

Act 294

Case Identification:

F-02295534; Dawn Feinberg Keating v.  
Philadelphia Gas Works

Initial Decision By:

ALJ Angela T. Jones

Deadline for Return to OSA:

August 6, 2008

This decision has not been reviewed by OSA.

2008 AUG -6 AM 10:55  
OFFICE CLERK  
ASSISTANT

\*\*\*\*\* DOCUMENT FOLDER

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

James H. Cawley

8/6/08

Commissioner

Date

SECRETARY'S BUREAU

2008 AUG -6 AM 10:13

SECRET

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OFFICE OF THE  
ASSISTANT  
2008 AUG -6 AM 9:56

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Commissioner

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Robert F. Pouch  
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Commissioner

8/6/08  
\_\_\_\_\_ Date

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2008 AUG -7 AM 8:07  
OFFICE OF ASSISTANT  
COMMISSIONER

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Commissioner

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X Tyrone J. Christy  
Commissioner

8/06/08  
Date

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I want full Commission review of this decision.

OFFICE OF ASSISTANT  
2008 JUL 28 AM 10:23

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Commissioner

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Date

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7-28-08

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Commissioner

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Date

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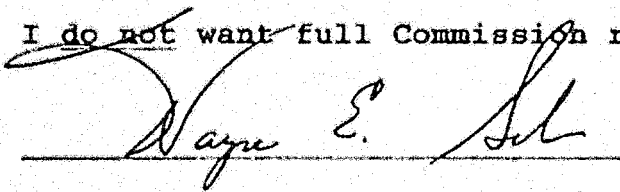
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Commissioner

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Date

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\_\_\_\_\_  
Commissioner

  
\_\_\_\_\_  
Date

Philadelphia Gas Works



800 West Montgomery Avenue, Philadelphia, PA 19122

Laureto A. Farinas, Senior Attorney  
Legal Department

Direct Dial: 215-684-6982

FAX: 215-684-6798

E-mail: laureto.farinas@pgworks.com

ORIGINAL

August 12, 2008

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AUG 12 2008

James McNulty, Secretary  
Pennsylvania Public Utility Commission  
Room B-20, North Office Building  
Harrisburg, PA 17105-3265

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

RE: Dawn Feinberg Keating v. Philadelphia Gas Works Docket No. F - 02295534

Dear Secretary McNulty:

Pursuant to 52 Pa. Code §5.61, the Philadelphia Gas Works ("PGW") hereby files the original and nine (9) copies of its Exceptions to the Initial Decision dated July 23, 2008, in above captioned matter.

If additional information is needed about this matter, please contact me at my direct-dial number above. Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Laureto Farinas", is written over a large, stylized flourish that extends to the left.

Laureto Farinas

DOCUMENT  
FOLDER

cc: Service List  
Anne Marie Cromley  
Ray Kempenski  
Elsa Leung  
Cristina Coltro

B# 16578

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

AUG 12 2008

Dawn Feinberg Keating

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

v.

Docket No. F - 02295534

Philadelphia Gas Works

EXCEPTIONS OF THE  
PHILADELPHIA GAS WORKS TO THE INITIAL DECISION

Pursuant to 52 Pa. Code §5.535, the Philadelphia Gas Works (PGW) hereby files its Exceptions to the Initial Decision dated July 23, 2008, in the above captioned matter.

