marshall Square Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304303;
* *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.

*See* I.D. at 4-5.

At a Prehearing Conference held December 6, 2012, the Parties agreed that, due to the numerous transactions disputed in the complaints, the logistics of the cases would benefit from their separation into two groups for hearing and adjudication purposes. I.D. at 4. Because they involve accounts that are potentially interrelated, the Parties agreed that the following dockets would constitute two distinct groups of cases. The first group consists of the following dockets:

* *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.

*See* I.D. at 4; ALJ Order dated January 24, 2013.

The second group of cases consists of the following Commission dockets:

* *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.

*See* I.D. at 4, 5; *also* ALJ Orders dated January 24, 2013; March 7, 2013.

Based on the foregoing, this proceeding involves the second, above-cited, group of consolidated formal 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 PGW customers in these proceedings are Colonial Garden Realty Co., L.P., owner of Colonial Garden Apartments (as noted, Colonial Garden), and Simon Garden Realty Co., L.P., owner of Simon Garden Apartments (as noted, Simon Garden). *See* Fact # 32, 34, 67-68.

We note that in addition to the present group of five (5) consolidated cases (two of which are addressed in this Opinion and Order), the complaints also share an identity of parties, identity of issues, and common questions of law and of fact, as between PGW and SBG Management Services, Inc. with three other proceedings. The three additional proceedings (resulting in a total of nine (9) dockets)[[3]](#footnote-3) are captioned and docketed as follows:

* *SBG Management Services, Inc./Marchwood Realty Co, L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2308454;
* *SBG Management Services, Inc./Oak Lane Court Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2308462; and
* *SBG Management Services, Inc./Fern Rock Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2308465.

*See*, *SBG Management Services, Inc./Marchwood Realty Co, L.P.*, *et al v. Philadelphia Gas Works*, Docket Nos. C-2012-2308454*, et al.* (Initial Decision issued January 13, 2016) at 6 n.2.

Because the billing disputes and related issues in the consolidated Complaints are substantially the same as those litigated in the nine, in total, formal complaints involving SBG and PGW, the Parties stipulated that testimony provided in the cases would be incorporated by reference into the record of each of the proceedings. *See, e.g.,* I.D. at 10 n.6; August 29, 2013 Transcript (Tr.) at 32-34, 36, 38.

# III. History of the Proceedings

ALJ Vero reached sixty-eight (68) Findings of Fact and drew twenty-six (26) Conclusions of Law. We, hereby, adopt the Findings of Fact of presiding ALJ Vero. We also adopt the Conclusions of Law of ALJ Vero to the extent the said conclusions are not expressly rejected or modified, or rejected or modified by necessary implication from our discussion and disposition of the Exceptions of PGW. The History of the Proceedings and related statement of facts is derived from the Initial Decision, the pleadings, transcript and exhibits.

## A. Complainant Colonial Garden Realty Co., L.P. – Docket No. C-2012-2304183 – Account No. 6128000245

Colonial Garden is a 72-unit garden style walk-up apartment complex located at 5427 Wayne Avenue, in the Germantown section of Philadelphia, Pennsylvania. The property is owned by Colonial Garden Realty Co., L.P. I.D.at 24. The tenants of Colonial Garden are described as mostly elderly in nature or those that suffer with mental disabilities. *See* Tr. at 38.[[4]](#footnote-4) The tenants are also characterized as predominantly on fixed income or receiving some sort of government assistance. *Id*. The heat is provided by the landlord (Colonial Garden). The tenants are responsible for their own cooking gas, which is sub-metered from the landlord. *Id*.

PGW is a “city natural gas operation” pursuant to Section 2212 of the Code, 66 Pa. C.S. § 2212, that provides natural gas distribution utility service to Colonial Garden. *See, generally,* Natural Gas Choice and Competition Act, 66 Pa. C.S. §§ 2201-2202 (NGCCA); I.D. at 24. As explained by presiding ALJ Vero, PGW is a municipal utility that is wholly owned by the City of Philadelphia. PGW consists only of the real and personal assets that are used to manufacture and deliver natural gas to entities within the city’s borders. *See* July 17, 2012 Order, *infra*, citing *Public Advocate v. Philadelphia Gas Comm’n*, 544 Pa. 129, 674 A.2d 1056 (1996).

Colonial Garden has one gas account with PGW (Account number 6128000245) and receives gas utility service pursuant to PGW’s commercial rate schedule GS. Although Colonial Garden has one account with PGW, it has two separate Service Agreements (SAs), (SA # 1375369694 and SA # 4018739567). Charges for Colonial Garden’s two SAs are reflected on the same monthly bill. Fact # 8; SBG CG/SG Exhibit 5.[[5]](#footnote-5)

Colonial Garden is managed by a real estate management company, SBG Management Services, Inc. (as noted, SBG). Mr. Phillip Pulley is the Director of Operations for SBG. Fact # 6; Tr. at 41. Ms. Kathy Treadwell is a senior accountant with SBG and Mr. Eric Lampert is the controller. I.D. at 7; 24.

The relationship between SBG and Colonial Garden was explained in detail in its Amended Complaint, *infra.* The relationship is that of agent and principal. *See* Amended Complaintat 3. SBG, as the managing company (agent) for Colonial Garden (principal), handles the day-to-day activities for the apartments, such as maintenance, collection of rents, tenant issues, accounting, etc. I.D. at 24. Also, SBG, on behalf of Colonial Garden, receives, reviews, and submits payments on Colonial Garden’s gas bills for accounts located at the service property address. Attached as an exhibit to the Amended Complaint was a letter which gave Mr. Pulley authority to commence legal actions against PGW for all accounting and billing disputes between Colonial Garden and PGW.

On May 11, 2012, Phillip Pulley filed the above-captioned formal complaint with the Commission in his capacity as Director of Operations for SBG, on behalf of Colonial Garden (Docket No. C-2012-2304183). Also, on May 11, 2012, Mr. Pulley filed a formal complaint against PGW as Director of Operations for SBG on behalf of Simon Garden (Docket No. C-2012-2304324). I.D. at 2. Both complaints contained substantially similar allegations against PGW, with different billing amounts in dispute. *Id*. The amount in dispute regarding Colonial Garden was stated as $60,560.33. The amount in dispute regarding Simon Garden was stated as $184,410.87. I.D. at 5.

In Docket No. C-2012-2304183 (Colonial Garden), SBG alleged that there were incorrect charges on its bill. *See* Complaint at ¶ 4.A. SBG specifically raised the following allegations:

1. Dispute the accuracy of the billings.

2. Dispute the validity of the meter readings and or estimates.

3. Dispute the calculation of interest & penalties assessed.

4. Believe that PGW has refused to address our concerns about the accuracy of the billings.

5. Believe that PGW failed to mitigate its damages by allowing large unpaid gas debts by tenants to accrue in lieu of gas termination.

6. Believe that PGW has incorrectly collected payments for these accounts from us in error.

7. Believe that PGW is using unfair, unjust and untimely billing practices to collect unpaid debts from the wrong party.

8. Believe that PGW failed to mitigate its damages by its refusal and or its inability to provide accounting as requested by complainant.

9. Believe that PGW failed to resolve these matters as required by law.

10. Believe that PGW has acted in bad faith.

11. Believe that PGW has refused to address our request for information.

12. Believe that PGW has wrongfully encumbered our property causing us irreparable harm.

*See* Complaint at ¶ 4.B; SBG M.B. at 5.

SBG listed four accounts in dispute. SBG also listed municipal liens filed pursuant to the provisions of the MCTLL against its properties for unpaid bills that were associated with the disputed accounts. For relief, Colonial Garden requested a refund and/or credit for all overpayments to PGW. *See* Complaint at ¶ 5. Further, SBG requested “account adjustments for excessive penalties and interest erroneously assessed to the accounts listed . . .” *Id*.

On June 4, 2012, PGW filed an Answer with New Matter. In its Answer, PGW clarified the accounts and service addresses of record that were involved in the Complaint. PGW acknowledged that it provided service to Colonial Garden with an account No. 0061-2800-0245, but averred that the other account numbers stated in the Complaint did not exist. *See* Answer at ¶ 1.

In its Answer, PGW additionally responded that the amounts in dispute represented amounts which were the subject of municipal liens filed by the City of Philadelphia, as owner of PGW. The liens, explained PGW, were filed pursuant to the authority of the MCTLL. PGW answered that, pursuant to the MCTLL, the City of Philadelphia, as owner of PGW, had the right to collect on municipal claims for amounts owed to PGW for gas service provided to a service address. *See* Answer at ¶ 4.B 12.

In its Answer, PGW also specifically responded to and denied the material averments raised in ¶ 4.B of the Complaint. PGW, *inter alia*, denied that there were incorrect charges on the bill for service to the account(s) in dispute; PGW denied that the bills of the account in dispute were inaccurate; PGW denied the allegations raising the invalidity of meter readings for the account and pointed out that the Service Address account was equipped with Automated Meter Reading devices (AMRs) and that the bills were based on actual gas usage and valid meter readings; PGW denied that the calculation and assessment of interest and penalties was incorrect, but admitted that the customer disputed its calculations; and PGW further denied the material allegations of the Complaint.[[6]](#footnote-6)

In New Matter, PGW raised the Code’s statute of limitations as an affirmative defense. PGW asserted that the dispute between the Company and Colonial Garden centered upon amounts for gas utility service billed more than four years prior to the Complaint.

Also on June 4, 2012, PGW filed Preliminary Objections (POs) and Motion to Strike, endorsed with a Notice Plead. *See* 52 Pa. Code § 5.101. The POs, referenced to Docket No. C-2012-2304183, argued, *inter alia*, that the Commission lacked subject matter jurisdiction over the Complaint to the extent the Complaint concerned acts performed under the authority of the MCTLL. PGW relied upon language in the NGCCA, 66 Pa. C. S. §§ 2201, *et seq.*, specifically, Section 2212(n), 66 Pa. C.S. § 2212(n), and cases decided before the Commission which, it argued, stood for the proposition that the Commission has recognized its lack of subject matter jurisdiction in cases involving a dispute over a municipal lien placed upon a property. *See* POs at ¶¶ 2, 4, 5.

In its POs, PGW also argued that SBG, as complainant, was not the customer of record for certain of the accounts which were the subject of the Complaint. Therefore, PGW challenged SBG’s standing as the proper party in interest to appear before the Commission to dispute claims based on financial obligations which underlay the municipal liens. POs at ¶ 10. PGW also directly raised the lack of Commission jurisdiction over municipal liens as a defense.

Based on the foregoing pleadings, PGW requested the summary dismissal of the Complaint. As noted, in addition to the substantive bases for dismissal alleged by the Company, PGW took the position that SBG lacked the requisite standing to prosecute the action. *See* POs at 5, citing *Larry and Gail Newman v. Philadelphia Gas Works*, Docket No. C-2011-2273565 (Order entered March 29, 2012).

In the Motion to Strike, PGW requested that the Commission strike, as impertinent matter within the meaning of 52 Pa. Code § 5.101(a)(2), the references to, and request for relief, involving the municipal lien(s) placed upon the properties that received gas service. *Id*.

On June 25, 2012, PGW filed a document styled, “Supplemental Information Regarding . . . Preliminary Objections . . . .” Presiding ALJ Vero reviewed the document and concluded that the filing was, essentially, amended Preliminary Objections, and treated the pleading as such. I.D. at 3. In the “Supplemental Information . . . .” (Amended POs), PGW asserted that SBG was not the customer of record for the accounts in dispute. PGW, however, acknowledged four accounts with Colonial Garden which had become the subject of four separate municipal liens. *See* Amended POs, Appendix 1. In addition to the issue of the standing of SBG to prosecute the Complaint, PGW again asserted that the subject properties for the gas accounts in dispute were each associated with a municipal lien. Based on the foregoing, PGW argued that, to the extent the Complaint challenged the satisfaction of the amount of the liens, this was an impermissible collateral attack on the lien under the MCTLL.

Counsel for Colonial Garden did not file a responsive pleading to the POs, New Matter, Motion to Strike, or the PGW Amended POs. *See* I.D. at 3.

By Order dated July 17, 2012, ALJ Vero granted in part and denied in part, the POs, Amended POs and Motion to Strike. ALJ Vero extensively addressed the pertinent legal considerations involving the Commission’s subject matter jurisdiction over the claims prosecuted in the Complaint, including the relationship between municipal liens and unpaid amounts for gas utility service, and the ability of the Commission to provide any relief to SBG. *See* July 17, 2012 Order.[[7]](#footnote-7)

In the July 17, 2012 Order, as a threshold consideration, ALJ Vero analyzed the Commission’s subject matter jurisdiction over municipal liens and reasoned as follows:

Acting under the authority and power granted in the Municipal Claim and Tax Lien Law, 53 P.S. § 7101 *et seq*., the City [City of Philadelphia] files a lien to enforce municipal claims against property for unpaid natural gas service rendered by Respondent at the property.

Only the City, being a municipality, can file a municipal lien. . . .

Respondent does not meet the legal definition of an entity authorized to file a lien to enforce a municipal claim as set forth in the Municipal Claim and Tax Lien Law. *See*, 53 P.S. § 7101. Consequently, when Respondent provides natural gas service to an entity within the borders of the City and is not paid, it is the City that has a municipal claim which it can enforce by way of a lien on the property that was provided natural gas service.

\* \* \*

The proceeding to obtain and enforce the City’s municipal claim lien is an *in rem* proceeding. “Accordingly, the lien is either valid or invalid as to the property in question rather than as to the respective property interests involved.” *Borough of Towanda v. Brannaka*, 61 Pa.Cmwlth. 622; 625-626, 434 A.2d 889; 891 (1981). What this means is that the Premises, not Complainant, is responsible for satisfying the claim secured by the municipal lien. No personal responsibility is asserted against the Complainant by the filing of the lien on the Premises. *Philadelphia v. Northwood Textile Mills, Inc.*, 395 Pa. 112, 149 A.2d 60 (1959). *See*, also, *Ransom v. Marrazzo*, 848 F.2d 398 (3d Cir. 1988).

\* \* \*

In the instant case, the entire proceeding for the effectuation of and defense to the statutory lien of the City is within the jurisdiction of the Court of Common Pleas of Philadelphia County, not the Commission. Municipal lien proceedings are exclusively matters of judicial, not administrative, jurisdiction.

\* \* \*

The Commission has consistently recognized its lack of subject matter jurisdiction in cases involving a dispute over a municipal lien placed upon a property. In *Cornelia Strowder v. Philadelphia Gas Works*, Docket No. C-20028036 (Order entered December 30, 2002) the Commission determined that it had no jurisdiction to rule on the validity of a lien. . . . These decisions affirm that the Commission lacks jurisdiction over a municipal lien. *See also*, *Agron Vata v. Philadelphia Gas Works*, Docket No. C-2009-2149960 (Order entered August 24, 2010); *Ardelle Jackson v. Philadelphia Gas Works*, (Order entered June 29, 2011); and *Larry and Gail Newman v. Philadelphia Gas Works,* Docket No. C-2011-2273565 (Order entered March 29, 2012).

Turning to SBG’s claim that PGW did not terminate service to its tenants for failure to pay and allowed a large arrearage to accumulate, I note that the Commission recently addressed a similar issue in *Faye Payne v. Philadelphia Gas Works*, Docket No. C-2011-2247124 (Order entered February 16, 2012) (*Payne*). In response to SBG’s argument that PGW failed to mitigate its damages because it did not terminate service to the Complainant’s tenants before the tenants accumulated a large outstanding bill, the Commission stated that a “mitigation of damages” defense of this nature is to be raised in the appropriate court:

In the absence of subject matter jurisdiction, we do not have the authority to order the City to remove *or reduce* the lien on the Complainant’s property.  The Complainant’s argument that the lien should be reduced because PGW is partially responsible for her tenants’ arrearage can be raised by the Complainant as a defense in the appropriate court with jurisdiction over the municipal lien in question.  In the alternative, the Complainant may be able to pursue an action against her tenants.  The Complainant, however, has no cause of action before the Commission.

(Emphasis in the original) *Faye Payne v. Philadelphia Gas Works*, Docket No. C-2011-2247124 (Order entered February 16, 2012) (citing *Griffin v. Philadelphia Gas Works*, Docket No. C-2011-2251780 (Order entered November 14, 2011)).  Therefore, with regard to the liens imposed upon its properties, I conclude that Complainant’s relief, if any, must be obtained under the procedures established by the Municipal Claim and Tax Lien Law.

July 17, 2012 Order at 6-10 (notes omitted).[[8]](#footnote-8)

Concerning the PGW Motion to Strike, ALJ Vero granted the said motion and struck as impertinent matter those specific references to the municipal liens associated with unpaid sums that were recorded on the subject properties. *See* July 17, 2012 Order at 16. In conclusion, the pertinent Ordering Paragraph disposing of PGW’s Preliminary Objections, *et al*, and entered in Docket No.C-2012-2304183, ruled as follows:

3. That Philadelphia Gas Works’ Amended Preliminary Objections filed against the Complaint of SBG Management Services, Inc., at Docket No.C-2012-2304183 are sustained, in part, with regard to the Commission’s lack of subject matter jurisdiction over municipal liens, and are denied, in part, with regard to SBG’s billing dispute and quality of service issues. The portion of the Complaint seeking relief, in the form of a Commission order that the liens in question be reduced, shall be stricken as impertinent matter.

July 17, 2012 Order at 19.

A Prehearing Conference was, thereafter, scheduled and held on December 6, 2012. At the conference, several matters were discussed. The Parties agreed that, due to the numerous transactions disputed in each of the five (5) consolidated Complaints, the logistics of the cases would benefit from their separation into two groups for hearing and adjudication purposes. I.D. at 4. The separation of the cases into two groups for hearing and adjudication was memorialized in an Order dated January 25, 2013. I.D. at 5. Entry of and withdrawal of appearances for counsel for the Parties were noted.

On December 10, 2012, SBG filed Amended Complaints at Docket Nos. C-2012-2304183 and C-2012-2304324. In the Amended Complaints, counsel explained the relationship between SBG, Colonial Garden, and Simon Garden. SBG explained that, pursuant to an Exclusive Management Agreement, SBG was given full agent authority to represent the various, listed, property owners in legal proceedings against PGW. *See* Exhibit A to Amended Complaint.

Specifically, the Amended Complaint set forth a coded, “. . . Account Dispute Legend”, which identified the nature of the dispute regarding the various accounts with PGW, including Colonial Garden Account # 6128000245. The Complaint identified and coded the disputed transactions between PGW and Colonial Garden 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 disputed by Colonial Garden was stated as $60,560.33. I.D. at 5.

On January 2, 2013, PGW filed Answers to each of SBG’s Amended Complaints in which PGW denied the material allegations. I.D. at 6, 22. PGW did not file Preliminary Objections to the Amended Complaints. I.D. at 22. Neither did PGW file New Matter raising the statute of limitations in Section 3314 of the Code, 66 Pa. C.S. § 3314. *Id*.

Initial hearings were scheduled for August 29-30, 2013, and were held as scheduled. Francine Thornton Boone, Esq. represented the Complainants and presented the testimonies of Phillip Pulley (Director of Operations for SBG); Kathy Treadwell (senior accountant with SBG); and Eric Lampert (controller for SBG). At the conclusion of the August 30, 2013 hearing, ALJ Vero informed the Parties that further hearings were necessary. I.D. at 7.

Following the initial hearings, the Parties engaged in extensive discovery. Discovery was extremely contentious as evidenced upon a review of the motions, rulings and interim discovery orders of the presiding ALJ. *See* I.D. at 7 n.2. Between November 29, 2014 and December 3, 2014, ALJ Vero issued several orders on various Motions to Compel filed by SBG regarding discovery and granted SBG/Colonial Garden relief in part. A chief discovery ruling of ALJ Vero compelled PGW to perform late payment analyses on all of the accounts at issue.