I. Introduction

This matter involves gas service to the Complainant's address, 1417 Philip Street, Philadelphia, Pennsylvania (Service Address). The Complainant maintains that the PGW bill for previously unbilled service issued in August 2007 is incorrect, that she was not provided with an opportunity to mitigate her damages and that there is questionable reliability, safety, or quality issues with her gas utility service.<sup>1</sup> The Complainant requests an apology from PGW, compensation for her time and effort in pursuing this matter and a refund.<sup>2</sup>

On July 30, 2007, PGW gained access to the Service Address to complete a meter exchange and discovered that the index reading on the meter was double than that of the Automatic Meter Reading device (AMR) attached to the meter.<sup>3</sup> After further investigation, PGW concluded that the AMR was calibrated incorrectly and only measuring 1/2 of the volume of gas passing through the meter (One-foot drive).<sup>4</sup> PGW replaced the meter calibrated incorrectly. PGW sent the Complainant a make-up bill for approximately \$6,000. After making further adjustments, PGW reduced the make-up bill to \$1,441.<sup>5</sup> The Complainant disputed the make-up bill as adjusted and filed an informal

<sup>1</sup> The Complaint, Paragraph 4

<sup>2</sup> Id, Paragraphs 4 and 5

<sup>3</sup> The Answer, Paragraph 4, p. 2

<sup>4</sup> Initial Decision, p.7, Findings of Fact, Paragraph 38

<sup>5</sup> Id., p. 7 Findings of Fact, Paragraph 31

complaint with the Bureau of Consumer Services (BCS). In a decision dated September 26, 2007, the BCS concluded, *inter alia*, that the Complainant's gas bills were correct as rendered.<sup>6</sup> The Complainant appealed the BCS decision.

On February 5, 2008, an Initial Hearing held in this matter. Among the PGW's evidence presented was an analysis of the Complainant's historical usage and a record of the Complainant usage since the installation of the meter that was calibrated correctly.<sup>7</sup> PGW's witness provided testimony that the analysis and the Complainant's actual usage during the heating season after the change to a correctly calibrated meter was approximately double of the amount that the miscalibrated meter read.<sup>8</sup> This confirmed for PGW that the make-up bill, as adjusted, is accurate.<sup>9</sup>

The Complainant's testimony focused, *inter alia*, on the largely unchanged nature of the factors affecting gas usage in her household and the fact the Complainant's subsequent use during the summer months did not reflect double the amount used during the period when the bills were based upon readings from a miscalibrated meter.<sup>10</sup>

On July 23, 2008, the Commission issued an Initial Decision in this matter (Initial Decision). The Initial Decision sustained the Complaint in part; finding, *inter alia*, that the while PGW presented a plausible explanation for the failure of a miscalibrated meter to provide proper billing from the Complainant's subsequent winter heating season usage, PGW presented an illogical explanation for the failure of a miscalibrated meter to provide proper billing from the non-heating season usage information.<sup>11</sup> Thus, the Initial Decision concluded that PGW did not sustain its burden going forward once shifted from the Complainant.<sup>12</sup> The Initial Decision found that the Complainant was not responsible for the payment of the disputed (make-up bill) amount of \$1,153.95, but that the Complainant is responsible to pay the undisputed amount of \$469.77.<sup>13</sup>

These exceptions follow.

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<sup>6</sup> PGW Exhibit -- 4

<sup>7</sup> PGW Exhibits -- 1 and 3

<sup>8</sup> Tr. pp. 35 through 46

<sup>9</sup> *Id.*, p. 41

<sup>10</sup> *Id.*, pp. 7 through 30

<sup>11</sup> Initial Decision, p. 21, Conclusions of Law, Paragraph 4

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, p. 18 and p. 21, Conclusions of Law, Paragraphs 5 and 7

## II. Exceptions

### A. **PGW takes exception to the finding that PGW did not sustain its burden going forward once shifted from the Complainant.**

The Initial Decision misapplies the case law to the record evidence in finding that PGW did not sustain its burden. The Initial Decision overlooks PGW's presentation of evidence rebutting the Complainant's prima facie case in this high bill matter.