In November 2014, based upon the information provided from the late payment analyses PGW produced in response to the SBG motions to compel, Colonial Garden was able to obtain an understanding of how PGW conducts its accounting practices and how PGW applied payments to the accounts in dispute. Based on the receipt of the information concerning PGW’s accounting methodology, at the pre-hearing conference held on November 24, 2014, SBG advised the presiding officer that many of the issues raised in the Complaints had been addressed or explained through the discovery process and could, therefore, be removed from the list of disputed transactions. *See* I.D. at 8 n.4; Tr. 481-84, 790, citing, *inter alia*, Complainants’ M.B., at 9 (“The pivotal issue in this case involves PGW’s underlying payment posting reordering accounting scheme and accuracy of the interest rate, penalties and late payment charges imposed on all accounts, 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…”).[[9]](#footnote-9)

Further hearings were scheduled and held, January 29-30, 2015. On the first day of the hearings, ALJ Vero was advised of the withdrawal of the Complaint against PGW at Docket No. C-2012-2334253. *See* I.D. dated June 24, 2015 (Docket No. C-2012-2304183). The hearings proceeded according to schedule on the remaining consolidated Complaints: Docket No. C-2012-2304183 (Colonial Garden), and Docket No. C-2012-2304324 (Simon Garden). I.D. at 8.

At hearings held January 29-30, 2015, Donna S. Ross, Esquire represented Complainants, Colonial Garden, and Simon Garden, and presented the testimonies of Kathy Treadwell, Jeremy Gabell, and Roger Colton. Jeremy Gabell testified on behalf of the Complainants as a certified public accountant, a certified evaluation analyst, and a certified forensic accountant. Roger Colton testified on behalf of Complainants as an expert in public utility regulation and regulatory economics. Complainants sponsored eight exhibits, four of which were admitted into the record. Complainants withdrew their disputes coded as C – disputed transfers, D – disputed estimated billings, and H – disputed canceled transactions. Attorney 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 by ALJ Vero. *See* I.D. at 9.

Laureto Farinas, Esquire represented PGW at the hearings and presented the testimonies of: Bernard Cummings – Vice President of Customer Service and Collections for PGW; Wendy Vacca – a senior customer review officer with PGW; Diane Rizzo – a retained consultant analyst for PGW’s customer service at the time of the hearings; and Ralph T. Savage – Director of PGW’s Commercial Resource Center. I.D. at 9. PGW sponsored five exhibits, all of which were admitted into the record. *Id*.

Complainants were instructed by the presiding officer to submit several late-filed exhibits. The last of the late-filed exhibits were submitted on June 30, 2015, without objection. I.D. at 9. The late-filed exhibits were admitted into the record. *Id*.

ALJ Vero issued a March 27, 2015 Briefing Order, which provided for the filing of Main and Reply Briefs on or before, 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 and # 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;

\* There is no SBG CG/SG Exhibit 7. I.D. at 9 n.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[[10]](#footnote-10);

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.

*See* I.D. at 9-10.

The record closed on the filing of the late-filed exhibits, June 30, 2015.

On September 17, 2015, the Initial Decision of ALJ Vero was issued. The Exceptions and Replies were filed, thereafter, as noted.

## B. Complainant Simon Garden Realty Co., L.P. - Docket No. C-2012-2304324

The Procedural History of the Simon Garden Complaint is virtually identical to that for the Colonial Garden apartment units, the only difference being, as noted, the billing amounts in dispute. Minor differences in the averments will not be repeated.[[11]](#footnote-11)

Simon Garden is a 72-unit apartment complex located in three buildings at Musgrave Street and Chew Avenue, Philadelphia, PA. *See* Fact # 32; Tr. at 399. The property was described as “primarily low income and moderate income.” *Id*. (testimony of Mr. Pulley). The Simon Garden tenants are not receiving any sort of “subsidy.” However, the tenants pay “less than market rent.” *Id*. Simon Garden has one gas account with PGW, Account # 539547187, and three separate SAs: SA # 1162325601, # 4395848077 and # 8569221065. Fact # 34; Tr. 438, 492; PGW Exhibits 1-3. Charges for Simon Garden’s three SAs are reflected on the same monthly bill. Fact # 35; SBG CG/SG Exhibit 1.

On May 11, 2012, Mr. Pulley, in his capacity as Director of Operations for SBG, filed a formal complaint on behalf of Simon Garden against PGW. At ¶ 4B of the Complaint, Simon Garden averred the identical claims that were raised against PGW by Colonial Garden. Simon Garden attached a copy of a statement of disputed billing amounts referenced to an account, # 0005-3954-7187. For relief, Simon Garden requested “. . . a refund and or credit for all overpayments made to PGW. Additionally we are requesting account adjustments for excessive penalties and interest erroneously assessed to the accounts listed on page 3.” *See* Complaint (Docket No. C-2012-2304324).

On June 4, 2012, PGW filed an Answer and New Matter in which it acknowledged an account with Simon Garden, but responded with substantially similar challenges to the Commission’s jurisdiction and SBG’s standing as were noted in its Answer to the Colonial Garden Complaint. Similarly, the Commission’s statute of limitations was asserted as an affirmative defense in PGW’s New Matter.

On June 4, 2012, PGW filed Preliminary Objections and Motion to Strike. This pleading was in all material respects identical to the Preliminary Objections and Motion to Strike filed regarding Colonial Garden.

On June 18, 2012, Simon Garden filed “Supplemental Information . . . Preliminary Objections . . .” which filing was, again, in all material respects identical to the pleading filed regarding Colonial Garden.

By Order dated July 6, 2012, ALJ Vero consolidated the Colonial Garden and Simon Garden Complaints. ALJ Vero noted that, because the substance of the Complaints was identical, the supporting data would be heard once and there would be no need for repetition as between the two proceedings. *See* July 6, 2012 Order at 6.

On December 10, 2012, Simon Garden filed an Amended Complaint in which it used the same, “Account Dispute Legend” terminology referenced in the Colonial Garden Complaint. Simon Garden listed the following dispute account legends regarding account # 539547187; C – Transfers; H – Canceled Payments; and J – Disputed Meter Read. The amount in dispute was stated as $184,310.87.[[12]](#footnote-12)

PGW Answered the Amended Complaint and substantially admitted and denied the material averments as in the matters pertaining to Colonial Garden.

By Order of January 25, 2013, the Simon Garden Complaint was further divided into the grouping of proceedings for adjudication and disposition purposes as previously identified. As noted, the similarity of facts occasioned Simon Garden’s grouping with the complaint of Colonial Garden.

The record in the Simon Garden Complaint was closed in consolidated fashion at the time of the Colonial Garden Complaint.

# IV. Discussion

## A. ALJ’s Recommendations

On consideration of the evidence and legal arguments of the Parties, ALJ Vero dismissed, in part, and sustained, in part, the Complaints. ALJ Vero dismissed the high billing disputes asserted by Complainants. ALJ Vero sustained the Complaints to the extent she found improprieties in PGW’s billing of Complainants for gas utility services under Commission-approved tariffs. Based, *inter alia*, on PGW’s billing in violation of the Code and Commission Regulations, the presiding ALJ directed the refund of amounts to Colonial Garden and Simon Garden resulting from the improper billing under PGW tariffs. The presiding ALJ further recommended the imposition of a civil penalty against PGW based on, *inter alia*, unreasonable service due to its improper billing of SBG. The pertinent Ordering Paragraphs of the Initial Decision are reprinted below.

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.

\* \* \*

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*.

I.D. at 73-74.

### 1. Burden of Proof

At pages 20-24 of the Initial Decision, ALJ Vero has appropriately identified those pertinent considerations regarding the burden of proof in these proceedings.

As a general matter, the proponent of a rule or order from the Commission (in this case, the Complainants) bears the burden of proof. *See* Section 332(a) of the Code, 66 Pa. C.S. § 332(a). To satisfy this burden, Complainants must demonstrate that PGW, as Respondent, was responsible for the problems alleged in the Complaints through a violation of the Code, a Commission Regulation, or Commission Order. The evidentiary burden must be shown by an evidentiary standard defined as “preponderance of the evidence.” *See* I.D. at 20, citing *Patterson v. Bell Telephone Company of Pa.*, 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. PUC,* 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.” Substantial evidence 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. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by Complainants of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut that of Complainants shifts to the Respondent, in this case, PGW. If the evidence presented by PGW is of co-equal weight, Complainants have not satisfied their burden of proof. Complainants would be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. PUC*, 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. PUC*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

### 2. Claims Precluded Based on Statute of Limitations

In addition to considerations involving the burden of proof, the billing controversy between SBG and PGW spanned a period of, approximately, a decade. Based on the foregoing, the Code’s statute of limitations was implicated. Section 3314(a) of the Code, 66 Pa. C.S. § 3314(a), establishes a general limitations period of three years for the prosecution of any action under the Code, except as otherwise provided. I.D. at 21 citing, *Duquesne Light Co. v. Pa. PUC,* 611 A.2d 370 (Pa.Cmwlth.(1992) *(Duquesne)*. The statute of limitations, however, can be tolled by the filing of an informal complaint with the Commission. *See* *Duquesne*, 611 A.2d at 383. Also, the statute of limitations may be tolled by application of the doctrine of equitable estoppel. *Id*., citing *Lester Ely v. Pa. American Water Compan*y, Docket No. C-20055616 (Order entered July 10, 2006) (*Ely*). There was no indication that an informal complaint was ever filed by SBG, Colonial Garden, or Simon Garden with the Commission concerning any of the properties or issues raised in the present consolidated Complaints. *Id*.

#### a. Colonial Garden

At pages 21-29 of the Initial Decision, ALJ Vero discussed the applicable burden of proof for high billing complaints under the Code and Commission Regulations and also those presumptions concerning the evidentiary burden of persuasion that applies to such disputes as derived from our decision in *Waldron v. Philadelphia Electric Company, (Waldron)*, 54 Pa. PUC 98 (1980).[[13]](#footnote-13) The presumptions established in *Waldron* were pertinent to the SBG complaint allegations involving inaccurate meter readings, or “J Code” disputes pursuant to the coding designation of SBG. I.D. at 22-24.

On consideration of the Code’s statute of limitations, ALJ Vero concluded that the high billing complaint and billing disputes regarding a March 5, 2005, billing transaction for Colonial Garden Account # 6128000245, SA # 4018739567, Meter # 1906431 and # 2115477, would be dismissed as barred by the statute of limitations. I.D. at 29.[[14]](#footnote-14)

ALJ Vero considered the holdings of *Duquesne* and *Ely*, *supra* for their application to the facts of these proceedings. The testimony of SBG witnesses and related documents that summarized and recorded the interaction between representatives of PGW and SBG regarding the account(s) in question was reviewed by ALJ Vero to ascertain whether the statute of limitations should be tolled based on the precedent of *Ely*. *Ely* was cited for the proposition that the Commission’s statute of limitations could be tolled based on a finding that PGW’s actions or statements with regard to the bill(s) either misled Complainants or caused Complainants to, essentially, relax their vigilance in pursuing formal or informal action before the Commission. Interactions between SBG and PGW representatives concerning the billing for the accounts in dispute began, on or about, April 11, 2005, and continued through a period, 2006-2010. The period 2006-2010, was disputed. I.D. at 28.

On review of the testimony and related documentary evidence, ALJ Vero found that Colonial Garden had not met its burden of proof by a preponderance of the evidence that the billing inquiries of SBG, on behalf of Colonial Garden, did, in fact, continue through the disputed period, 2006-2010. A review of documents, including correspondence and memos, led the presiding officer to conclude that such interactions between SBG and PGW representatives were not sufficient to toll the statute of limitations regarding claims that predated the period, May 11, 2012, by more than four years. Rather, ALJ Vero found:

It was only in 2011 that the issue of the March 5, 2005 bill was picked up again [subsequent to April, 2005] 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.

I.D. at 28.

After finding that SBG had not avoided application of the preclusive effect of the limitations period under the Code through filing an informal complaint with the Commission, ALJ Vero was also not persuaded that the doctrine of equitable tolling should apply to further extend the period:

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. . . 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.

I.D. at 29.

Based on the foregoing, the operative claims and billing disputes regarding a Colonial Garden account, March 5, 2005, transaction were not subject to a tolling of the Commission’s limitations statute and were dismissed. *See* I.D. at 29.

Also, ALJ Vero considered and rejected on the merits an SBG claim addressed to a January 5, 2011 bill for Colonial Garden, involving $1,572.81, and a claim concerning a November 2, 2011 bill for $4,125.80. SBG challenged these bills as abnormally high in relation to past consumption on the accounts. These claims were denied based on the conclusion of the ALJ that SGB/Colonial Garden failed to meet their burden of proof. I.D. at 29-33.

#### b. Simon Garden

For Simon Garden’s three service accounts, the ALJ concluded and so recommended that no corrections were warranted for transactions pertaining to these accounts for the period in dispute. *See* I.D. at 49-51. Although no corrections were recommended, ALJ Vero noted the issue of how PGW applied partial payments to the accounts. Concerning partial payments made on the accounts, PGW’s analysis showed that the entire amount of partial payments was first applied towards accumulated late payment charges. This, as discussed below, formed a separate claim of Complainants. The pertinent discussion concerning the propriety of how partial payments were applied to the SBG accounts appears at I.D., pp. 49-50, a portion of which is reprinted below:

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.

I.D. at 50.

Finally, at pages 52-54 of the Initial Decision, ALJ Vero considered and rejected the position of SBG that the applicable statute of limitations should be tolled based on the actions of PGW regarding the accounts with Simon Garden. SBG argued that PGW’s actions caused it to relax its vigilance in pursuing its billing dispute claims. The ALJ rejected the position of SBG and found, essentially, that PGW’s actions fell below evidencing fraud or concealment so as to justify equitable tolling. ALJ Vero concluded that the failure of SBG to formally prosecute its claims against PGW with the Commission in a timely manner was a calculated business decision by SBG rather than the product of ignorance or concealment. And, the availability of the Commission as the proper forum to initiate complaints against PGW was well known. I.D. at 54.

We have noted that SBG did not file Exceptions to the Initial Decision and, thus, did not pursue the ALJ’s conclusions regarding the statute of limitations in its Exceptions.

### 3. Late payment charges – Application of partial payments

Colonial Garden and Simon Garden have, respectively, two and three service agreements with PGW that are billed pursuant to their commercial service accounts. *See* Fact # 7, 8, 34, 35. Over time, Complainants failed to make timely payments for utility service and failed to remain current in the bills rendered by PGW for service. During these periods, partial payments were made on the accounts. Such payments did not eliminate prior utility bill balances, however. *See* Fact # 52-59. ALJ Vero considered, in detail, SBG’s complaints concerning the order in which PGW applied and/or credited partial payments made on the accounts of Colonial Garden and Simon Garden. *See* I.D. at 36-54.

SBG, on behalf of Colonial Garden and Simon Garden, alleged that the manner in which PGW applied such partial payments violated the Code and Commission Regulations. Although SBG identified late payment charges as one of the issues to be considered in each of the consolidated Complaints, Complainants did not fully articulate the nature of the challenges to PGW’s application of late payment charges, either in the original or amended Complaints. I.D. at 36. The nature of the Complaint allegations against PGW became more defined, however, on receipt of discovery by SBG obtained during the course of the proceedings. Based on information received during discovery, Complainants’ theories of PGW’s violations of the Code and Commission Regulations were set forth in detail through testimony presented at the hearings. *Id*.

We note that PGW argued that the SBG complaints concerning the order in which PGW applied partial payments was raised for the first time in January, 2015. PGW made this argument in the context of its response in opposition to the position of SBG that the Code’s statute of limitations should be tolled based on the “continuing violations” theory involving equitable tolling. *See* PGW R.B. at 8. PGW argued that, prior to January, 2015, Complainants made billing inquiries of a generic and non-specific nature. Complainants, according to PGW, articulated the issues regarding late payment charges assessed against their accounts as a dispute based on the accuracy of the Company’s calculation of the 1.5% per-month charge on outstanding account balances. PGW R.B. at 8-9.

We observe, however, that SBG consistently maintained that, neither the billing statements issued by PGW, the statement of accounts, PGW’s tariff, the Code, Commission Regulations, nor PGW personnel, adequately disclosed the utility’s payment posting and accounting methodology to the customer. *See* SBG M.B. at 10. According to SBG, the PGW methodology that was used for the posting of payments (partial) made on overdue account balances was an internal measure that was only known to PGW. Consequently, SBG took the position that Complainants could not have known of the pattern and practice relative to the posting of partial utility bill payments until after PGW was ordered to produce a late payment analysis during discovery, after filing their formal Complaint. *Id*.

SBG presented the testimony of three witnesses in support of its contentions that PGW’s posting of partial payments on its accounts violated the Code or Commission Regulations. Ms. Kathy Treadwell testified on behalf of SBG in her capacity as senior accountant for SBG; Mr. Jeremy Gabell testified as a certified public accountant, a certified evaluation analyst, and a certified forensic accountant;[[15]](#footnote-15) and Mr. Roger D. Colton testified as an expert witness in public utility regulation and regulatory economics. I.D. at 36-41.

PGW responded with the testimony of Mr. Bernard Cummings, Vice President of Customer Service and Collections for PGW, and Ms. Diane Rizzo. Ms. Rizzo worked for PGW for 32 years. Ms. Rizzo’s last full time position as an employee of PGW was as a project manager supporting and maintaining PGW’s billing system and information systems. I.D. at 42. At the time of the hearing, Ms. Rizzo was a consultant/analyst for PGW’s customer service. *Id*.

SBG made three primary attacks on the posting practices of PGW regarding partial payments. First, through the testimony of Ms. Treadwell, SBG explained that PGW charged interest on late payment charges inconsistent with the rate of 1.5 percent. A 1.5 percent charge against the outstanding unpaid balance as a late payment fee is authorized by PGW’s tariff and Commission Regulations.[[16]](#footnote-16) Ms. Treadwell performed her own calculations of the interest rate applied to SBG unpaid balances in order to figure out the percentage rate that was actually applied to its accounts per month. According to Ms. Treadwell’s analysis, the percentage rate of PGW’s late payment charges varied from month to month. Therefore, it was difficult for Complainants’ accountants to reconcile the charges to its accounts. I.D. at 36-38.

Ms. Treadwell also articulated another aspect of Complainants’ challenges to PGW’s methodology for posting partial payments. As a result of discovery, SBG learned that PGW applied partial payments first to late payment charges and then to “principal gas charges.” I.D. at 37. SBG took the position that this method of applying partial payments by PGW to first eliminate outstanding late payment charges contravened the Commission’s Regulation at 52 Pa. Code § 62.74. Complainants understood this regulation to establish a “hierarchy” in applying partial payments. SBG argued, “They [partial payments] 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.” I.D. at 37, citing Tr. 508-509, 511, 567.

Ms. Treadwell performed her own calculations based on Complainants’ understanding of 52 Pa. Code § 62.74. The witness performed calculations that assumed that PGW would have applied partial payments first, to principal, *i.e.* gas charges, and not to the cumulative late payment charge. This was done in order to assess what would be the difference in the late payment charge itself and also in the principal balance on the account. Using the assumption that partial payments would have been applied to principal, or gas charges first, Ms. Treadwell calculated that PGW had overcharged Complainants $19,099.35 in late payment charges and overcharged them $142,612.67 in gas charges. These figures were alleged to be the direct result of PGW’s practice of allocating partial payments such that PGW paid off late payment charges first. I.D. at 37; Tr. at 518-536, SBG CG/SG late-filed Exhibit 3. At Transcript page 521, the SBG witness explained her conclusions on the PGW posting practices in the following manner:

Q. In each of these calculations, are you accounting for and applying a late payment charge to the outstanding balance in the amount of one and a half percent?

A. [Ms. Treadwell] Yes. After the payment was applied, to the extent that there was an unpaid principal, we applied a one and a half percent interest.

Q. So, you are accounting for the fact there are late payment charges?

A. Correct. This column Q represents cumulative, the late payment charges just as column PGW’s calculation here in my column, column G would.

Q. Why are their [PGW] charges so much higher than ours?

A. Because they’re applying the payment directly to cumulative unpaid balances first; therefore, leaving the principal exaggerated and high as possible, and that information is concealed and not revealed in any of the bills. It would never have been revealed to us had they not provided the late payment calculation, late payment charge calculation.

Tr. at 521 (January 29, 2015)

For the Simon Garden SAs, Ms. Treadwell testified that, as of December 2012, PGW had overcharged 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. I.D. at 37.

For the Colonial Garden Account # 6128000245, SA #114472580 and SA  # 1375369694 combined, Complainants maintained 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, by December 2012, PGW had overcharged Colonial Garden $9,630.43 in late payment charges and $132,467.01 in gas charges. I.D. at 37-38; SBG CG/SG late-filed Exhibit 3.

Second, SBG witness, Mr. Jeremy Gabell, testified that the effect of PGW’s posting practice was to compound the interest rate that was applied as late payment charges to the prior bill balances. Mr. Gabell testified: “[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.” I.D. at 38, citing Tr. at 583.

Additionally, SBG witness Gabell noted that the effect of the Company’s posting practices was to increase the amount on which authorized late payment charges were applied: *See* I.D. at 38 (quoting the witness’ testimony that “[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.”).

Third, SBG witness, Mr. Roger Colton, proffered his expert opinion as a regulatory analyst 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. *See* I.D. at 40; Tr. 618-19; Tr. 620-22, 626, 632-633.

Mr. Colton reached additional conclusions regarding the regulatory effect of PGW’s practices. The conclusions he reached after reviewing Complainants’ account statements and bills were summarized 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). I.D. at 41; Tr. 620, 660.[[17]](#footnote-17)

PGW, in reply to the contentions of SBG, confirmed its practice of reordering partial payments on past due accounts consistent with the manner observed by SBG’s witnesses on the subject. PGW witness, Mr. Bernard Cummings, admitted that PGW applied partial payments to late payment charges first. I.D. at 41; Fact # 48, 49; Tr. 753-54. PGW took the position that, according to Commission Regulations, absent written instructions by the customer, all partial payments should be applied to “basic” charges first, and, he explained, late payment charges are “basic” charges. *Id*. Thus, PGW responded that it did not violate any Commission Regulation with its application of partial payments and that the Commission Regulations do not specify a “hierarchy” in the order of payments within the basic charges themselves. *Id*.; Tr. 753.

Mr. Cummings also testified that PGW complies with Commission Regulations regarding the information that appears on its gas bills. I.D. at 41; Tr. 734. PGW’s bills included information on the price of the commodity, any type of charges that are basic and nonbasic, and any bill messages that need to be placed on the bill. *Id.* The Company took the position that the Commission does not require utilities to provide the method in which they apply payments as part of the information included in their bills. *Id*.

PGW witness, Ms. Diane Rizzo, also confirmed the practice of reordering partial payments made on SBG accounts consistent with the testimony of SBG witnesses. Ms. Rizzo used a September 3, 2007, bill issued to Complainants to illustrate PGW’s method of calculating late payment charges. I.D. at 42; Tr. 844. 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 late payment charges, all accumulated during several months, Ms. Rizzo explained that the unpaid late payment charges would be ‘zeroed’ out. *See* I.D. at 42; Tr. 872-873.[[18]](#footnote-18) Ms. Rizzo testified that PGW has never been told by the Commission or the Philadelphia Gas Commission, the agency under whom PGW was subject to regulation prior to the Commission, that it was doing something wrong with regard to its method of applying partial payments. Tr. 846. The witness further 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. I.D. at 42; Tr. 865-66.

Ms. Rizzo continued to explain PGW’s practice under circumstances where a customer in arrears has multiple service agreements. When a partial payment is made to an account that has multiple SAs, PGW distributes the payment amongst the different SAs based on a weighted average principle. The weighted average distribution process was 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. Consequently, twenty percent of the payment will go towards the first SA, 50% to the second SA, and 30% to the third SA. *See* I.D. at 42-43;Tr. 847. The witness further advised that 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. I.D. at 43; Tr. 848, 854-57. Ms. Rizzo stated 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. I.D. at 43; Tr. 863.

On consideration of the positions of the Parties, ALJ Vero concluded as follows:

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.

I.D. at 44.

ALJ Vero, on analysis of the data provided by the Parties, found fault with PGW’s method of applying partial payments. PGW’s practice and methodology, as described by SBG and confirmed by PGW, was found to be inconsistent with the Commission’s Regulations. *See* I.D. at 46-47. The applicable Commission Regulations were discussed and the language of the Regulations was found in express contravention to the Company’s practice.

Section 56.22 of the Commission’s Regulations is reprinted below:

§ 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.

*See* I.D. at 43.

Section 56.23 of the Regulations, 52 Pa. Code § 56.23, 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, 52 Pa. Code § 56.24, governs the application of partial payments 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).

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. ALJ Vero reasoned that, pursuant to these Commission Regulations, 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. *See* I.D. at 46 (emphasis ours). The ALJ concluded that these charges, together, constitute the balance due for basic service each month and, therefore, should be addressed simultaneously when a partial payment is made and applied on an account with a balance due for prior service. *Id*.

Based on the foregoing analysis of the pertinent Commission Regulations, the ALJ rejected PGW’s position, but also disagreed with SBG’s proposed method of applying partial payments. She found the SBG proposed method was, essentially, a mere reversal of PGW’s method. *See* I.D. at 46. “Where PGW would apply partial payments to late payment charges first, despite of [sic] their order of accrual, SBG would apply partial payments to gas service charges first, ignoring accumulated late payment charges.” *Id*. at 47, citing SBG CG/SG late-filed Exhibit 3.

After finding the posting practices of PGW to be inconsistent with Commission Regulations, ALJ Vero performed a detailed computation of the Colonial Garden and Simon Garden accounts, for the periods in dispute. These computations assumed compliance with Commission Regulations that govern the order of partial payments on past due utility account balances. *See* I.D. at 44-51.

For Colonial Garden SA # 1375369694, ALJ Vero directed that PGW issue a refund to Colonial Garden in the amount of $281.36. I.D. at 47. With regard to this SA, the ALJ found that one partial payment in the amount of $140,742.25 was made on an outstanding utility balance on this SA, November 4, 2011. Of this payment, PGW applied $46,948.66 to pay off the entirety of late payment charges representing all late payment charges accumulated on the account as of November 4, 2011. This sum was applied before applying the remainder of the partial payment to the accumulated “Unpaid Balance” of $98,511.64, thereby leaving an outstanding balance of $4,717.76 on the account. The outstanding balance under the PGW posting method consisted entirely of gas service charges or “Unpaid Balance.” I.D. at 46. The result of PGW’s application of this partial payment was consistent with SBG witness Mr. Colton’s description in his testimony. That is, PGW applied payments out of order. And, in the case of the November 4, 2011, partial payment, PGW paid off late payment charges as of November 2011, before it provided credit to Colonial Garden for accumulated service charges based on an August 3, 2011 bill. *Id*. According to the ALJ, this result was 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.” *Id*.

ALJ Vero engaged in a similar analysis and computation and directed a refund of $218.96 for Colonial Garden SA # 4018739567. I.D. at 49.

For Simon Garden SA # 1162325601; SA # 1162325601; and SA # 8569221065, no corrections were recommended based on the analysis of partial payments and thus, no refunds were directed concerning these SAs. I.D. at 50-53.[[19]](#footnote-19)

### 4. Late Payment Charges on Outstanding Balances That Were the Subject of Municipal Liens For Unpaid Gas Service

PGW, in the ordinary course of business, exercises its right as a municipally-owned utility to cause the City of Philadelphia to file a municipal lien for the collection of unpaid gas debt. If the liened debts remain unpaid, PGW admitted it is its practice to continue to charge finance charges (late payment fees) on the outstanding balance of the account at a rate of 1.5% monthly, as authorized by its PUC tariff, until the debt is satisfied. The liened indebted amount remains included in the customer’s outstanding utility bill balance and, as new charges accrue, the entire balance is subject to the 1.5% monthly finance charge, if the amounts remain unpaid. *See* SBG M.B. at 38.

ALJ Vero, on consideration of the uncontroverted testimony of the Parties, confirmed the Company’s practice to include liened amounts in the derivation of applicable Commission authorized late payment charges. She found that it was PGW’s long standing practice to assess late payment charges at 1.5% per month on any outstanding balance on an ‘active’ utility account, even if the said debt was also the subject of a municipal lien filed with the Philadelphia Court of Common Pleas. *See* Fact # 63; Tr. 207-216. ALJ Vero addressed the dispute regarding PGW’s application of late payment charges authorized pursuant to PGW’s tariff to the debt for unpaid utility service which amounts were also the subject of a municipal lien, at pages 54-64 of the Initial Decision.

The dispute between the Parties focused upon the appropriate rate of interest that PGW should be able to apply to unpaid utility debt when such debt became the subject of a municipal lien. SBG, through the testimony of its witness, Ms. Treadwell, challenged the lawfulness of PGW’s application of the 18% annual or 1.5% monthly late payment charges authorized pursuant to Commission Regulations and PGW’s tariff. SBG contested the fact that PGW also applied this rate to outstanding balances on which it also filed a lien. *See* I.D. at 54-55; Tr. 206-207. SBG’s position centered on its argument that the effect of a lien should be the same as a judgment according to law. SBG asserted that, because the lien constitutes a “judgment” pursuant to the law, any amounts which were the subject of such liens should accumulate interest at the legal rate of interest of 6% annual as opposed to PGW’s tariffed rate of 18% annual. I.D. at 55; *see* 42 Pa. C.S. § 8101;[[20]](#footnote-20) *also* 41 P.S. § 202.[[21]](#footnote-21)

SBG’s position was grounded upon its reliance on the holding of *Equitable Gas Co. v. Wade*, 812 A.2d 715 (Pa. Super. 2002) (*Equitable Gas v. Wade*). *Equitable Gas v. Wade* involved a dispute between a utility and a ratepayer concerning the proper interest that could be charged on an outstanding debt. The Court held that once the utility obtained a final judgment in the Court of Common Pleas on an outstanding balance for gas service, the utility was no longer entitled to charge 18% per year pursuant to its Commission approved tariff. Instead, the utility could only charge the legal rate of interest of 6% annual in accordance with 42 Pa. C.S. § 8101 (concerning interest on judgements). I.D. at 54-55, 58; Tr. 208-12.

SBG also argued that once a debt becomes a lien, the creditor has moved from the jurisdiction of the Commission and entered into the court system. SBG reasoned that the lien now becomes a “judgment” and PGW should be held to the 6% annual interest rate that is applied to judgements under the law. SBG duly noted that the accounting of PGW confused the foregoing propositions as PGW kept a statement of accounts that SBG characterized as, essentially, a “running tab” of what was owed by the delinquent ratepayer. That is, the indebtedness on the account subjected to the municipal lien was not always closed or “finalized,” according to PGW’s records, but remained in flux. *See* Tr. at 214 (August 29, 2013).

PGW, in reply to SBG, took the position that the MCTLL does not authorize the imposition of interest charges on municipal liens for gas service. I.D. at 55; Tr. 207. Therefore, since interest is not charged on municipal liens for unpaid gas service, PGW asserted that it had the right to charge PGW’s tariff rate on the liens until the outstanding balance represented by the liens is paid off. I.D. at 55; Tr. 209. PGW emphasized the primacy of the Court of Common Pleas’ authority to establish the proper interest rate subsequent to the filing of a lien and further emphasized court decisions that held that the permissible interest rate on “claims” arising from the MCTLL and which a municipal entity is authorized to charge is a matter to be set by municipal ordinance. *E.g.,* PGW R.B. at 13-14 and case citations.

PGW explained that, when an account is an active account, the municipal lien continues and does not constitute a judgment. Rather, PGW asserted, the lien is just a “marker” used to state, on a particular date, the amount that is owed to PGW. Under this argument, PGW took the position that the mere filing of a lien is not an “adjudication” of indebtedness because the final amount due on the lien is not, at this point, conclusively determined. PGW conceded, however, that if the utility account is active, the lien continues to accrue interest under its tariff. PGW further conceded that as no interest authorized under the MCTLL is applied at all, whether the account has been finalized and remains as a lien or whether the account is an active account according to PGW’s records and is referenced in its records as a “marker” lien, there is no conflict with the application of its tariffed rate to the debt amount. *See* I.D. at 60; Tr. 212-13; *also* Tr. 216.

On consideration of the positions of the Parties, ALJ Vero concluded that the interest rate at which late payment charges are accrued on an outstanding utility bill balance is a billing issue. I.D. at 56. As a billing issue, the matter was within the jurisdiction of the Commission. *Id*. This was so, reasoned the ALJ, even if the outstanding balance in question was also the subject of a municipal lien filed against Complainants’ property for unpaid gas service. *Id*.

The ALJ described the position of Complainants in the excerpt that is reprinted below:

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. 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.

I.D. at 56 (note omitted)

After analysis of the Parties’ responses to three questions which were requested to be briefed, the presiding ALJ found that PGW improperly applied tariffed late payment charge interest on past due utility bill amounts on which it, simultaneously, filed a municipal lien. The ALJ found that it was within the Commission’s jurisdiction to determine the amounts on which PGW improperly billed SBG and to also direct a refund of improperly billed amounts pursuant to Section 1312 of the Code, 66 Pa. C.S. § 1312. ALJ Vero reasoned as follows:

. . . 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.

I.D. at 63-64.

### 5. Civil Penalty for Violations of the Code and Commission Regulations

At pages 64-68 of the Initial Decision, ALJ Vero considered the facts of the litigation and recommended the imposition of a civil penalty against PGW. The ALJ concluded, as so recommended, that PGW violated its statutory duty to provide adequate and reasonable service, 66 Pa. C.S. § 1501, based on the foregoing:

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.

I.D. at 63.

After applying the criteria set forth in the Commission’s Regulations pertaining to the factors to be considered for the purpose of assessing a civil penalty at 52 Pa. Code § 69.1201(c) for a violation of the Code, Commission Regulations, or other provisions which the Commission has been delegated authority to administer, ALJ Vero recommended the imposition of a civil penalty of $27,000. The Recommended Order further included a, “cease and desist” directive to PGW for eliminate further violations of the Code or Commission Regulations. *See* Recommended Order ¶ 9.

## B. Exceptions, Replies and Dispositions

PGW filed five (5) general Exceptions to the Initial Decision. We consider and dispose of PGW’s introductory comments and Exceptions Nos. 1 and 2 in conjunction, finding that they raise substantially similar arguments.[[22]](#footnote-22)

### 1. PGW Introduction to Exceptions, Exception No. 1 and Exception No. 2

#### a. Positions of the Parties

In an Introduction to its Exceptions (Exc.), PGW provides several policy-oriented rationales for reversing the conclusions in the Initial Decision concerning the filing and recording of a municipal lien and the effect of the municipal lien on tariff-approved late payment charges.

PGW places the dispute in the broader context of stating its opinion that affirmance of the Initial Decision would threaten its ability to appropriately deal with customers who “systematically” refuse to pay for gas service. Exc. at 1. The Company, citing *Bolt v. Duquesne Light Co.*, 66 Pa. P.U.C. 463 (1988), argues that all customers, regardless of financial means, have an obligation to pay for the natural gas service that PGW provides.[[23]](#footnote-23) Thus, explains PGW, late payment charges are a “rate” authorized by the Commission, the purpose of which is to compensate it as a municipal utility for the service of carrying delinquent accounts. Also, late payment charges increase timely collections and ensure that service is available to all customers based on equitable terms and conditions. Exc. at 1-2. Customers who do not honor the obligation to pay their bills, explains PGW, result in such unpaid bills’ inclusion in the Company’s uncollectible expense. This, continues PGW, results in an expense ultimately paid by PGW’s other ratepayers. *Id*.

PGW further impugns the motives of SBG in this litigation. It asserts that SBG wishes to avoid payment of gas utility service and to avoid tariffed late payment charges for as long as possible. Exc. at 2. This has the effect, posits the Company, of enabling the Complainants to “borrow” money from paying customers while they refuse for years to pay significant portions of the bill. *Id*.

PGW also summarizes its core objection to the Initial Decision. That objection is to the ALJ’s conclusion that the charging of late payment fees on Complainants’ arrearages is, essentially, barred, once PGW files a lien on Complainants’ property. Exc. at 2. PGW argues that such claims are not within the jurisdiction of the Commission to adjudicate in these proceedings. *Id*. Even were the Commission authorized to adjudicate the legality of the MCTLL concerning the Company’s practice involving liened amounts and late payment charges under its tariff, PGW asserts that the conclusions reached are erroneous. They are erroneous for reasons that the conclusions, *inter alia*, fail to recognize the legal distinctions between a “judgment” under the law and a municipal lien under the statutory provisions of the MCTLL. Exc. at 3.

PGW also opposes the Initial Decision’s findings that its allocation methodology concerning the order of payments for partial payments on past due balances was improper. PGW takes the position that the allocations mandated by the Initial Decision are not supported by the plain language of the Commission’s existing regulation, would permit delinquent account customers to systematically avoid paying late payment charges, and are not consistent with the policy objectives of Chapter 14 of the Code, 66 Pa. C.S. § 1402(1), which expresses an intent to provide city natural gas distribution operations additional collection tools. Exc. at 4.

Finally, PGW objects to the imposition of a civil penalty on the basis that the penalty is based on a standard of conduct that is newly created and, therefore, *ex post facto*, in its application to the Company in this proceeding. PGW argues that the ultimate effect of the Initial Decision will operate to “disincentivize” it from using the MCTLL as a tool to collect delinquent accounts. Exc. at 5. PGW explains, “If a civil action is used against the customer of record, the account will need to be closed for a final bill.” *Id*.

In Replies to the Exceptions (R.Exc.), SBG, as a threshold consideration, moves that the Exceptions be stricken and dismissed as untimely. This request is based on the observation that the Exceptions were filed by counsel who had not entered an appearance on behalf of PGW in these proceedings prior to their filing and were not, as of the filing, attorneys of record for the Company. R.Exc. at 3-4.

In addition to requesting the dismissal of PGW’s Exceptions based on the failure of signatory counsel for the Exceptions to enter an appearance, SBG assails the tenor of the Exceptions as contemptuous of the presiding officer and tribunal pursuant to 52 Pa. Code §§ 1.26 and 1.27. R.Exc. at 5.[[24]](#footnote-24)

**PGW Exception No. 1 – The Initial Decision Exceeds the Commission’s Jurisdiction by Interpreting The Municipal Claims and Tax Lien Law (MCTLL), 53 P.S. § 7101 *et seq.*, and 42 Pa. C.S. § 8101(ID at 54-64; COL ¶ 1, 14-16; Ordering ¶ 5-6)**

In Exception No. 1, pages 6-12, PGW explains its position that the ALJ should be reversed in her conclusions regarding the legal effect of the placement of a municipal lien on a property (service address) that has unpaid utility service on the lawfulness of including the said liened amount in the computation of Commission-tariffed late payment charges.

PGW asserts that the Commission – and the Initial Decision, exceed the scope of their authority by interpreting the law and reaching a conclusion that there is a preemptive effect of the MCTLL on the application of a utility tariff when a municipal lien has been placed on a service property for past due service. In addition to the argument that such a determination is beyond the scope of the Commission’s jurisdiction and authority, PGW argues that the conclusions reached are erroneous. The Company asserts that the conclusion that a municipal lien, perfected under the provisions of the MCTLL, should be given preclusive effect concerning the simultaneous or continued accrual of charges pursuant to its tariff is error.

On review, PGW’s essential position in its Exception No. 1 is that the existence of a municipal lien does not create a jurisdictional issue with regard to the Company’s service and/or billing practices under its Commission-approved tariff. Exc. at 10.

In its Replies to Exceptions, SBG counters the arguments of PGW by noting that the allegations of PGW that the Initial Decision has exceeded the scope of jurisdiction and authority of this Commission relative to the MCTLL is a misstatement of the ALJ’s decision, conclusions of law, and order. R.Exc. at 6. SBG, citing *Dennis J. Vicario v. Philadelphia Gas Works*, C-2010-2213955 (Opinion and Order entered November 16, 2011), clarifies its position in this litigation as follows:

. . . Complainants are not challenging the validity of PGW’s right to impose a lien under the MCTLL. Complainants are challenging PGW’s billing practices that lead to the account balance that is subject to being liened, which is a valid distinction and an issue that falls squarely before the authority of the Commission.