In this matter, the Complainant bears the burden of proof, as the party seeking relief from the Commission.<sup>14</sup> To satisfy that burden, the Complainant must show that the utility is responsible or accountable for the problem described in the Complaint.<sup>15</sup> The Complainant must establish a fact by a preponderance of the evidence. While this may be established though the presentation of more convincing evidence that the other party, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.<sup>16</sup>

Pursuant to the Commission's decision in Waldron v. Philadelphia Electric Company, once the Complainant has established a *prima facie* case in a high bill complaint, by showing that [1] the number of occupants of the household has not changed, [2] the potential for energy utilization is low; and, [3] the prior billing history shows no previous abnormalities, the burden of going forward shifts to the utility to rebut the prima facie case with evidence which is at least co-equal.<sup>17</sup> The Commission's decision in Poorbaugh v. West Penn Power Company, provides further direction. If the utility rebuts the Complainant's evidence then the burden of going forward shifts back to the Complainant.<sup>18</sup> Irrespective of whether the burden of going forward has shifted to either party, the ultimate burden of proof never shifts but rather remains with the Complainant.<sup>19</sup> The Initial Decision, after finding that the Complainant has established a *prima facie* case shifts the burden going forward to PGW; the Initial Decision ignores record evidence that directly rebuts the Complainant's testimony about the unchanged nature of gas usage in her home.

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<sup>14</sup> 66 Pa. C.S. §332(a)

<sup>15</sup> Patterson v. Bell Telephone Company of Pennsylvania, 72 PA PUC 196 (1990)

<sup>16</sup> Norfolk and Western Ry. v. PA Public Utility Commission, 413 A.2d 1037 (1980)

<sup>17</sup> Waldron v. Philadelphia Electric Company 54 Pa. PUC 98 (1990)

<sup>18</sup> Poorbaugh v. West Penn Power Company 1994 Pa. PUC Lexis 95

**1. PGW presented a sound analysis of gas usage at the property rebutting the Complainant's testimony.**

After the Complainant gave testimony in support of her prima facie case in this matter, PGW responded with sound evidence that was at least co-equal to the Complainant's testimony. PGW's evidence rebutted the Complainant's assertion that the make up bill is inaccurate.

As the Complainant testified to no significant changes to the patterns of her gas usage at her home, the Complainant states that her billing and usage information does not support PGW's explanation that the meter was miscalibrated as a One-foot drive and only measured the ½ of the gas passing through the meter. She believes this because the Complainant's usages during the non-heating months after the installation of a correctly calibrated meter is not double that of the usage of the non-heating months in the disputed period.<sup>20</sup>

In providing its rebuttal evidence the witness for PGW, Mr. Irizarry, provided PGW Exhibit -1, that was a comparison of the Complainant's usage read from the miscalibrated meter and the correctly calibrated meter for both heating and non-heating seasons.<sup>21</sup> Irizarry's testimony clearly shows that usage measured by the miscalibrated meter during the heating months, the usage was about ½ of the usage measured by the correctly calibrated meter. That analysis demonstrated that in doubling the usage measured by the miscalibrated meter during the heating months is comparable to the usage measured by the correctly calibrated meter during the heating months one year later. Irizarry provides a reasonable caveat, explaining any slight variation due to variations in the weather for that period from one year to the next.<sup>22</sup>

Next, PGW presented PGW Exhibit-2, the Gas Usage Analysis. Irizarry further shows through this analysis, that when eliminating the effects of variations of weather, the Complainant's gas heating usage is similar when comparing usage measured on the two

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<sup>19</sup> Replogle v. Pennsylvania Electric Co., 54 Pa. PUC 528 (1980)

<sup>20</sup> Tr. p. 10 and Initial Decision, p. 4, Findings of Fact, Paragraph 11

<sup>21</sup> Tr. pp. 33 through 36

<sup>22</sup> Id. pp. 35 and 36

meters.<sup>23</sup> In further rebuttal, PGW witness Irizarry provided PGW Exhibit-3. Irizarry's testimony clearly shows that usage measured by the miscalibrated meter during the heating months, the usage was about ½ of the usage measured by the correctly calibrated meter.<sup>24</sup>