R.Exc. at 6.

**PGW Exception No. 2 – The Initial Decision Errs In Interpreting Both The MCTLL and 42 Pa. C.S. § 8101(ID at 54-64; COL ¶ 17-22; Ordering ¶ 5-8)**

In Exception No. 2, the Company asserts that the Initial Decision, to the extent it appropriately engaged in an analysis of the MCTLL statute and related case law involving judgments and liens, committed five points of error.

First, PGW asserts that the decision failed to understand the inherent and fundamental differences between a municipal claim and a monetary judgment. Exc. at 12-13. PGW contrasts a judgment and municipal lien. The essential distinction, as emphasized by PGW, is that a judgment is a conclusive and definitive judicial resolution of a claim. Exc. at 13. A judgment is evidenced by a verdict entered upon the court’s docket, presumably after all parties adversely affected by the verdict or judgment have been given notice and opportunity to appear and contest the proceedings that resulted in the determination. *Id*.

In contrast, asserts PGW, a municipal lien is the result of a municipal claim. The claim arises by operation of law and may result in a lien which does not require notice or opportunity to be heard prior to its effectiveness or creation. Exc. at 13. Significantly, for purposes of the Commission’s disposition of PGW’s Exceptions in this regard, PGW concedes that the “. . . form, substantive validity, or calculation of a lien . . . is according to the statutory provisions of the MCTLL.” *Id*.

Second, PGW asserts that the ALJ confused and commingled the concepts of a municipal lien and a judgment lien. Exc. at 14-16. PGW highlights the essential difference between the concepts of a municipal lien and a judgment lien. The essential distinctions are that the municipal lien is *in rem*, or an action taken against a specific property and the judgment lien is an *in personam* determination by which the judgment binds, or encumbers, all real property of the judgment-debtor. Exc. at 15.

Third, PGW argues that the Initial Decision did not accurately reflect or recognize the statutory process for the adjudication and enforcement of municipal liens as compared to monetary judgments. Exc. at 16-18. In this objection, PGW repeats its basis for distinguishing a municipal lien and judgment lien. PGW repeats its description of the municipal lien procedures under the MCTLL and states that the municipal lien, by itself, is not conclusive as between the parties concerning the amount owed. Exc. at 16. There is a legal process to establish the final amount of indebtedness represented by the municipal lien and the lien merely secures payment of a sum that can, eventually, be modified. *Id*.

Fourth, PGW asserts that the ALJ erred in her reliance on *Equitable Gas v. Wade*, *supra*, and the doctrine of merger of judgments. Exc. at 18-20. In this section of its Exception No. 2, PGW again asserts that dual procedures, *in rem* and *in personam*, are permitted under the MCTLL, to enable a municipal entity to recover on the debt represented by the municipal lien. Exc. at 18.[[25]](#footnote-25)

PGW distinguishes the holding in *Equitable Gas v. Wade* based on the fact that in *Equitable Gas v. Wade*, the action before the court resulted in a valid and final personal judgment against the utility customer. Therefore, in *Equitable Gas v. Wade*, PGW observes, there was a “conclusive” judicial determination as to the amount owed by a ratepayer to a utility concerning the ratepayer’s personal liability for the utility service. Also, PGW places special emphasis on the fact that in contrast to *Equitable Gas v. Wade*, neither PGW nor SBG, commenced the statutory process for adjudicating the final amount due on the municipal lien. Exc. at 19. PGW states, “[t]here has been no valid and final determination by the Court of Common Pleas as to the valid [sic] or amount of the debt owed on the municipal lien.” *Id*.

Additionally, PGW asserts that the ALJ improperly relied on the doctrine of merger in this proceeding. Exc. at 19. As noted, PGW argues that none of the circumstances necessary to achieve a merger of judgments are present as neither the original claim nor any defenses to that claim have been extinguished. *Id*.

Fifth, PGW asserts that the Initial Decision misinterpreted and misapplied the applicable statutory provision regarding interest on judgments, 42 Pa. C.S. § 8101. *See* Exc. 20-23. PGW objects that the Initial Decision implicitly concluded that the interest provisions in 42 Pa. C.S. § 8101 should be applied to municipal liens. Exc. at 20. This is legal error because: 1) it is incorrect to conclude that 42 Pa. C.S. § 8101 preempts either the MCTLL at 53 P.S. § 7143 (a provision “capping” interest on liens at 10%), the Commission Regulations on late payment charges at 52 Pa. Code § 56.22, or PGW’s tariff on late payment charges; and 2) late payment charges are calculated based on the rate of interest in 52 Pa. Code § 56.22 and a late payment charge should not be equated with “interest” as that term is used in civil actions. Exc. at 21-22.

#### b. Disposition (Introduction; Exception Nos. 1 and 2)

As a preliminary matter, we advise the Parties that any issue that we do not specifically address has been duly considered and should be deemed denied without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also*, *generally*, *Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984); *Pa. Game Comm’n v. Pa.PUC*, 651 A.2d 596(Pa. Cmwlth. 1994), citing [*Barasch v. Pa. PUC*, 515 A.2d 651, 655 (Pa. Cmwlth. 1986)](http://www.lexis.com/research/buttonTFLink?_m=032ad340e5076e74c39b1f00caeb443e&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b651%20A.2d%20596%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=97&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b101%20Pa.%20Commw.%2076%2c%2084%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=19&_startdoc=11&wchp=dGLbVzk-zSkAl&_md5=c813ad03f8a75e18b8833eade5f49696) (“We have held that a [PUC] decision is adequate where, on each of the issues raised, the [PUC] was merely presented with a choice of actions, each fully developed in the record, and its choice on each issue amounted to an implicit acceptance of one party’s thesis and the rejection of the other party’s contention.”).

##### (1) Request to Strike Exceptions and Request for Sanctions

As noted, in Replies to Exceptions at 3-5, SBG raises, preliminarily, an objection to our consideration of PGW’s Exceptions on the merits. SBG notes that the Exceptions were signed and filed by attorneys whose appearance was not entered in the record of these proceedings.

On consideration of the SBG request in the nature of a motion to strike the Exceptions of PGW, the said request shall be denied. Our Regulation at 52 Pa. Code § 1.2(a), provides, in pertinent part:

This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.

Notwithstanding that the PGW Exceptions were signed by attorneys who had not, prior to the filing, entered their appearance in this proceeding, the proper entry of appearance noting the representation of counsel for PGW in this matter was subsequently filed with the Commission. The hallmark of the applicable Commission rule is to avoid conduct that affects (adversely) the substantive rights of a party. We find that the entry of appearance by counsel who are signatories to the PGW Exceptions was cured and has not adversely affected the substantive rights of SBG in this matter.

SBG has also made a request, in the nature of a motion, seeking sanctions against counsel for PGW, for what SBG terms, the “contemptuous tenor” of language in the Exceptions. *See* R.Exc. at 5, citing 52 Pa. Code §§ 1.26, 1.27.

On review of the Exceptions and consideration of the record of these proceedings, we are aware that they have been vigorously contested and zealously advocated by counsel for the Parties. We appreciate the attentiveness of Complainants’ counsel to the overall requirements of observing civility in administrative proceedings in compliance with Commission Regulations and the Code of Ethics for members of the Pennsylvania Bar, generally.[[26]](#footnote-26) However, we do not conclude that the tenor or tone in the Exceptions of PGW has exceeded the bounds of vigorous advocacy or exemplify any disrespect for this tribunal or the presiding officer. We additionally note that there does not appear any order in the nature of sanctions that has been issued by the presiding officer in this matter, especially in light of the extremely contentious matters arising during discovery. *See* 52 Pa. Code § 5.372. Therefore, the SBG motion for sanctions for a violation of Commission Regulations pertaining to contemptuous conduct of counsel shall also be denied.

##### (2) The Commission Has Inherent Authority to Determine the Scope of its Jurisdiction in the First Instance

As a threshold ruling, we conclude that this Commission has the authority to determine whether we have jurisdiction over the Parties and the subject matter of the Colonial Garden and Simon Garden Complaints. *See Kim v. Heinzenroether*, 390 A.2d 874, 876-877 (Pa. Cmwlth. 1978) (“Commensurately, we deem it within the power and authority of any tribunal performing quasi-judicial functions to determine the nature and extent of its own jurisdiction. *See*. . .  *Troiani Brothers, Inc. v. Pa. PUC*, . . . [387 A.2d 980 (1978)](http://www.lexis.com/research/buttonTFLink?_m=402f82e55171b5a9cf46d02b190dbeb0&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b37%20Pa.%20Commw.%20328%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=52&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b387%20A.2d%20980%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAW&_md5=13025205908c307d74773889e3a5db44) . . .”).

Based on the foregoing, the Commission, in an exercise of its quasi-judicial function, and pursuant to Code Sections 102; 103; 501; 701; 1301; 1303; 1312; 1501; 1502; 1503; 1504; 1509; 1521-1533; and, specifically, 2212, pertaining to a “city natural gas distribution operation;” 3301; 3309; and 3314; has the requisite power and authority to determine the nature and extent of our jurisdiction and authority in this Complaint. *See* 66 Pa. C.S. §§ 102, 103, 501, 701, 1301, 1303, 1312, 1501, 1502, 1503, 1504, 1509, 1521-1533, 2212(a)-(t), 3301, 3309, and 3314.[[27]](#footnote-27)

##### (3) Legal Process to Collect on a Debt for Unpaid Utility Service Preempts Applicability of a Commission-Approved Tariff for the Same Debt

On consideration of the Exceptions of PGW, we find that the ALJ properly analyzed the legal issues, several of which present questions of first impression. In the Initial Decision, ALJ Vero requested legal argument and responses from the Parties on 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.

*See* I.D. at 57.

We shall affirm ALJ Vero’s conclusion reached in the Initial Decision, subject, however, to different reasoning. That is, PGW’s inclusion of amounts which are the subject of a municipal lien are improperly incorporated as billing determinants in the calculation of just and reasonable late payment charges (rates) under PGW’s tariff.

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.

*See* I.D. at 61 (emphasis supplied).

The focus of the litigation in this dispute has centered upon the permissible rate of interest that PGW is entitled to impose on past due utility bill balances pursuant to its tariff authorization to charge a late payment fee. In this regard, PGW argues that the municipal lien applied to such accounts is merely a “placeholder” and its existence should, essentially, have no impact on its right to include the “liened” amount for purposes of applying a Commission-approved tariff to derive the proper late payment charges for a delinquent customer. The following excerpt from PGW’s Exceptions represents a key argument made by the Company in this area:

Contrary to the Initial Decision, the municipal lien is not a remedy in and of itself. There is a legal difference between the underlying debt and the municipal lien. As noted, the municipal lien provides notice. But, that lien in and of itself does not create any preclusive effect, and it does not affect the use of the property. A separate process is used to challenge and/or enforce the lien. Once that process is completed, the final amount of the municipal lien is determined.

Until that debt is paid in full, efforts can be made to collect such sums from either the customer of record or the property itself. The Initial Decision, if adopted by the Commission, would necessarily force the City/PGW to pursue the debt against only one of them. But, no support can be found in the Public Utility Code for requiring that efforts to collect debt from the customer of record must end upon the filing of a municipal lien. Nor does the Public Utility Code support only pursuing the customer of record when a guarantor is available for the debt of the customer of record. As set forth in the Introduction, the requirement of making an election between who to pursue for the debt will have negative consequences and results from a misunderstanding of the laws regarding liens and judgments.

PGW Exc. at 11 (notes omitted; emphasis supplied).

In the above-cited excerpt, PGW states that “. . . the municipal lien is not a remedy in and of itself;” and “[t]he Initial Decision, if adopted by the Commission, would necessarily force the City/PGW to pursue the debt against only one of them.” *See* Exc. at 11. These assertions, while partially accurate, must be qualified for purposes of the Commission’s jurisdiction and authority in this dispute.

PGW is correct in its position that “[u]ntil that debt is paid in full, efforts can be made to collect such sums from either the customer of record or the property itself.” By operation of law, PGW may, consistent with the MCTLL, simultaneously pursue recovery on a debt for unpaid utility service through the prosecution of an action *in rem* or an action, *in personam*. Thus, PGW is entitled to exercise both its statutory rights under the municipal lien procedures, referenced as *scire facias* (*in rem*),[[28]](#footnote-28) as well as institute an action at law, in assumpsit (*in personam*), to establish individual liability for the debt. *See City of Pittsburgh* *v. William Ondeck*, 525 A.2d 1286 (Pa. Cmwlth. 1987) (*Ondeck*) (“A municipality may resort to both a judgment *in rem* and a judgment *in personam* to satisfy a municipal claim”); *Philadelphia v. DeArmond*, 63 Pa. Super. 436 (1916) (*DeArmond*) (The filing of the claim was not an action for its recovery, the defendant was not required to answer or do anything concerning it, it did not invoke the jurisdiction of the court to enter any judgment or decree.).

*Ondeck*, *supra*,and *DeArmond*, *supra*,only support PGW’s assertion that the mere placement of the municipal lien on a property encumbers the property but does not result in satisfaction of the underlying financial obligation represented by the lien amount. That is to say, the lien is not a “remedy” as argued by PGW, as the lien does not, in and of itself, achieve recovery or satisfaction of the obligation or debt it represents. Rather, the lien secures payment or satisfaction of the indebtedness evidenced by the municipal lien, only upon invocation of a subsequent civil procedure. *See* SBG R.Exc. at 16.[[29]](#footnote-29)

Notwithstanding that PGW (through the City of Philadelphia) has a legal right to pursue collection on a debt for past due utility service under actions *in rem* and *in personam*, we agree with the presiding officer, with modification to the underlying reasoning as detailed below, that the legal effect of the municipal lien is to remove the indebtedness for the unpaid utility bill from Commission purview.

Consequently, for reasons that are distinguishable from the reasoning of ALJ Vero, and explained below, we come to the same conclusion. Upon the filing of a municipal lien for the debt represented by an unpaid utility bill, there is a preemptive legal effect resulting from this act that affects PGW’s rights to include the said liened amount in the determination of charges under a Commission-approved tariff.

PGW, in its Exceptions, complains that our affirmance of the conclusion of the ALJ will force it to make an “election” of its remedies, contrary to the MCTLL. We would disagree. As delineated below, any “election” of available remedies that PGW and the City of Philadelphia may pursue to recover on the debt for an unpaid utility bill is an election brought about by operation of law and the statutory procedures of the MCTLL. These are matters over which this Commission lacks jurisdiction. *See N. Coventry Twp. v. Tripodi*, 64 A.3d 1128 (Pa. Cmwlth. 2013) (citations omitted):

Section 3(a) of the [Municipal Claims Act of 1923 (Act)] provides that ‘[a]ll municipal claims, municipal liens, . . . which may hereafter be lawfully imposed or assessed on any property in this Commonwealth . . . shall be and they are hereby declared to be a lien on said property, together with all charges, expenses, and fees incurred in the collection of any delinquent account, including reasonable attorney fees . . . .’ A municipal lien arises by operation of law whenever a municipal claim is lawfully assessed or imposed upon the property. A municipal lien is a charge, claim or encumbrance on the property placed to secure payment of a debt and does not affect the owner’s right to possess or control the property. . .

. . . To challenge a municipal claim, the owner must utilize the specific procedures set forth in . . . the Act.

The Initial Decision has correctly noted that a municipal lien is the result of a municipal “claim” under the MCTLL. A municipal “claim” is defined as, “. . . the claim arising out of, or resulting from, a tax assessed, service supplied, work done, or improvement authorized and undertaken, by a municipality.” *See* 53 P.S. § 7101; *Newberry Twp. v. Stambaugh*, 848 A.2d 173 n.9 (Pa. Cmwlth. 2004). In this dispute, the municipal claim arises from the natural gas distribution service supplied by PGW to properties owned and/or managed by Colonial Garden, Simon Garden, and SBG.

Based on the existence of the claim for unpaid service, a municipal lien is created upon the docketing and filing of the claim by the City of Philadelphia. And, as noted by the presiding ALJ, the obligation on the claim is *in rem*, or pertaining to the service address property. Recovery to satisfy the debt that has resulted in the claim, or challenges to the validity, amount, or civil process involving the claim must be pursued through the Courts, however. This is where PGW’s position in its Exceptions must fail.[[30]](#footnote-30)

The process to enforce the indebtedness secured by a municipal lien is, without dispute, administered by the Courts. *See* [*David Fasone v. Philadelphia Gas Works*](http://www.lexis.com/research/retrieve?_m=896abbcaf65ab87ff0af9c731b358b8c&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzk-zSkAz&_md5=f4ca9099df2a79df21c93b8f581b7e6c), Docket No. C-2012-2322684 (Initial Decision issued October 12, 2012; Final Order entered November 30, 2012), involving the dismissal of a formal complaint against PGW regarding a lien for unpaid utility bills placed on complainant’s property. The property owner contended that PGW should seek payment for the amount of the lien from the tenant who lived at the property because the tenant failed to pay the utility bills. It was held by the Commission on sustaining preliminary objections, that the Commission lacks jurisdiction to address the validity and enforcement of liens.

There are a plethora of cases cited in these proceedings that stand for the proposition that all matters concerning municipal liens must proceed in a court of law. *See Malisa Tate v. Philadelphia Gas Works*, Docket No. C-2014-2428639 (Initial Decision issued January 7, 2015) at 10, (“In attaching a municipal lien on the premises, the [City of Philadelphia] is acting in its capacity as a municipality only. The Commission has jurisdiction over public utilities pursuant to the Public Utility Code, 66 Pa.C.S.A. § 101 *et seq*., not over municipalities acting in their municipal capacity”); *Malisa Tate v. Philadelphia Gas Works*, Docket No. C-2014-2428639 (Final Order entered February 13, 2015); *Hynn Yoo and Yu Shin Yoo v. Philadelphia Gas Works*, Docket No. C-2013-2369915 (Initial Decision issued April 7, 2014; Final Order entered July 10, 2014);[*Barbara J. Streff and Francis J. Streff v. Philadelphia Gas Works*](http://www.lexis.com/research/retrieve?_m=896abbcaf65ab87ff0af9c731b358b8c&docnum=2&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzk-zSkAz&_md5=f4ca9099df2a79df21c93b8f581b7e6c), Docket No. C-2012-2306034 (Initial Decision issued September 14, 2012; Final Order entered November 2, 2012); [*Rose Daversa v. Philadelphia Gas Works*](http://www.lexis.com/research/retrieve?_m=896abbcaf65ab87ff0af9c731b358b8c&docnum=3&_fmtstr=FULL&_startdoc=1&wchp=dGLbVzk-zSkAz&_md5=f4ca9099df2a79df21c93b8f581b7e6c), Docket No. C-2012-2310986 (Initial Decision issued July 26, 2012; Final Order entered November 6, 2012); *Cornelia Strowder v. Philadelphia Gas Works*, Docket No. C-20028036 (Order entered December 30, 2002); *Debra Williams Lawrence v. Philadelphia Gas Works*, Docket No. C-20066672 (Order entered January 22, 2007); *Tina L. Francis-Young v. Philadelphia Gas Works*, Docket No. C-2008-2029672 (Order entered February 23, 2009); *Agron Vata v. Philadelphia Gas Works*, Docket No. C-2009-2149960 (Order entered August 24, 2010); *Ardelle Jackson v. Philadelphia Gas Works*, (Order entered June 29, 2011); *Josephine Pitt v. Philadelphia Gas Works*, Docket No. C-2009-2140025 (Order entered April 29, 2010); *William Petravich v. Philadelphia Gas Works*, Docket No. C-2010-2188984 (Order entered February 10, 2011); *Larry and Gail Newman v. Philadelphia Gas Works,* Docket No. C-2011-2273565 (Order entered March 29, 2012); *Faye Payne v. Philadelphia Gas Works*, Docket No. C-2011-2247124 (Order entered February 16, 2012) (“the Commission lacks the authority to order the City to remove *or reduce* a lien on the complainant’s property” (emphasis added)); *Griffin v. Philadelphia Gas Works*, Docket No. C-2011-2251780 (Order entered November 14, 2011).

On consideration of the weight of authority, this Commission concludes that at such time as PGW’s municipal claim becomes a municipal lien, this is a voluntary election by the City of Philadelphia,[[31]](#footnote-31) as a creditor, that acts to remove the procedural and substantive entitlement to recovery on the debt from the administration of this Commission and relegates that legal entitlement into the province of the Courts. *See* *Tina L. Francis-Young v. Philadelphia Gas Works*, *supra*.

While PGW takes the position that the lien is not a volitional act by the City of Philadelphia (it arises by operation of law) and is not a “remedy” in the sense that the debt obligation is not satisfied by the lien and ownership of the encumbered property is not affected, the recording of the lien is, in fact, an act and a remedy in the sense that it is a statutory, civil collection process that invokes the jurisdiction of the Courts concerning the debt. This is to the exclusion of this Commission.

##### (4) Modification of the Reasoning Supporting the Conclusions that a Municipal Lien Has a Preemptive Effect on a Commission Tariff

By affirming the presiding ALJ in her conclusions regarding the preemptive effect of a municipal lien on the application of PGW’s late payment charge calculations under its tariff for the same debt, we acknowledge that a decision as to whether a municipal lien will, or will not, be construed to be the functional equivalent of a “judgment” according to law, is beyond the jurisdiction of the Commission to so decide. *See* I.D., Conclusion of Law # 17.

We agree with the argument of PGW that a conclusion regarding the permissible rate of interest on a municipal lien is a determination that is also beyond the scope of jurisdictional authority of this agency. We, therefore, expressly decline to adopt the following Conclusions of Law in the Initial Decision:

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).

\* \* \*

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).

*See* I.D. at 71.

The Commission lacks jurisdiction to determine what, if any, is the appropriate rate of interest that PGW may charge for past due amounts that the Company has placed in the municipal lien category according to the MCTLL. A corollary to our primary reasons to adopt the conclusions in the Initial Decision and for our denial of PGW’s Exceptions is that the simultaneous inclusion of amounts subject to a municipal lien in the computation of tariff charges, *inter alia*, violates the provisions of Section 1303 of the Code, 66 Pa. C.S. §1303. This section of the Code prohibits a utility from “ . . . directly or indirectly, by any device whatsoever, . . . receiv[ing] . . . a greater or less rate for any service rendered . . . than that specified in the tariffs of such public utility applicable thereto.” As recognized by the Parties, particularly the testimony of SBG witness Roger Colton, the late payment charge is a Commission-made rate.[[32]](#footnote-32) As a rate, the lawful, tariffed late payment charge compensates the Company for the financial consequences of the delinquent account. Application of any factors external to the Commission’s determination of the just and reasonable charge for a delinquent account impermissibly conflates with this determination and is, therefore, in conflict with the statute. *See* Fact # 63.[[33]](#footnote-33)

Based on the foregoing, a determination of whether the permissible rate of interest on the indebtedness secured by a municipal lien will be the legal rate of interest that is applied to a “money judgment” under 42 Pa. C.S. § 4101, or the statutory “capped” rate of 10% under the MCTLL, or some other percentage, is a determination that must be made upon proper presentation of the issue to the Court of Common Pleas. This is, as noted, consistent with our conclusion that the question of whether a municipal lien that is filed and recorded pursuant to the MCTLL will be treated as the functional equivalent of a judgment under the law is also outside of the jurisdiction of the Commission.

We have acknowledged that the law permits the City of Philadelphia, as the owner of PGW and the municipal entity that is the beneficiary of the municipal claim, to pursue recovery on the debt that is created by unpaid utility bills by pursuing actions both, *in rem*, and *in personam*. Therefore, we also decline to endorse the ALJ’s conclusion concerning the doctrine of “merger” as this doctrine has been discussed in the present case:

Nor did it [PGW] 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.[[34]](#footnote-34)

*See* I.D. at 63 (emphasis added).

The ability of the City of Philadelphia to pursue, in dual fashion, actions *in rem* and *in personam*, distinguishes the holding in *Equitable Gas v. Wade* from the present dispute. PGW’s Exceptions to this aspect of the Initial Decision are granted solely to the extent consistent with our discussion.

Rather than use the term, “extinguished,” as referenced in the above quoted portion of the Initial Decision, I.D. at 63 and Conclusion of Law # 20, concerning PGW’s claims, we would characterize the effect of the municipal lien on the same debt as accrued pursuant to a Commission-approved tariff, as “removed.”

Notwithstanding our modifications to the ALJ’s reasoning and our rejection of the ALJ’s conclusions of law regarding the doctrine of merger, on consideration of the weight of authority, this Commission expressly decides that at such time as PGW’s municipal claim becomes a municipal lien, this is a voluntary election by the City of Philadelphia that has legal consequences. Transformation of the indebtedness resulting from the unpaid utility bill into a municipal lien, whether by operation of law, or by the volitional act of the City of Philadelphia as creditor of the utility patron, is an act that results in the preemption of this agency’s ability to exercise any degree of authority or jurisdiction over its collection. *See*, *e.g.,* *Tina L. Francis-Young v. Philadelphia Gas Works*, Docket No. C-2008-2029672 (Initial Decision issued October 28, 2008) at 4 (*distinguishing Gasparro v. Pa. PUC*, 814 A.2d 1282 (Pa. Cmwlth. 2003) (*Gasparro),* “Here, the Respondent was a step ahead of the Commission’s determining whether its over-billing occurred. It collected its charges on May 9, 2007 before the Complainant raised them with the Commission. Therefore, I conclude that the Commission does not have jurisdiction over a lien imposed by the Respondent.”)

Based on the legal effect of a municipal lien on the debt resulting from a Commission-approved tariff, we concomitantly find that such amounts that are removed from Commission authority and jurisdiction are improperly included in the derivation of late-payment tariff charges under a Commission-approved tariff. Our conclusion is heavily reliant on *Equitable Gas v. Wade*, *supra*, as distinguished by the above discussed factors, also, *Gasparro* and those cases discussing the doctrine of primary jurisdiction as between the Commission and the Courts.

##### (5) *Equitable Gas v. Wade*, *supra*, and *Gasparro*, *supra*,Counsel in Favor of Affirmance

At Exceptions pages 18-20, PGW attempts to distinguish the applicability of *Equitable Gas v. Wade* to these complaint proceedings based on the legal differences between a money judgment and a municipal lien. The most notable distinction cited by PGW is that, in contrast to the factual circumstances in *Equitable Gas v. Wade*,“neither PGW nor the Complainants commenced the statutory process for adjudication of the municipal lien.” Exc. at 19.

While we acknowledge that the distinctions between a money judgment and a municipal lien present issues that are beyond the scope of Commission jurisdiction, we find that *Equitable Gas v. Wade* and *Gasparro* are substantial precedent that counsel in favor of our affirmance of the presiding ALJ in her result.[[35]](#footnote-35)

*Gasparro*, citing *Bell Tel. Co. v.* [*Phila. Warwick Co*., 355 Pa. 637, 644, 50 A.2d 684, 688](http://www.lexis.com/research/buttonTFLink?_m=c9758162fc71fcc9d1d52f24bd0a0a25&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b814%20A.2d%201282%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=25&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b355%20Pa.%20637%2c%20644%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzB-zSkAl&_md5=ba8b1240af0a8f3b5080f73fd68ff14a) (1947), has held that the Commission lacks jurisdiction to entertain a proceeding by a public utility to recover payment for its services. The reasoning of *Gasparro* relied upon the following discussion in *Bell v. Phila. Warick Co.*:

These cases make it abundantly clear that where a plaintiff sues for moneys alleged to be due under a contract, or in trespass for damages, the court is not without jurisdiction over the subject-matter of the suit merely because the action of some other tribunal may be necessary to fix the amount due as a condition precedent to plaintiff's right of recovery. In the present case the only tribunal in which plaintiff can sue for the moneys it claims is the Court of Common Pleas; whatever the function of the Public Utility Commission to determine the reasonable and just amount of defendant's commissions that body cannot give relief to plaintiff by awarding him a judgment, followed, if necessary, by a writ of execution. The Public Utility Commission has no jurisdiction to entertain a proceeding by a public utility to recover its charges. If plaintiff is entitled to recovery in its present action it is for the Court of Common Pleas to say so; if it is not entitled it is likewise for that court so to declare. But, whether its ultimate conclusion in regard to that question be in favor of or against plaintiff, the Court of Common Pleas, and it alone, has jurisdiction over the cause of action here asserted.

355 Pa. at 644, 50 A.2d at 688 (emphasis supplied).

*Gasparro* is a recent holding that affirms the principles set forth in *Bell v. Phila. Warwick Co*. The Commission’s discussion in *Jerold C. Kintzel v. Pa. Power and Light Company*, Docket No. Z-00319269, 54 Pa. PUC 491 (1980), is further consistent with the well-settled understanding that the Commission lacks jurisdiction over the collection of unpaid amounts that have accrued pursuant to the provisions of a Commission-approved tariff. Actions in the nature of collection must proceed according to civil actions at law:

In the initial decision (p. 20), Judge Casey discussed the holding in the case of *Pennsylvania Power & Light Co. v Brubaker Motors Inc.*, reported at 64 *Lancaster Law Review* (1974), wherein the [court] of common pleas of Lancaster held:

“In the present case the only *tribunal* [emphasis in original] in which *plaintiff* [emphasis here] [utility] can sue for the moneys it claims is the court of common pleas; whatever the function of the public utility commission to determine the reasonable and just amount . . . *that body cannot give relief to plaintiff by awarding him a judgment, followed, if necessary, by a writ of execution.*” [Emphasis here.]

The commission has no power to render a money judgment, no power to enforce a judgment by issuance of a writ of execution, and no power to award damages. The factual situation in *Brubaker Motors*, and the cases therein cited, arose initially by *suit brought in common pleas court* to collect unpaid utility bills or to secure damages for failure to list a subscriber's telephone number in a telephone directory. These cases clearly fall within the jurisdiction of common pleas court since the relief sought is a judgment which is enforceable by a writ of execution, a remedy unavailable before this commission. The case before us *does not,* however, *involve a suit brought by a utility against a consumer* for unbilled charges due to a faulty meter or a meter which has been tampered with.

This commission has at least initial jurisdiction, if not exclusive jurisdiction to determine matters involving, *inter alia*, rates, certifications, service, facilities, safety, extensions, and transfer of utility property. The case of [*Borough of Lansdale v Philadelphia Electric Co*. (1961) 403 Pa 647, 39 PUR3d 474, 170 A2d 565,](http://www.lexis.com/research/buttonTFLink?_m=11f2faa8eb1c74b7ac874a379dd00e76&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b54%20Pa.%20PUC%20491%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=1&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b403%20Pa.%20647%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=355bcb64fa0114401145b857d7e6106c) discusses those areas of utility matters over which this commission has been granted jurisdiction, to wit:

\* \* \*

Our independent review of the record regarding the evidence presented by respondent concerning the method used to calculate estimated consumption during the July, 1975, -- January, 1979, period in question establishes that the consumption estimate has been determined in accordance with accepted industry procedures . . .

It is important that this opinion does not relinquish the commission's authority to hear billing disputes or its authority to rule upon agreements between the utility and customer to decrease the amount of arrearages. The commission lacks authority, only, to compel an unwilling customer to pay past due bills.

54 Pa. PUC at 492, 494 (underscore emphasis added)

Based on the foregoing, the position of PGW in its Exceptions is inconsistent with the doctrine of primary jurisdiction between this Commission and the Courts.

In Reply Exceptions at 17, SBG without specific reference to the doctrine of primary jurisdiction, nonetheless, highlights the viability of the doctrine in this dispute. SBG notes that, in argument before the Court of Common Pleas occurring on March 25, 2014, counsel for PGW represented to the Court that the Commission had exclusive jurisdiction regarding the determination of the underlying debts that concerned the municipal liens that were before that Court. The liens were before the Court as a result of foreclosure proceedings initiated by the City of Philadelphia as SBG managed properties. SBG, in its Replies, goes on to criticize the positions of PGW in court proceedings as inconsistent with PGW’s position and representations made to the Commission in this litigation. *Id*.

A fundamental basis of the doctrine of primary jurisdiction is grounded on, *inter alia*, the lack of statutory authority of this agency to award damages. *See Pettko v. Pa. Am. Water Co*., 39 A.3d 473 (Pa. Cmwlth. 2012), *appeal denied* 616 Pa. 670, 51 A.3d 839 (2012) (*Pettko*); *PPL Electric Utilities Corp. v. Pa. PUC*, 912 A.2d 386 (Pa. Cmwlth. 2006); [*Behrend v. Bell Telephone Company*, 363 A.2d 1152 (Pa. Super. 1976)](http://www.lexis.com/research/buttonTFLink?_m=1adbede313cecd26f36fcb743fb2fdfa&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b258%20Pa.%20Super.%20555%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=24&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b242%20Pa.%20Super.%2047%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzB-zSkAA&_md5=9f290b1640467724a6dd33bc68a0821b), *vacated and remanded on other grounds*, [473 Pa. 320, 374 A.2d 536 (1977)](http://www.lexis.com/research/buttonTFLink?_m=1adbede313cecd26f36fcb743fb2fdfa&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b258%20Pa.%20Super.%20555%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=25&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b473%20Pa.%20320%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzB-zSkAA&_md5=fe7b509c22c75967aa927f5e8d352f04); *also* *Elkin v. Bell Tel. Co. of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980) (*Elkin*); *Feingold v. Bell Tel. Co. of Pa.,* 477 Pa. 1, 383 A.2d 791 (1977) (*Feingold*); [*DeFrancesco v. Western Pa. Water Co.*, 499 Pa. 374, 453 A.2d 595 (1982)](http://www.lexis.com/research/buttonTFLink?_m=5f8d03027046935eeb1326b6a18e8220&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b341%20Pa.%20Super.%20598%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=46&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b499%20Pa.%20374%2c%20378%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=7720fe72a396873fc432275ac5c22115); *Poorbaugh v. Pa. PUC*, 666 A.2d 744 (Pa. Cmwlth. 1995), *appeal denied* 548 Pa. 662, 698 A.2d 69 (1997) (*Poorbaugh*);*Optimum Image, Inc. v. Phila. Elec. Co.*, 600 A.2d 553 (Pa. Super. 1991); *Hoch v. Phila. Elec. Co*., 492 A.2d 27 (Pa. Super. 1985); *Morrow v. Bell Tel. Co.*, 479 A.2d 548 (Pa. Super. 1984); [*Byer v. Peoples Natural Gas Company*, 380 A.2d 383 (Pa. Super. 1977)](http://www.lexis.com/research/buttonTFLink?_m=1adbede313cecd26f36fcb743fb2fdfa&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b258%20Pa.%20Super.%20555%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=14&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b251%20Pa.%20Super.%2075%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzB-zSkAA&_md5=5fbb38ed5e34bc6d247b5e977f39cb44); and *Allport Water Auth. v. Winburne*, 393 A.2d 673 (Pa. Super. 1978).[[36]](#footnote-36)

*Pettko* is cited for the following propositions: 1) the question of whether a utility’s manner of billing is in compliance with a tariff is encompassed in the claims relating to billing practices and the Commission has particular expertise in interpreting its tariffs; *see, also,* *Di Santo v. Dauphin Consol. Water Supply*, 436 A.2d 197 (Pa. Super. 1981) (*Di Santo*) (questions dealing with excessive charges pursuant to a tariff are matters to be decided in the first instance exclusively by the Commission);and 2) the courts have considered whether the Commission has exclusive jurisdiction over the claims in a complaint or whether the bifurcated procedure adopted by *Elkin*, *supra*, should be followed. Such a determination is dependent upon the adequacy of the administrative remedies available through the Commission. If the available administrative remedies are complete and adequate to make the complainant whole, then the Commission has exclusive jurisdiction over the controversy and there is no recourse to the courts outside of the normal channels of appeal to the Commonwealth Court. However, where the administrative remedies are not adequate and complete, the Commission’s jurisdiction is not exclusive and an action for damages may be brought in a court of Common Pleas based upon the Commission’s initial determination of the matters within its realm of expertise. *Pettko*, 39 A.3d at 482-483.

As confirmed by our consideration and review of the cases before this Commission wherein complainants have disputed municipal liens which arose in the context of unpaid bills for utility service, this Commission does not have jurisdiction over any aspect of the underlying debt once it has been converted into a municipal lien. *Cornelia Strowder v. Philadelphia Gas Works*, Docket No. C-20028036 (Order entered December 30, 2002). Thus, there is no relief which the Commission has authority to provide to a successful litigant, either ratepayer (debtor) or utility (creditor), based on a dispute regarding the lien. An administrative agency does not have exclusive jurisdiction unless it has the power to award relief that will make a successful litigant whole. *Pettko; Di Santo*.

Based on the foregoing, PGW’s position that the municipal claim, which has become a municipal lien by operation of law of the act of the City of Philadelphia, is merely a “placeholder” or “marker” and not a collection remedy under law because it does not, of itself, achieve recovery on the debt until a subsequent civil process is used, belies the fact that the process that must be followed and all issues that are ancillary to the process are under the jurisdictional authority of the Courts – not the Commission. It is for these reasons that we conclude that PGW’s practice of using the lien amount to count toward, or to be considered in, the derivation and accrual of charges pursuant to a Commission authorized tariff, is illegal.

Additionally, our conclusion that removing amounts represented by a municipal lien in applying a Commission-approved tariff based on their non-jurisdictional status before this agency accords with the long-standing policy of “recourse” pertaining to non-jurisdictional charges included in telephone utility billing statements. *See Bruce Kaczmarczyk v. Lakewood Telephone Company*, Docket No. F-00162260 (Initial Decision issued December 9, 1992) citing, [*M. Dan Jones v. The Bell Telephone Company of Pennsylvania*, 1991 Pa. PUC LEXIS 181 (Order entered October 7, 1991).](http://www.lexis.com/research/buttonTFLink?_m=7dc499889210c8c7c671dd1a80d0b439&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1992%20Pa.%20PUC%20LEXIS%20128%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1991%20Pa.%20PUC%20LEXIS%20181%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLbVzk-zSkAz&_md5=ee591b1e22d75136b8e63df771760bda)

In *Bruce Kaczmarczyk v. Lakewood Telephone Company*, *supra*, the Commission held that because “900” service companies are not public utilities, the tariff and billing provisions of the Code, [66 Pa. C.S. §§ 1303](http://www.lexis.com/research/buttonTFLink?_m=7dc499889210c8c7c671dd1a80d0b439&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1992%20Pa.%20PUC%20LEXIS%20128%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=7&_butInline=1&_butinfo=66%20PACODE%201303&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLbVzk-zSkAz&_md5=1381d76dd33f5bbcb0b8ea6ce065fb63), [1304](http://www.lexis.com/research/buttonTFLink?_m=7dc499889210c8c7c671dd1a80d0b439&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b1992%20Pa.%20PUC%20LEXIS%20128%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=8&_butInline=1&_butinfo=66%20PACODE%201304&_fmtstr=FULL&docnum=13&_startdoc=11&wchp=dGLbVzk-zSkAz&_md5=54fdcc086539b679881f70525f676154), that apply to public utilities, do not apply to these services. The appropriate remedy in disputes involving such non-jurisdictional charges that appeared on the bills administered by utilities was to remove the said charges from the complainant/patron’s bill.[[37]](#footnote-37) After removing these charges, further collection efforts regarding the charges are beyond the Commission’s jurisdiction to regulate. In reciprocal fashion, the telephone utility is not authorized to use utility collection remedies such as suspension or termination of service to collect charges for “900” [non jurisdictional] services. *Id*.