## **2. PGW's rebuttal testimony shifts the burden going forward back to the Complainant.**

The testimony of PGW witness Irizarry is the rebuttal testimony showing that for the periods where occurs the bulk of gas usage, the evidence points only to the conclusion that the Complainant's bills were inaccurate because of the One-foot drive miscalibration measuring only ½ of the gas used. PGW's body of rebuttal evidence causes the burden of going forward to shift back to the Complainant pursuant the applicable case law.<sup>25</sup> Further, the Initial Decision comments that the record lacks evidence of what PGW would have presented so that it might "...explain why the adjustment to double the usage does not reconcile in the non-heating season."<sup>26</sup> Particularly, the Initial Decision states that PGW could have stated that only high volumes of usage affect a measurement error.<sup>27</sup> PGW did make such an assertion on the record of this proceeding. In Mr. Irizarry's discussion of PGW Exhibit -3, he states that the higher usage in the winter months makes the miscalibration problem more evident and that minor variations in usage could obscure the detection of miscalibration.<sup>28</sup>

In order to find that PGW failed to meet its burden going forward, the Initial Decision ignores the weight that the evidence of the usage during the heating months provides. The fact that the Complainant's usage for the non-heating months after the meter was replaced did not appear as exactly lockstep as double is insufficient support a finding that PGW did not carry its burden when held against the Complainant's testimony. In this regard, the Initial Decision is not supported by substantial evidence.<sup>29</sup>

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<sup>23</sup> Id. pp. 36 through 41 and PGW Exhibit -2

<sup>24</sup> Id. pp. 43 through 45 and PGW Exhibit -3

<sup>25</sup> Poorbaugh v. West Penn Power Company 1994 Pa. PUC Lexis 95

<sup>26</sup> Initial Decision, pp. 16 and 17

<sup>27</sup> Id. p. 17

<sup>28</sup> Tr p. 46, lines 7 through 10

<sup>29</sup> 2 Pa. C.S. §704, Mill v. PA Public Utility Commission, 447 A.2d 1100 (1982)

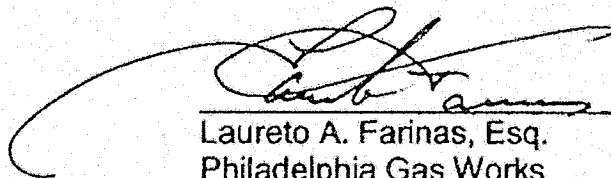
With the ultimate burden of proof remaining with the Complainant, the fact that the adjustment to double the usage does not directly reconcile in the non-heating season is insufficient evidence to meet her burden of proof. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.<sup>30</sup> Thus, the Commission should reverse the finding that PGW failed to meet its burden in showing that the make up bill is accurate and find that the Complainant has failed to meet her ultimate burden of proof in this matter.

#### IV. CONCLUSION

For the foregoing reasons, PGW respectfully requests that the Commission dismiss the Complaint and reverse the finding in the Initial Decision that PGW failed to meet its burden going forward and that the Complainant's bill is correct as rendered.

Respectfully submitted,

August 12, 2008



Laureto A. Farinas, Esq.  
Philadelphia Gas Works  
800 W. Montgomery Avenue  
Philadelphia, PA 19122

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<sup>30</sup> Norfolk and Western Ry. v. PA Public Utility Commission, 413 A.2d 1037 (1980)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS DAY SERVED A TRUE COPY OF THE FOREGOING DOCUMENT UPON THE PARTICIPANTS LISTED BELOW, IN ACCORDANCE WITH THE REQUIREMENTS OF 52 PA CODE §1.54 (RELATING TO SERVICE BY A PARTICIPANT).

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AUG 12 2008

Service List:

For Complainant:

Ms. Dawn Feinberg Keating  
1417 S. Philip Street  
Philadelphia, PA 19147

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

August 12, 2008



Laureto A. Farinas, Esq.  
Philadelphia Gas Works  
800 W. Montgomery Avenue  
Philadelphia, PA 19122