Also, this Commission has recently addressed its statutory authority over non-jurisdictional charges in the context of electric generation supplier (EGS) companies under Section 2809, *et seq.*, of the Code, 66 Pa. C.S. § 2809, *et seq*. In *Commonwealth of Pa., et al. v. IDT Energy, Inc*., Docket No. C-2014-2427657 (Order entered December 18, 2014) (*IDT Order*), we concluded that we lacked authority to direct an EGS company to refund charges for electric generation supply service pursuant to [66 Pa. C.S. § 1312](http://www.lexis.com/research/buttonTFLink?_m=cdb837c0f75d26fd724ad3894b86e382&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2015%20Pa.%20PUC%20LEXIS%20358%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=21&_butInline=1&_butinfo=66%20PACS%201312&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLbVzt-zSkAA&_md5=218efea0886cf2d9136432973fca08c2), as this provision of the Code applied to “rates” charged by “public utilities” and EGS companies were not “public utilities” under the Code, except for the limited purposes of Sections 2809 and 2810, [66 Pa. C.S. §§ 2809](http://www.lexis.com/research/buttonTFLink?_m=cdb837c0f75d26fd724ad3894b86e382&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2015%20Pa.%20PUC%20LEXIS%20358%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=23&_butInline=1&_butinfo=66%20PACS%202809&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLbVzt-zSkAA&_md5=58af19b614247f6297d928dbe38f4efc) and [2810](http://www.lexis.com/research/buttonTFLink?_m=cdb837c0f75d26fd724ad3894b86e382&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2015%20Pa.%20PUC%20LEXIS%20358%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=24&_butInline=1&_butinfo=66%20PACS%202810&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLbVzt-zSkAA&_md5=977ba0f2185d3471f986681d062cd32d). In the *IDT Order*, we expressly acknowledged our ability to exercise general authority over EGS companies pursuant to Section 501 of the Code, 66 Pa. C.S. § 501, to direct an EGS company to adjust a bill to an EGS patron based on a finding of, *inter alia*, a violation of the Code, Commission Regulation, or other provision over which we have authority to administer.

Under the factual circumstances of the present dispute and using the above-cited cases for guidance, the debt represented by the municipal lien, once perfected, cannot form the basis for just and reasonable rates pursuant to a Commission-approved tariff. Consequently, we find that inclusion of that same indebtedness in the determination of a rate (late payment charge) authorized by a Commission-approved tariff is contrary to law.

##### (6) Policy Considerations Do Not Support PGW’s Position

Finally, by denying PGW Exceptions No. 1 and 2, we conclude that the policy arguments put forth by the Company, particularly those regarding the consequences of adopting the conclusions of the Initial Decision on PGW’s ability to manage delinquent accounts, are to no avail. We do not endorse the scenario painted by PGW that a voluntary election of a statutory remedy to collect on a debt for past due (unpaid) utility service forces it to, either, engage in an unduly administratively burdensome process, effectuate a complete write-off of the delinquent account, or raises a question that should be decided by this Commission on the basis of policy.[[38]](#footnote-38)

It is well-settled that Section 1301 of the Code, 66 Pa. C.S. § 1301, requires that, “[e]very rate made, demanded, or received by any public utility . . . shall be just and reasonable, and in conformity with regulations or orders of the commission.” *See Barasch v. Pa. PUC*, 507 Pa. 496, 491 A.2d 94 (1985), citing[*Pa. PUC v. Pa. Gas and Water Co.*, 492 Pa. 326, 424 A.2d 1213 (1980)](http://www.lexis.com/research/buttonTFLink?_m=6542278a1627141a065085936554cd16&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b507%20Pa.%20496%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=97&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b492%20Pa.%20326%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLbVzB-zSkAl&_md5=53fb2113689e9048742c6c244146fcb9), *cert. denied* [454 U.S. 824, 102 S.Ct. 112, 70 L.Ed.2d 97 (1981)](http://www.lexis.com/research/buttonTFLink?_m=6542278a1627141a065085936554cd16&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b507%20Pa.%20496%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=98&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b454%20U.S.%20824%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLbVzB-zSkAl&_md5=cbf3ce00cdf28eea243d83542e448b8d). Under the predecessor, Public Utility Law,[[39]](#footnote-39) and under the current, Public Utility Code, the term “rate” is broadly defined as encompassing every individual, or joint fare, toll, charge, rental, or other compensation whatsoever of any public utility made, demanded, or received for any service within this act [Code], offered, rendered, or furnished by such public utility and includes any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll, or rental. *See Di Santo.*

For the same reasons that PGW asserts (correctly) that we lack jurisdiction over disputes arising under the MCTLL, this Commission cannot create relief for the Company where the General Assembly has not so provided. When there is a question concerning the justness and reasonableness of rates or the adequacy and reasonableness of service or facilities of any entity subject to the Code, the Commission, as an agency delegated by the General Assembly to implement the Code, cannot be indifferent to a practice that results in a violation of the Code, or any applicable provision of law. *See* *Di Santo*; *Painter v Pa. PUC*, 116 A.3d 749 (Pa. Cmwlth. 2015).

Under the NGCCA, this Commission has been expressly granted jurisdictional authority over PGW, as a city natural gas distribution operation, “ . . . with the same force as if the service were rendered by a public utility.” 66 Pa. C.S. § 2212(b). Under sub-section ‘c’ of Section 2212 of the Code, it states: “. . . the provisions of this title [Code], . . . shall apply to the service of a city natural gas distribution operation with the same force as if the city natural gas distribution operation was a public utility under section 102 . . . .” *See* *Philadelphia Gas Works v. Pa. PUC,* 2009 Pa. Commw. Unpub. LEXIS 797 (No. 1914 C.D. 2007 February 4, 2009). Also, as cited by PGW, sub-section ‘n’ of Section 2212 of the NGCCA expressly preserves the power of city natural gas operation entities to collect delinquent receivables, *i.e.* accounts, through the imposition of liens pursuant to the MCTLL. *See* 66 Pa. C.S. § 2212(n).

In Chapter 14, the General Assembly has expressly preserved the statutory right of a municipal entity to impose or assess a municipal claim and file a lien against a service property for unpaid service. *See* 66 Pa. C.S. § 1414(a), “ . . .[a] city natural gas distribution operation furnishing gas service to a property is entitled to impose or assess a municipal claim against the property and file as liens of record claims for unpaid natural gas distribution service and other related costs, including natural gas supply, in the court of common pleas of the county in which the property is situated . . . .” Also in Chapter 14, the Commission is granted limited authority over a city natural gas distribution operation in specific provisions concerning security deposits for applicants for service. *See* 66 Pa. C.S. §§ 1404(a) and 1414(f).

In this dispute, we do not find any intent by the General Assembly to provide a municipally-owned natural gas distribution operation superior authority, rights, or privileges in the collection and management of delinquent accounts, than possessed by non-municipal utilities. PGW relies upon statements in Chapter 14, entitled, Responsible Utility Customer Protection, “Declaration of policy” at Section 1402(4) of the Code, 66 Pa. C.S. § 1402(4),[[40]](#footnote-40) wherein the General Assembly has expressed a policy to provide “additional” collection tools to city natural gas distribution operations so as to recognize their financial circumstances and to protect their ability to provide service for the benefit of their residents.

We discern that the intent of the General Assembly in its Declaration of policy and enactment of the NGCCA, and the subsequent enactment of Chapter 14, was to subject municipal utilities to the Commission’s jurisdiction and authority as other, private, investor-owned concerns, regarding Chapter 14’s statutory scheme. [[41]](#footnote-41) Under the statutory scheme of Chapter 14, there is a balance struck between utility/ratepayer obligations and responsibilities for the timely payment for utility service, while preserving pre-existing statutory remedies held by municipally-owned utility service providers to collect sums due under the MCTLL. *E.g.,* Section 1404(f) and 1414 of the Code, 66 Pa. C.S. §§ 1404(f); 1414; *also* *Delphine Matthews v. Philadelphia Gas Works*, Docket No. C-2008-2029557 (Order entered April 17, 2009), at 6-7 (“We believe these provisions [Sections 1414(a) and 2212(n) of the Code] were intended to preserve a statutory right that PGW had before the Commission was given authority to regulate PGW. We do not believe that the above provisions were intended to give this Commission authority to adjudicate disputes over the validity and enforceability of PGW’s alleged liens. Such authority remains with the courts.”).

A public utility is entitled to receive payment for the service it provides. *See Nina Jones v. Philadelphia Gas Works*, Docket No. C-2015-2493099 (Initial Decision issued January 20, 2016), citing [*Scaccia v. West Penn Power Co.*, 55 Pa. PUC 637 (1982);](http://www.lexis.com/research/buttonTFLink?_m=2b7a984ed7335aaf4d8461fbb2f49951&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2016%20Pa.%20PUC%20LEXIS%2052%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=15&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b55%20Pa.%20PUC%20637%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=bb5ca39725b42effef7035b6f1e71444) [*Kea v. Peoples Natural Gas Co.*, 60 Pa. PUC 215 (1985);](http://www.lexis.com/research/buttonTFLink?_m=2b7a984ed7335aaf4d8461fbb2f49951&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2016%20Pa.%20PUC%20LEXIS%2052%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=16&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b60%20Pa.%20PUC%20215%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=4485a924240d68cc30527e9e8318f997) [*Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982).](http://www.lexis.com/research/buttonTFLink?_m=2b7a984ed7335aaf4d8461fbb2f49951&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2016%20Pa.%20PUC%20LEXIS%2052%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=17&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b447%20A.2d%201100%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=5047950f15f6854bb92fe83ed9c449b4) PGW has the right to bill and receive payment for the utility service actually supplied. *Nina Jones v. Philadelphia Gas Works, supra,* citing [66 Pa. C.S. § 1303](http://www.lexis.com/research/buttonTFLink?_m=2b7a984ed7335aaf4d8461fbb2f49951&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2016%20Pa.%20PUC%20LEXIS%2052%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=18&_butInline=1&_butinfo=66%20PACS%201303&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=dea67226d6d53aa313b3106bd8707ad5); *Neal v. Philadelphia Gas Works*, Docket No. Z-00871874 (Final Order entered January 4, 2002); [*Angie's Bar v. Duquesne Light Co.*, 72 Pa. PUC 213 (1990).](http://www.lexis.com/research/buttonTFLink?_m=2b7a984ed7335aaf4d8461fbb2f49951&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2016%20Pa.%20PUC%20LEXIS%2052%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=19&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b72%20Pa.%20PUC%20213%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=b5d3c24dc9fa5045be816b180c4ac686) Therefore, we do not countenance the payment history of Colonial Garden or Simon Garden in this litigation.[[42]](#footnote-42) However, neither do we adopt PGW’s position that SBG, on behalf of Colonial Garden and Simon Garden, has not attempted, in good faith, to ascertain the accuracy of bills rendered for gas utility service to their accounts for a period of time approaching a decade. *See* PGW R.B. at 3.

Based on the foregoing, we shall deny PGW’s Exceptions Nos. 1 and 2, consistent with the modification of the ALJ’s reasoning in the Initial Decision.

### 2. PGW Exception No. 3

#### a. Positions of the Parties

**PGW Exception No. 3 – The Initial Decision Errs By Directing Credits or Refunds Of the Late Payment Charges (of $94,626.23 and $471,351.38), In their Entirety, (ID at 53-64; COL at ¶ 14-22; Ordering ¶ 5, 6)**

PGW confirmed and did not deny that its business practice is to apply a Commission-authorized, late payment charge at the rate of 1.5% per month (18% annually) on amounts which are also the subject of a municipal lien. *See, e.g.* PGW R.B. at 4. PGW makes a distinction between an “active account,” *i.e*., one in which it continues to provide gas service and an “inactive account,” an account which no longer receives service and is “finalized.” *See* PGW R.B. at 4-5, 6-7, 12, 16-17. On active accounts, PGW takes the position that it has a Commission-authorized right, pursuant to its tariff, to assess this charge. *See* R.B. at 4 (citing PGW Gas Service Tariff - Pa. PUC No. 2, Section 26 Page 4.2. Finance Charge on Late Payments). This is, according to PGW’s position, the only interest rate which it is authorized to charge on a past due account and is the Commission-approved late payment charge percentage. This is so, notwithstanding the account has been the subject of a municipal lien, as no final Court Order upon *scire facias*, has been established to definitively establish the debt amount. PGW notes that on an account that has been finalized, it does not further assess any late payment charges.

In its Exceptions, pp. 23-25, PGW complains that the Initial Decision proposed a refund of the entire amount of late payment charges assessed on liened amounts involved in the present complaint proceedings, notwithstanding the poor payment history of Colonial Garden and Simon Garden. *See* I.D. at 63-64.[[43]](#footnote-43) PGW asserts that the late payment charges were calculated in accordance with Commission Regulations, 52 Pa. Code § 5.62, and its tariff. Exc. at 24. PGW further argues that the failure to provide for any level of late payment charges is manifest error as, even under the logic of the Initial Decision, which PGW insists is incorrect, some amount of a late payment charge is appropriate. Exc. at 24.

PGW presumes, though is not certain, that the lawful rate of interest to be charged on late payment sums was found by the ALJ to be the lawful rate of interest of 6% that would normally apply to money judgments. Exc. at 25. The Company maintains that it did not charge “lien” interest on any liens in this case. *Id*.

In Replies, SBG’s responses incorporate arguments made in opposition to PGW Exceptions Nos. 1 and 2. Initially, SBG points out that PGW offered no credible legal defense, authority, or credible evidence to rebut the testimony, calculations, or theories presented. R.Exc. at 19.

SBG primarily relies upon Section 1303 of the Code, 66 Pa. C.S. § 1303, to take the position that PGW was under a statutory obligation to charge a rate for late payment charges authorized by its tariff, under the most advantageous manner to Colonial Garden and Simon Garden as patrons. Here, SBG reiterates its argument that the reordering by PGW of partial payments on outstanding balances was a deliberate “scheme” whereby PGW, effectively, compounded Commission-authorized interest rates on late payment charges for outstanding balances. The reordering of partial payments, which included “liened” amounts, resulted in a violation of the Code’s provision for computing rates under the rate most advantageous to the customer. R.Exc. at 19-20.

SBG cites decisions from other jurisdictions as illustrative of the disfavor with which other tribunals have viewed the process of indirectly compounding penalties which have been authorized. R. Exc. at 20.[[44]](#footnote-44)

Additionally, SBG cites to evidentiary justification for supporting the determination of ALJ Vero concerning the refund of improperly billed amounts. SBG cites, in pertinent part, the testimony of PGW’s Vice President of Billings and Collections, Mr. Bernard Cummings, which confirmed the application of the tariffed authorized charge of 18% on “liened” and “unliened” past due utility account balances. *See* SBG R.Exc. at 22-23.[[45]](#footnote-45)

#### b. Disposition

On consideration of the record in these consolidated proceedings, we shall deny Exception No. 3 of PGW, consistent with our discussion in this Opinion and Order. We accept the calculations of ALJ Vero as supported by the record and consistent with the Code, as modified only with regard to a correction to her computation of a refund amount due to Colonial Garden. Based on the foregoing, we conclude that PGW has improperly applied its tariff to assess late payment charges on past due utility account balances accrued for service provided to Colonial Garden and Simon Garden which amounts were also subjected to a municipal lien. Consistent with this determination, we find that Colonial Garden shall be entitled to a billing adjustment credit in the amount of $94,626.23 as recommended by the ALJ. Simon Garden shall be entitled to a billing adjustment credit in the amount of $471,351.38 as found by the ALJ. We shall modify the recommendation in the Initial Decision only to the extent that our directive for PGW to issue a billing adjustment credit/refund to Complainants is made pursuant to our authority found at Section 501 of the Code, and not pursuant to Section 1312. *See* 66 Pa. C.S. §§ 501, 1312.

The pertinent Findings of Fact reached by ALJ Vero regarding the refund amounts for Colonial Garden and Simon Garden are reprinted below:

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.

I.D. at 19.

As noted by Fact # 65 and # 66, PGW, pursuant to its Commission-authorized tariff, assessed Colonial Garden the amount of $94,626.23 in late payment charges for 15 municipal liens filed against properties owned by Colonial Garden. PGW admittedly applied a percentage of 18% on these sums which were also “liened” against. *See* I.D. at 63.

As noted by Fact # 67 and # 68, PGW, pursuant to its Commission-authorized tariff, assessed Simon Garden the amount of $471,351.38 in late payment charges at 18%, for 24 municipal liens filed against properties owned by Simon Garden which are the subject of the present formal complaints. *Id*.

We have concluded that the filing of a municipal lien for unpaid utility bills invokes a judicial process in the nature of collection that removes the said amounts from Commission jurisdiction and authority and into jurisdiction of the Courts.[[46]](#footnote-46) For reasons consistent with this determination, we also find that the amounts represented by the 15 liens for Colonial Garden and 24 liens for Simon Garden shall further be removed.

On review of the ALJ’s methodology for determining the results of PGW’s improper billing of Colonial Garden and Simon Garden, we do not find any merit in the Exceptions of PGW. Initially, and as a threshold observation, we find that PGW has not rebutted any of the calculations represented by SBG late-filed Exhibit 4.

PGW’s first objection appears to request some modification of the amounts to be refunded. This is based on PGW’s position that some amount of late payment charge is proper due to the poor payment history of Colonial Garden and Simon Garden. On consideration of this concern, we are constrained to reject PGW’s position. We expressly decline to modify the ALJ’s recommendations and accept PGW’s position that the billing adjustment should be reduced or modified as this exercise would invite the Commission to implicitly decide an applicable rate of interest on the amounts represented by the liens – a question over which we lack jurisdiction. *See* Exc. at 21 n.73. This would also contravene our disposition in this proceeding that when a sum due for unpaid utility service is placed in the civil collection process with the Courts, it is, concomitantly, removed from Commission adjudication. This is so, unless the jurisdiction of the Court is appropriately relinquished in recognition of the principles of primary jurisdiction as between administrative tribunals and the Courts.

Under the principles of primary jurisdiction, each tribunal should refrain to act on a dispute pertaining to the same corpus unless their actions are coordinated and are within their respective spheres of jurisdiction and authority. *See Pettko*. We cite with favor the observation of ALJ Vero:

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 . . . .

I.D. at 61.

Also, SBG has cited to representations of counsel for PGW, appearing in the transcript, which expressly reference judicial proceedings before the Court of Common Pleas. These statements, corroborated by the Parties, establish that judicial proceedings in the nature of foreclosure under the *scire facias* procedures are pending that involve liens filed against the properties managed by SBG and owned by Complainants. Our decision to adopt the recommendation of ALJ Vero is consistent with the preservation of the jurisdiction of this Commission and the Courts. *See* Tr. at 23 (July 11, 2014):

. . . [Attorney Boone] But the bottom line is we were at the hearing on March 25th before the Philadelphia Court of Common Pleas. And PGW Attorney - - -

ATTORNEY FARINAS:

Jerry Clark.

ATTORNEY BOONE:

--- Jerry Clark told Judge Ceisler that the PGW was actually waiting for the PUC to decide the underlying debts before they were looking at how much the total lien amount should be. So to calculate the total amount of the lien we need to know ---.

Finally, we do not find any cognizable challenge to the derivation of the credited amounts presented by PGW. As we understand PGW’s Exceptions, the Company essentially complains that the improperly billed amounts should have been calculated based on the application of a different percentage, or a different amount, than what the record supports. The crediting of these improperly billed amounts, in their entirety, is proper given their significance to ongoing proceedings in the Courts. Our conclusion as to the improperly billed sums and referral of these findings to the Courts for any further procedures as may be necessary is consistent with our determination for the removal of the liened sums from the jurisdiction of the Commission tariff authority and into the jurisdictional authority of the Courts.

Based on the foregoing, we shall adopt the recommendation of ALJ Vero, that Colonial Garden has been improperly billed $94,626.23 in late payment charges represented by the 15 liens which amounts were unlawfully subjected to a Commission tariff. This is an amount that should be credited to Colonial Garden.

We modify the Initial Decision only to direct that the recovery of the improperly billed amounts must proceed through the Courts. It is at this time that PGW will have available to it any remedies and defenses pursuant to law, including set-off and counter claim. Also, at this time, any arguments regarding the question of whether the final administrative determination of this agency should be modified or “molded” to reflect the proper rate of interest (if applicable) shall also be available. We decline, at this time, however, to direct an order of refund pursuant to Section 1312 of the Code, 66 Pa. C. S. § 1312. Notwithstanding that we have decided that PGW has improperly applied its tariff to sums which were also the subject of municipal liens, and, as such, unlawful under PGW’s tariff, we shall exercise our general authority pursuant to Section 501 of the Code and direct a billing adjustment or credit for the recovery of these amounts based on to their placement into civil collection proceedings. *See IDT Order*, *supra*.

Based on the foregoing, we shall uphold and adopt the determination of the presiding officer, that Simon Garden has been improperly billed the amount of $471,351.38 in late payment charges represented by the 24 liens which amounts were unlawfully subjected to a Commission tariff. This is an amount that should be credited to Simon Garden. Similar to our determination regarding Colonial Garden, this amount should proceed for collection through the judicial process.

With regard to the computation of an amount recommended to be refunded to Colonial Garden at Initial Decision, pages 45-47, we revise the computation based on the following:

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| 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** | |

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, and $1,464.84 in late payment charges assessed on November 2, 2011. The remaining $2,398.10[[47]](#footnote-47) represents the unpaid portion of the October 4, 2011 bill, which consisted of $978.82 in gas service charges and $1,450.16 in late payment charges. Applying 40% of the $2,398.10 to the gas service charges ($978.82)[[48]](#footnote-48) and 60% to the late payment charges ($1,450.60), it appears that after the $140,742.25 payment was made on November 4, 2011, $959.24 of the $978.82 gas service charge and $1,438.86 of the $1,450.16 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 | $2,903.70[[49]](#footnote-49) | $1,814.06[[50]](#footnote-50) |  |  |
| 12/02/2011 | LPC | **$27.21** |  | **$2,903.70** | **$1,814.06** | **0.015** | **$27.21** |

In view of the above calculations and analysis, PGW shall modify the computations of the presiding ALJ and direct that PGW issue a refund to Colonial Garden Account # 6128000245, SA#1375369694 in the amount of $348.40[[51]](#footnote-51).

### 3. PGW Exception No. 4

#### a. Positions of the Parties

**PGW Exception No. 4 – The Initial Decision Errs In The Application Of Partial Payments (ID at 36-54; Ordering ¶ 3, 4)**

PGW excepts to the ALJ’s findings that PGW’s practice in reordering partial payments on a past due bill so as to eliminate, in this order, security deposits assessed on the account, late payment charges, and then arrearages, was in violation of the Code and Commission Regulations. *See* Exc. at 25-28.

PGW repeats its arguments that we summarize as follows: a) the pertinent Code Regulations do not cite a “hierarchy” (*i.e.*, order of application of payments among basic charges assessed during the same billing period for partial payments made on past due balances), the Regulations only provide for the payment of “basic charges” and late payment charges are within the category of basic charges; b) the ALJ’s recommendation is a newly created rule for the allocation of partial payments and is not supported by the plain language of the existing regulation which does not distinguish between the nine (9) types of charges designated as basic charges; c) the, self-described, “new” rule for allocating partial payments is unreasonable, unworkable, and not in the public interest because it would permit the holders of delinquent accounts to systematically avoid paying late payment charges to PGW; and d) the ALJ’s determination is not consistent with the intent of Chapter 14 of the Code, 66 Pa. C.S. § 1401, *et seq.*, and Chapter 56 of the Commission’s Regulations. 52 Pa. Code § 56.1, *et seq*.

SBG counters the position of PGW that the evidence of record supports the imposition of a civil penalty.

#### b. Disposition

As a threshold consideration, we note that the provisions of the Code generally apply to residential utility service and Colonial Garden and Simon Garden are served pursuant to a commercial tariff. Notwithstanding that Colonial Garden and Simon Garden are served under commercial rate schedule, GS, we shall apply the Code provisions in our analysis of PGW’s compliance based on 52 Pa. Code § 56.2. **Definitions**, that defines residential service in the following manner:

*Residential service*—

(i) Public utility service supplied to a dwelling, including service provided to a commercial establishment if concurrent service is provided to a residential dwelling attached thereto.

52 Pa. Code § 56.2 (emphasis added).

On consideration of the positions of the Parties, we shall deny Exception No. 4 of PGW. We, hereby, adopt ALJ Vero’s recommendations and conclusions that the Company has violated the Commission Regulation at 52 Pa. Code § 56.24. PGW’s defense of and rationale concerning its practice to apply partial payments on past due bills to address security deposits and late payment charges prior to reducing the outstanding charges for past due gas distribution service is internally inconsistent and contrary to the clear and unambiguous terms of the Regulation. Pursuant to the examples set forth in the Initial Decision, it is apparent that the clear and unambiguous language in the Regulation is violated to the extent a partial payment does not reduce interest bearing charges billed and accumulated under a past due bill, *i.e.* August 2011 bill, before reducing more current charges for distribution service, *i.e.* November, 2011, *i.e*., late payment charges are paid for current bill leaving as an outstanding balance, distribution service charges for the prior bill.

Section 56.24 of the Regulations, 52 Pa. Code § 56.24, provides:

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.

ALJ Vero has correctly interpreted the clear and unambiguous language in the Regulation. Pursuant to the Regulations’ directives, 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. *See* I.D. at 46. As such, these items, together, constitute the “balance due” for service in each billing month. Consequently, in the case of a partial payment on a past due bill, the entirety of the “balance due” for prior service for which the utility has issued a bill and of which the ratepayer has received notice, should be addressed simultaneously. In this light, the text clearly obligates a utility to apply a payment insufficient to pay a balance due both for prior service and service billed during a current period “. . . shall first be applied to the balance due for prior service.” We reject PGW’s position and find that the language is clear and unambiguous.

If one were to assume that the text and requirements of the pertinent Commission Regulation are, in fact, ambiguous, we also find the rationale of PGW internally inconsistent. It is internally inconsistent for PGW to argue that a proper reading of the Regulation requires treatment of all basic charges under the Regulations similarly, and then proceed to, unilaterally, prioritize partial payments among the various charges within the same class (basic charges) in a manner that increases the accumulation of interest bearing charges on the past due bills to the detriment of the ratepayer and to the benefit of the Company. *See* 52 Pa. Code § 62.72. Definitions (“*Basic services* -- Services necessary for the physical delivery of natural gas to a retail customer, consisting of natural gas distribution services and natural gas supply services.”). PGW argues for an unacceptable reading of the Regulation and an unacceptable result.

We also find no merit to the Company’s position that it has engaged in this practice with the imprimatur of the prior, Philadelphia Gas Commission or this agency.

Based on the foregoing, PGW’s Exception No. 4 is denied.

### 4. PGW Exception No. 5

#### a. Positions of the Parties

**PGW Exception No. 5 – The Initial Decision Errs In Assessing A Civil Penalty For Violation(s) Of the Public Utility Code And The Commission’s Regulations (ID at 64-68; COL at ¶ 23, 24; Ordering ¶ 7, 8)**

In its Exception No. 5, PGW argues against the imposition of a civil penalty by suggesting that its constitutional due process rights are implicated as a result of a ‘newly’ created and legally incorrect standard. Exc. at 29. PGW explains that, as “far back in time” as it came under the jurisdictional authority of the Commission, in 2000, it has used municipal liens to secure unpaid gas utility charges and has applied its partial payment methodology for the recovery of delinquent accounts. And, no issues or concerns were raised concerning these practices. *Id.* In light of the foregoing, PGW characterizes a civil penalty as arbitrary and, potentially, vindictive. *Id*.

PGW takes the position that the actions found by the ALJ to support imposition of a civil penalty are, essentially, matters of first impression as the presiding ALJ could not specifically point to a specific provision in the law or the Code to support the interpretations supporting a violation, much less, a penalty. Exc. at 30. PGW argues that the City of Philadelphia acted within the Commission’s Regulations and pursuant to its tariff in calculating and charging late payment charges on unpaid balances. Therefore, explains PGW, its actions do not evidence an intent to commit a willful violation of the Code or Commission Regulations. PGW also points out that no opportunity has been provided for the Company to modify its internal practices and procedures to address new interpretations of the law. Exc. at 30.[[52]](#footnote-52)

Finally, PGW specifically critiques the ALJ’s calculation and allocation of the civil penalty. PGW argues that the basis of the $2,000 civil penalty and $25,000 civil penalty, collectively resulting in a recommended civil penalty of $27,000, are not clearly articulated in the Initial Decision. Exc. at 31.

SBG, in its Replies, generically endorses the ALJ’s recommendation to impose a civil penalty for PGW’s actions in these proceedings.

#### b. Disposition

PGW does not offer a case citation in support of its objections to a civil penalty based on *ex post facto* grounds.[[53]](#footnote-53) However, we shall acknowledge that an *ex post facto* argument, though normally raised in criminal proceedings, can be applied to punitive civilsituations. [*Evans v. Pa. Bd. of Probation and Parole*, 820 A.2d 904 (Pa. Cmwlth. 2003)](http://www.lexis.com/research/buttonTFLink?_m=f56ecbad3a747057668f2504a48360e7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b60%20A.3d%20873%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=118&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b820%20A.2d%20904%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzk-zSkAl&_md5=42a5c3daa04236a9a6a34d6c1a5165ab), *appeal denied*, [580 Pa. 550, 862 A.2d 583 (2004)](http://www.lexis.com/research/buttonTFLink?_m=f56ecbad3a747057668f2504a48360e7&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b60%20A.3d%20873%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=119&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b580%20Pa.%20550%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzk-zSkAl&_md5=edb8f0fa0d493e7c34c7d5382da6ce1a). An *ex post facto* law has been defined by the Supreme Court as “ . . . 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender.*” *See Commonwealth v. Young*, 536 Pa. 57, 65-66, 637 A.2d 1313, 1316-1317 (1993) (emphasis in original), citing [*Calder v. Bull,* 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648, 650 (1798)](http://www.lexis.com/research/buttonTFLink?_m=05feff3a89826fb884eb1f22c0da8ef3&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b536%20Pa.%2057%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=26&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b3%20U.S.%20386%2c%20390%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzt-zSkAA&_md5=788f9da28d39cdb8e5ed0a1db8a78c7a) (opinion of Chase, J.).

PGW’s objections apparently involve the fourth prong of the Supreme Court’s definition of a prohibited, *ex post facto* law or violation. And, as we understand the Company’s position, it complains that it is being penalized for standards on which it had no prior notice, or which are newly created and retroactively applied to the facts of these proceedings.

On review of the record, we find that the imposition of a civil penalty does not rise to the level of a violation of PGW’s constitutional rights.[[54]](#footnote-54) We conclude that a civil penalty is appropriate and shall adopt the recommendation of the presiding ALJ. Our decision to impose a civil penalty upon PGW for a violation of Section 1501 of the Code, 66 Pa. C.S. § 1501, however, shall be applied to a different segment of the Company’s conduct than chosen by the ALJ.

ALJ Vero concluded that a civil penalty was appropriate based on the following:

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.

I.D. at 64.

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.

I.D. at 68.

Thus, ALJ Vero concluded that PGW’s conduct to reorder the application of partial payments out of sequence so as to eliminate outstanding late payment charges on more current bills before extinguishing past due balances for basic service on older bills (violation of 52 Pa. Code § 56.22, *et seq.*) was not the product of an intentional or willful violation of the Regulation. Rather, ALJ Vero concluded that the reordering was more a function of PGW’s billing administration or technical error and, therefore, recommended a modest penalty of $2,000. I.D. at 66. We, hereby, adopt this recommendation.

Concerning the inclusion of liened amounts for application of late payment charges under the Company’s tariff, the ALJ found this conduct to be more culpable in nature. Based on this conclusion, ALJ Vero recommended a substantially higher civil penalty ($25,000) as a punitive measure and also as a deterrent. I.D. at 66-67. ALJ Vero acknowledged the “unique” circumstances of PGW, as a municipally owned utility, and that the legal issues presented matters of first impression which had not come to “light” until this litigation. I.D. at 68.

Notwithstanding the uniqueness of the Respondent as a municipally owned utility and that the issues which have come to light in this litigation do, indeed, present matters of first impression concerning the interplay between the MCTLL and a utility tariff, we decide that a civil penalty is proper. A civil penalty is appropriate given the failure of PGW to provide an explanation and a clear numerical example of its billing methodology to Complainants after several occasions to do so. A reasonable response to detailed inquiries of Complainants, which would have clearly identified the methodology used by the Company in applying partial payments on past due bills and also disclosed PGW’s practice of including liened amounts in the derivation of Commission-approved, late payment charges, could have resulted in a conservation of all Parties’ (and the Commission’s) resources. We conclude that PGW’s actions concerning Complainants’ billing inquiries were less than forthcoming and, after a period of several years, constitute a failure to provide reasonable service.[[55]](#footnote-55)

The term “service” as set forth in Section 1501 of the Code, 66 Pa. C.S. § 1501, has been broadly defined. *E.g., AT&T v. Pa. PUC*, 568 A.2d 1362 (Pa. Cmwlth. 1990). The proper quotation of rates and the basis of the derivation of rates or charges to a patron is a basic tenet of the obligations of a public utility.

Section 1504 of the Code, 66 Pa. C.S. § 1504, provides, in pertinent part, the following:

**§ 1504. Standards of service and facilities.**

The commission may, after reasonable notice and hearing, upon its own motion or upon complaint:

(1) Prescribe as to service and facilities, including the crossing of facilities, just and reasonable standards, classifications, regulations and practices to be furnished, imposed, observed and followed by any or all public utilities.

Section 1505 of the Code, 66 Pa. C.S. § 1505, provides, in pertinent part, the following:

**§ 1505. Proper service and facilities established on complaint; authority to order conservation and load management programs.**

**(a) General rule.--**Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the service or facilities of any public utility are unreasonable, unsafe, inadequate, insufficient, or unreasonably discriminatory, or otherwise in violation of this part, the commission shall determine and prescribe, by regulation or order, the reasonable, safe, adequate, sufficient, service or facilities to be observed, furnished, enforced, or employed, including all such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonably necessary and proper for the safety, accommodation, and convenience of the public.

The failure of PGW to disclose its methodology concerning the manner in which it applied late payment charges has been argued by SBG to be the product of an internal business decision known only to PGW. We agree with SBG in this regard. The PGW methodology for, both, the allocation of partial payments, and the inclusion of liened amounts in deriving late payment charges was not a transparent application of its tariff. This was a business decision by the Company which resulted in charges on the bill that could not be ascertained by a patron, or Complainants, upon reasonable inquiry. *See* 52 Pa. Code § 62.71:

§ 62.71. Purpose   
  
(a) The purpose of this subchapter is to require that all natural gas providers enable customers to make informed choices regarding the purchase of all natural gas services offered by providing adequate and accurate customer information. Information shall be provided to customers in an understandable format that enables customers to compare prices and services on a uniform basis.

On consideration of the recommended $25,000 civil penalty, we do not adopt the reasoning of the presiding ALJ concerning the applicability of the doctrine of equitable tolling and the Code’s statute of limitations in this proceeding.[[56]](#footnote-56) We find that the record could support the position of Complainants for the equitable tolling of their claim prior to May 11, 2009, as the record demonstrates a concerted and consistent effort on the part of Complainants to ascertain the basis of the charges on their accounts through numerous requests, meetings, and exchanges with PGW employees and agents. The record does not support active concealment of the methodology by PGW, but our holdings have not been so stringent. As noted in *Lester Ely v. Pa. American Water*, the doctrine of equitable estoppel does not require fraud in the strictest sense, but rather, fraud in the broadest sense, which includes an unintentional deception. Were the matter directly before us, we would find sufficient basis on which PGW is equitably estopped from invoking the Code’s statute of limitation concerning Complainants’ claims.

Based on foregoing, we shall adopt the ALJ’s recommendation and associated reasoning for a civil penalty of $2,000. However, we additionally find a violation of Section 1501 based on the non-responsiveness to the billing inquiries of Complainants. Our reasoning pursuant to 52 Pa. Code § 69.1201(c) is as follows:

The first factor is whether the conduct was of a serious nature. The failure to adequately respond to and inform Complainants of the basis of PGW’s application of partial payments and the inclusion of liened amounts in the derivation of late payment charges over a period of several years is of a serious nature. Although the practice was the result of a PGW business decision which, in and of itself, did not pose a threat to health and safety, we are cognizant of the effect on the ability of Complainants to meet their legal obligations to retain utility service on behalf of themselves and their tenants.

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.§ 1501 had any consequences of a serious nature. There were no damages to property or injury to persons. To the contrary, it appears that the recovery of unpaid utility charges through the municipal lien process, in particular, arises at such time as a service property is either sold, or foreclosed upon by the affirmative act of a party. In this regard, the process is less disruptive than service termination for past due bills.

The third factor is whether the offending conduct was intentional or negligent. ALJ Vero has concluded that application of the 18% interest rate to an *in rem* judgment of the municipal lien is a highly profitable practice for PGW that cannot be explained by negligence. I.D. at 67. We note our modification of the reasoning of ALJ Vero concerning the dispute between judgments and liens in this matter. We conclude, however, that the application of the tariff amount was an intentional business decision on the part of PGW that is mitigated by the existence of legal issues that are of first impression.

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 found to be in violation of the Commission’s statutes and regulations. Having found no merit to PGW’s arguments in support of its billing practices, we would strongly advise PGW to modify its billing and will issue a “cease and desist.” We expressly note testimony that PGW uses a third party vendor to generate utility bills and such third party vendor may have systems in place to perpetuate the billing according to procedures that have been found to violate the Code. PGW shall be further directed to certify to this Commission within 45 days of the entry of this Order that it has modified its business practices, including services performed by third party vendors, to bill in compliance with this Order.

The fifth factor is the number of customers affected and the duration of the violation. The billing practices in question are applied on all PGW’s residential and small business customers. However, the practices only become pertinent when a customer has not paid his or her gas bill for two or more consecutive months and sends in a partial payment.

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. I.D. at 67. However, we note the consolidation of nine (9) proceedings involving similar issues pertaining to billing.

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. They are, respectively: the amount of a civil penalty required to deter future violations; prior Commission decisions in similar cases; and “other relevant factors” criteria.

As noted, these consolidated Complaints presented legal issues of first impression with regard to late payment charges described. On consideration of the amount necessary to deter future violations and other relevant factors, we shall impose a civil penalty in the amount of $25,000.

# V. CONCLUSION

In summary, we shall adopt the Initial Decision of ALJ Vero, subject to modifications to the reasoning as set forth in this Opinion and Order. We find that PGW improperly applied its Commission-approved tariff, PGW Gas Service Tariff - Pa. PUC No. 2, Section 26 Page 4.2. Finance Charge on Late Payments. We also find that PGW violated applicable Commission Regulations concerning the application of partial payments for past due utility accounts for Colonial Garden and Simon Garden and has improperly included amounts for unpaid bills in the determination and derivation of its late payment charges on past due accounts that were the subject of municipal liens.  As noted, the legal effect of the City of Philadelphia’s having obtained municipal liens on the subject accounts is to remove the indebtedness for the unpaid utility bills from the Commission’s purview.  Based on the foregoing, we have determined that the Commission lost subject matter jurisdiction over any aspect of the customers’ underlying debt once the City of Philadelphia converted such debt into a municipal lien and, thereby, lacks jurisdiction to determine what, if any, is the appropriate rate of interest that PGW may charge for such delinquent accounts. As non-Commission jurisdictional charges, we find the appropriate remedy here is to remove these late payment charges from the customers’ bills.

Based on the foregoing, the Exceptions of PGW are granted, in part, and denied, in part; the Initial Decision of ALJ Vero is adopted, as modified; and the Complaints of SBG Management Services, Inc./ Colonial Garden Realty Co., L.P., and SBG Management Services, Inc./Simon Garden Realty Co., L.P., are sustained, in part; all consistent with this Opinion and Order; **THEREFORE**,

**IT IS ORDERED:**

1. That the Exceptions of Philadelphia Gas Works filed on October 7, 2015, are granted in part and denied in part, consistent with the discussion contained in this Opinion and order.

2. That the motion to dismiss Exceptions and to impose sanctions upon Philadelphia Gas Works, as presented in the Replies to Exceptions filed by SBG Management Services, Inc./Colonial Garden Realty Co., L.P. and SBG Management Services, Inc./Simon Garden Realty Co., L.P., are denied consistent with the discussion contained in this Opinion and order..

3. That the Initial Decision issued by Administrative Law Judge Eranda Vero on September 17, 2015, is adopted as modified, consistent with the discussion contained in this Opinion and Order.

4. That the recommendation of Administrative Law Judge Vero is adopted, subject to corrections in the calculations, and Philadelphia Gas Works shall credit the Colonial Garden Realty Co., L.P.’s Account # 6128000245, SA # 1375369694, in the amount of $348.40.

5. That the recommendation of Administrative Law Judge Vero is adopted and Philadelphia Gas Works shall credit the Colonial Garden Realty Co., L.P.’s Account # 6128000245, SA # 4018739567, in the amount of $218.96.

6. That the recommendation of Administrative Law Judge Vero is adopted and Philadelphia Gas Works shall credit the amount of $94,626.23 to Colonial Garden Realty Co., L.P., Account # 6128000245 which shall be subject to collection through civil judicial process.

7. That the recommendation of Administrative Law Judge Vero is adopted and Philadelphia Gas Works shall credit the amount of $471,351.38 to Simon Garden Realty Co., L.P., Account # 539547187 which shall be subject to collection through civil judicial process.

8. That Philadelphia Gas Works is hereby assessed a civil penalty of Twenty-seven Thousand Dollars ($27,000.00) for its violations of the Public Utility Code, 66 Pa. C.S. § 1501, for failure to provide adequate, efficient, safe and reasonable service, to Complainants and for a violation of the Commission Regulation at 52 Pa. Code § 56.22, for failing to disclose its billing methodology concerning the assessment of late payment charges under its tariff, PGW Gas Service Tariff - Pa. PUC No. 2, Section 26 Page 4.2. Finance Charge on Late Payments.

9. 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

Commonwealth Keystone Building

400 North Street

Harrisburg, PA  17120

10. That Philadelphia Gas Works cease and desist from further violations of the Public Utility Code, 66 Pa. C.S. §§ 101 *et seq*., and the regulations of the Pennsylvania Public Utility Commission, 52 Pa.Code §§ 1.1 *et seq*. Philadelphia Gas Works, shall, within Forty-five (45) days of the entry of this Opinion and Order certify to the Commission that it has ceased any automated billing practices which violate the Public Utility Code of Commission Regulations concerning the application of municipal liens or related collection procedures as between the Commission and the Courts.

11. That these consolidated proceedings be marked closed.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: December 8, 2016

ORDER ENTERED: December 8, 2016

1. SBG Management Services Inc./Colonial Garden Realty Co., LP filed an additional formal Complaint against PGW on November 2, 2012, docketed at Docket No. C-2012-2334253. This Complaint alleged service and billing issues related to a proposed boiler conversion from oil to gas for a property. *See* I.D. at 6. On June 24, 2015, ALJ Vero issued an Initial Decision granting an unopposed Petition to Withdraw this complaint. I.D. at 8 n.3. [↑](#footnote-ref-1)
2. *See, Faye Payne v. Philadelphia Gas Works,* Docket No. C-2011-2247124, at 2 n.2 (Order entered February 16, 2012):

   “A lien is a charge on property, either real or personal, for the payment or discharge of a particular debt or duty in priority to the general debts or duties of the owner. It encumbers property to secure payment or performance of a debt, duty or other obligation. Liens fall into three categories: common law liens, equitable liens and statutory liens.” *London Towne Homeowners Ass’n v. Karr*, 866 A.2d 447, 451(Pa. Cmwlth. 2004) (notes and citations omitted).

   *Also Dennis J. Vicario v. Philadelphia Gas Works*, Docket No. C-2010-2213955,at 2 n.1 (Order entered November 6, 2011). [↑](#footnote-ref-2)
3. As noted, one complaint docket has been withdrawn with no objection. [↑](#footnote-ref-3)
4. August 29, 2013, Transcript. [↑](#footnote-ref-4)
5. In its Main Brief (M.B.), Colonial Garden states that it has three different Service Agreements (SAs) and three meters that are billed under the umbrella of the one account (Account number 6128000245) at the following SAs: a) SA # 1375369694 - associated with meter #1987516; b) SA # 1895894961 - associated with meter # 2115477, and c) SA # 4018739567 - associated with meter # 2115477. *See* SBG M.B. at 3. [↑](#footnote-ref-5)
6. PGW, also in response, attached a “Statement of Account” for the account in dispute. [↑](#footnote-ref-6)
7. The July 17, 2012 Order addressed in a consolidated fashion the substantially identical legal arguments raised by PGW in each of the five (5) consolidated dockets. [↑](#footnote-ref-7)
8. As noted, the ALJ’s legal analysis, referenced to Docket No. C-2012-2304167, is incorporated by reference in the consolidated docket of No. C-2012-2304183. *See* July 17, 2012 Order at 15. [↑](#footnote-ref-8)
9. *See also* Colonial Garden M.B. at 8 (the gravamen of the Complaints “ . . . pertains to the overpayment of post-judgment interest, overpayment of finance charges, late payment charges and penalties on the accounts as a whole from their inception to the present and high bill usage.”). [↑](#footnote-ref-9)
10. 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. I.D. at 10 n.6. [↑](#footnote-ref-10)
11. Mr. Pulley testified on January 19, 2005, that SBG reached a settlement agreement with PGW on all of its disputes related to Simon Garden. Based on the settlement, all disputed transactions which predate January 19, 2005, and which concern Simon Garden were dismissed. *See* I.D. at 33. [↑](#footnote-ref-11)
12. Owing to the pending requests for additional information pursuant to discovery, Simon Garden expressly reserved its right to supplement and/or amend the amounts in dispute. [↑](#footnote-ref-12)
13. *See* I.D. at 23: “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.” [↑](#footnote-ref-13)
14. A February 18, 2005, billing transaction was also raised by SBG, but, apparently, not pursued. I.D. at 24-25. [↑](#footnote-ref-14)
15. Mr. Gabell’s experience in accounting was not with public utilities accounting or finance. *See* I.D. at 37. [↑](#footnote-ref-15)
16. *See* PGW Gas Service Tariff – Pa. PUC No. 2, Page No. 26 Section 4.2 – Finance Charge on Late Payments. [↑](#footnote-ref-16)
17. Mr. Colton also testified that the reordering of payments practice affects any residential customer who is in arrears with PGW. And, based on the Commission’s Bureau of Consumer Service’s annual reports on collections performance, PGW has roughly 80,000 residential customers in arrears in any given month. *See* I.D. at 40-41; Tr. 662. [↑](#footnote-ref-17)
18. Any partial payments are first applied towards any security deposits assessed on the account, then late payment charges, then arrearages. I.D. at 42. [↑](#footnote-ref-18)
19. As discussed above, and consistent with her prior recommendations, ALJ Vero recommended that the statute of limitations not be tolled for any disputes concerning late payment charges assessed prior to May of 2009. Therefore, that portion of the consolidated Complaints concerning late payment charges assessed prior to May of 2009 was dismissed due to the running of the statute of limitations. I.D. at 54. [↑](#footnote-ref-19)
20. 42 Pa. C.S. § 8101 (relating to interest on judgments) states: “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.” [↑](#footnote-ref-20)
21. 41 P.S. § 202 (relating to **legal rate of interest) states:** “Reference in any law or document enacted or executed heretofore or hereafter to ‘legal rate of interest’ and reference in any document to an obligation to pay a sum of money ‘with interest’ without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum.” [↑](#footnote-ref-21)
22. *See* PGW Exceptions at 6, “At its core, this entire proceeding is related to the effectuation of, and defense to, the statutory lien of the City for unpaid natural gas service rendered by PGW at a specific property.” (Note omitted). [↑](#footnote-ref-22)
23. *Bolt v. Duquesne Light Co.*, *supra*, involved a Commission Order approving a payment plan to retire undisputed arrearages of an individual ratepayer. In so ordering, the Commission reasoned,

    While we find it inappropriate to reach conclusions on individual ratepayers’ values, life-styles and priorities, we are obligated to only recognize reasonable personal expenses in establishing a payment plan for an outstanding arrearage. This obligation is rooted in the fact that these payment plans are financed at the expense of all other ratepayers.

    66 Pa. P.U.C. at 464. [↑](#footnote-ref-23)
24. SBG also clarifies that the record should reflect its representation by Ms. Francine Thornton Boone, Esquire, in this matter on August 13 2013, until October 14, 2014 (corrected from October 14, 2013 as stated in the Initial Decision) after which her appearance was withdrawn. R.Exc. at 5. [↑](#footnote-ref-24)
25. PGW also argues that the Initial Decision incorrectly determined that the City could not have both an *in rem* claim and an *in personam* claim. Exc. at 18. We do not read the Initial Decision as reaching these conclusions, notwithstanding that we shall modify the reasoning for adopting the conclusion reached in the Initial Decision and we do not adopt the ALJ’s position concerning the applicability of the doctrine of merger. [↑](#footnote-ref-25)
26. *See* 204 Pa. Code § 99.1, Preamble:

    The conduct of lawyers . . . should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms. Integrity and courtesy are indispensable to the practice of law and the orderly administration of justice by our courts. Uncivil or obstructive conduct impedes the fundamental goal of resolving disputes in a rational, peaceful and efficient manner. [↑](#footnote-ref-26)
27. *See also* 66 Pa. C.S. §§ 1403, 1404(f), and 1414. [↑](#footnote-ref-27)
28. *See Norristown Mun. Waste Auth. v. 200 E. Airy, LLC*, 31 A.3d 1262 n.2 (Pa. Cmwlth. 2011) (unpublished decision) (“A *scire facias* procedure is a mechanism where the parties may establish a complete factual record from which the fact finder can ascertain the amount due on a lien.”). *See also,* *18 Standard Pennsylvania Practice*, § 102:1. Pursuant to the MCTLL, any party named as defendant may serve notice upon the claimant to issue a *scire facias* within 15 days of the notice. 53 P.S. §§ 7182, 7184. [↑](#footnote-ref-28)
29. *See Borough of Ambler v. Regenbogen*, 713 A.2d 145(Pa. Cmwlth. 1998) (citations omitted):

    Under the [MCTLL], municipal liens arise by operation of law, whenever municipal claims are lawfully assessed or imposed upon the property. After a municipal claim is filed, three procedural alternatives are available to the parties: (1) the owner may contest the municipal claim or the amount of assessment by filing and serving a notice on the claimant municipality to issue a writ of *scire facias*, thereby forcing a hearing on the municipal claim; (2) the municipality may pursue a writ of *scire facias* without the owner’s action; or (3) the owner and the municipality may choose not to do anything, thereby letting the municipal lien remain recorded indefinitely subject to revival of the lien in every twenty years upon the issuance of a suggestion of nonpayment and an averment of default. [↑](#footnote-ref-29)
30. At Exceptions, pages 7-8, 13, 17, PGW cites, *inter alia*, *City of Philadelphia v. Manu*, 76 A.3d 601, 604 (Pa. Cmwlth. 2013) and *Shapiro v. Center Twp.*, 632 A.2d 994 (Pa. Cmwlth. 1993), for the propositions that the MCTLL provides the *exclusive* procedure that must be followed to challenge a municipal lien or collect on a municipal lien once a lien has been recorded. (Emphasis ours). PGW, thus, concedes the primacy of Common Pleas Court (and alternately Commonwealth Court) jurisdiction and lack of Commission authority over the lien. *See also* Exc., at 7 n.17, 10 n.31, and 17 n.58. [↑](#footnote-ref-30)
31. Our discussion is pertinent to the City of Philadelphia which requires, as a prerequisite to the effectiveness of a municipal claim, that the lien be docketed by the Prothonotary. Other “city natural gas distribution operations” do not appear to have to satisfy this prerequisite to have the “claim” become a municipal lien or charge on the service property. *See* , *In re: Aikens*, 87 B.R. 350 (E.D. Pa. 1988), *related proceeding,* [*McLean v. Philadelphia, Water Revenue Bureau*](http://www.lexis.com/research/buttonTFLink?_session=cc5ffe60-899e-11e6-a959-89a833d37700.1.1.1145802.+.1.0&wchp=dGLbVzk-zSkAz&_b=0_2142997417&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c!%5BCDATA%5B891%20F.2d%20474%5D%5D%3e%3c%2fcite%3e&_lexsee=SHMID&_lnlni=&_butType=3&_butStat=254&_butNum=7&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c!%5BCDATA%5B1989%20U.S.%20App.%20LEXIS%2018496%5D%5D%3e%3c%2fcite%3e&prevCase=McLean%20v.%20Philadelphia%2C%20Water%20Revenue%20Bureau&prevCite=891%20F.2d%20474&_md5=989F2EEFE5910147913E0612D5180FA9), 891 F.2d 474 (3d Cir. 1989), holding, *inter alia*:

    . . .in Pennsylvania, water and sewer liens become effective when the charges for such services are imposed upon ratepayers, without any prerequisite of any prior court filing by the municipality. . . . However, for reasons unexplained in any sources that we were able to uncover, the Pennsylvania legislature, by enactment of [53 P.S. § 7106(b)](http://www.lexis.com/research/buttonTFLink?_m=068786a583affff79890a2e191d2dbf8&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b87%20B.R.%20350%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=44&_butInline=1&_butinfo=53%20P.S.%207106&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAz&_md5=143f9743a9153041009a3fd812ae81cd) in 1963, apparently changed this principle as to the City of Philadelphia only, by providing that, in this City, municipal claims are liens only *after* their docketing by the Prothonotary.

    Citations omitted, emphasis in original. [↑](#footnote-ref-31)
32. *See,* *Cheltenham & Abington Sewerage Co. v. Pa. PUC*, 344 Pa. 366, 25 A.2d 334 (1942). [↑](#footnote-ref-32)
33. At Fact # 63, ALJ Vero found as follows: “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.” [↑](#footnote-ref-33)
34. The ALJ properly found that the Commission does not have the requisite jurisdiction to decide upon the proper interest rate that applies to a municipal lien: “ 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 [sic] to interpret statutes that fall outside its area of purview.” I.D. at 60. [↑](#footnote-ref-34)
35. *See Gasparro*, 814 A.2d at 1285

    If Gasparro had raised these claims prior to the entry of the judgment in the amount of $6,902.97, then the PUC could have reviewed the underlying facts to determine whether over-billing occurred. *See Pennsylvania Electric Co. v. Public Utility Commission*, 81 Pa. Cmwlth. 285, 473 A.2d 704 (1984). At this point, however, PECO is moving to collect on its judgment, an issue over which the PUC does not have jurisdiction. [↑](#footnote-ref-35)
36. *See* [*U.S. v. Western Pacific Ry*., 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126 (1956)](http://www.lexis.com/research/buttonTFLink?_m=5c2328e9b5724e0ebd00edc905ed67ce&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b551%20F.3d%20587%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=114&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b352%20U.S.%2059%2c%2063%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAz&_md5=9dd94d6f9d4e5e07b4bf3de8b2234811):

    . . . the doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties . . . . “Primary jurisdiction” . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views. [↑](#footnote-ref-36)
37. We note the distinction between the line of cases represented by *M. Dan Jones v. Bell Telephone Co. of Pa.*, *supra*, and the circumstances that are raised in the present dispute. In these proceedings, jurisdictional charges originated pursuant to a Commission-approved tariff have subsequently been rendered outside of the Commission’s authority when placed in collection proceedings at law. [↑](#footnote-ref-37)
38. *See Butler Township Water Co. v. Pa. PUC*, 473 A.2d 219 (Pa. Cmwlth. 1984), citing [*Aizen v. Pa. PUC*, 60 A.2d 443 (Pa. Super. 1948)](http://www.lexis.com/research/buttonTFLink?_m=9c66d36a0217fcaa0899751209791bbf&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b81%20Pa.%20Commw.%2040%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=15&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b163%20Pa.%20Super.%20305%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzk-zSkAW&_md5=4601ddb3a4cea92f1c958e08e63c7a43) (“The declaration of a policy based on general conclusions may not be substituted for an evaluation of the evidence in each case. Although the PUC may adopt and follow a policy with respect to matters within its discretion, the exercise of such discretion is not without limitations.”). [↑](#footnote-ref-38)
39. Public Utility Law, Act of May 28, 1937, P.L. 1053. [↑](#footnote-ref-39)
40. “(4) The General Assembly believes that it is appropriate to provide additional collection tools to city natural gas distribution operations to recognize the financial circumstances of the operations and protect their ability to provide natural gas for the benefit of the residents of the city.” [↑](#footnote-ref-40)
41. Chapter 14 of the Code, “Responsible Utility Customer Protection,” P.L. 1578, No. 201, was added November 30, 2004 (effective in 14 days), whereas the NGCCA, P.L. 122, No. 21, was added June 22, 1999 (effective, July 1, 1999). Therefore, the General Assembly was aware of the potential for municipal liens to be considered in connection with the lawful collection activities of gas companies for past due bills as addressed by the Chapter 14. [↑](#footnote-ref-41)
42. A customer has an obligation to pay that portion of a bill which is not in dispute pending the outcome of a formal or informal complaint with the Commission. *See* 66 Pa. C.S. § 1410(b); *see* Fact # 47, 52, 56. [↑](#footnote-ref-42)
43. PGW notes that Simon Garden and Colonial Garden made no payments for 41 months, and one payment for 43 months of service, respectively. *See* Exc. at 23 n.83, 84. [↑](#footnote-ref-43)
44. In this regard, SBG has cited and relied heavily upon the reasoning of a California citation. *See* R.Exc. at 20, citing *Waterman Convalescent Hosp. v. Jurupa Community Services*, 53 Cal. App.4th 1550, 62 Cal. Rptr. 2nd 264 (1996), 1996 Cal. App. LEXIS 1228. [↑](#footnote-ref-44)
45. SBG references the August 26, 2013 Transcript and the reference is pursuant to the transcribed testimony in the other, consolidated, complaint proceedings. *See* I.D. at 10 n.6. [↑](#footnote-ref-45)
46. We note that PGW requests that we take judicial [official] notice that the Complainants have over 70 writs of *scire facias* pending at the time of the filing of Exceptions. *See* Exc. at 17. [↑](#footnote-ref-46)
47. $4,717.76 - $854.82 - $1,464.84 = $2,398.10. [↑](#footnote-ref-47)
48. $978.82 / ($978.82 + $1,450.16) = 0.40 [↑](#footnote-ref-48)
49. $1,464.84 + ($2,398.10 x 0.60) = $2,903.70 [↑](#footnote-ref-49)
50. $854.82 + ($2,398.10 x 0.40) = $1,814.06 [↑](#footnote-ref-50)
51. ($70.76 x 8) – ($27.21 x 8) = $348.40 [↑](#footnote-ref-51)
52. PGW also notes that, as a municipally owned utility, all such penalties will operate to the detriment of ratepayers and not investors. Exc. at 30. [↑](#footnote-ref-52)
53. The Company does refer to the applicable provisions of the United States and Pennsylvania Constitutions. [↑](#footnote-ref-53)
54. Due process in matters before the Commission requires that a party be afforded a reasonable opportunity to know the nature of its opponents’ contentions so that it can prepare a suitably responsive answer. *Duquesne Light Co. v. Pa. PUC*, 507 A.2d 433 (Pa. Cmwlth. 1986). [↑](#footnote-ref-54)
55. We distinguish our conclusion from any suggestion that PGW’s right to vigorously contest any Complainant allegation would be compromised. [↑](#footnote-ref-55)
56. As noted, SBG did not pursue this issue in Exceptions. [↑](#footnote-ref-56)