



PHILADELPHIA GAS WORKS

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July 19, 2019

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

Re: Tomisha Palmer v. Philadelphia Gas Works, Docket No. F-2018-3006197

Dear Secretary Chiavetta:

Enclosed for filing is Philadelphia Gas Works' Response to the Initial Brief of the Complainant, Tomisha Palmer submitted pursuant to 52 Pa. Code § 5.502(c)(2). This document has been filed electronically and served on the parties in accordance with the attached Certificate of Service.

If additional information is required, please do not hesitate to contact the undersigned. Thank you for your assistance in the matter.

Very truly yours,


Graciela Christlieb, Esq.

cc: Administrative Law Judge Christopher P. Pell
Josie Pickens, Esq.
Lydia Gottesfeld, Esq.
Robert Ballenger, Esq.

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

Tomisha Palmer,	:	
<i>Complainant,</i>	:	
	:	
v.	:	F-2018-3006197
	:	
Philadelphia Gas Works,	:	
<i>Respondent.</i>	:	
	:	

**RESPONSE OF RESPONDENT, PHILADELPHIA GAS WORKS,
TO THE INITIAL BRIEF OF COMPLAINANT, TOMISHA PALMER**

Respondent, Philadelphia Gas Works (“PGW”), by and through its undersigned counsel, hereby submits the following brief in response to the initial brief of Complainant, Tomisha Palmer (“Ms. Palmer”):

I. INTRODUCTION

The sole issue before the Commission is whether PGW violated the Public Utility Code, a Commission Regulation or order, or PGW's Commission-approved tariff when it determined Ms. Palmer to be responsible for the theft at 4244 North Hicks Street, Philadelphia, PA (“the Service Address”).¹ Ms. Palmer, by and through her counsel, has conceded that the theft occurred² and that she is responsible for the balance.³ Ms. Palmer’s sole argument is that she should not be held responsible for the theft because she did not live at the Service Address when the theft occurred and/or she did not knowingly and willfully engage in the theft and, as such should have

¹ The overwhelming majority Complainant’s initial brief is written based on a false premise, as if the Commission already made a determination that she is not responsible for the theft at the Service Address. In reality, whether the Complainant is responsible for the theft is the underlying issue currently pending before the Commission. The issues raised in Complainant’s initial brief would only exist and warrant a response if PGW had somehow acted in a way counter to a determination that Ms. Palmer was not responsible for the theft, and that determination has not been made. As such, PGW disposes of the issues raised in Complainant’s initial brief at III. B. and III. C., and reserves the right to address them at a later date, if necessary, as those issues are not properly before the Commission at this time.

² Hearing on the Merits of the Complaint Joint Exhibit 1, Stipulation 1.

³ Palmer Initial Brief, p. 13.

access to payment arrangements and PGW's Customer Assistance Program ("CAP").⁴ As demonstrated herein, Ms. Palmer has failed to produce a scintilla of evidence that PGW erred when it determined her to be responsible for the theft at the Service Address. Since it is clear that Ms. Palmer had a lease for the Service Address and indeed lived there during the time period of the theft, PGW committed no violation by holding her responsible for the theft. Therefore, PGW respectfully requests that the Commission find in its favor and dismiss the Complaint in its entirety.

II. STATEMENT OF FACTS

On September 26, 2012, Ms. Palmer entered into a lease with Bricks Management Company for the property at the Service Address.⁵ Ms. Palmer lived at the Service Address from September 2012 through July 2017.⁶ Ms. Palmer's late husband, Oliver Jackson, and her children also resided at the Service Address.⁷

When Ms. Palmer and her family moved into the property at the Service Address, the gas was already on, and she placed the gas service into her name.⁸

On June 27, 2013, PGW terminated the gas service at the Service Address for non-payment.⁹

On September 24, 2013, Ms. Palmer visited PGW's Center City District Office to restore the gas service to the Service Address.¹⁰ PGW informed Ms. Palmer that, in order to restore service,

⁴ Id. Ms. Palmer is either intentionally or mistakenly relying of the "knowing and willful" standard despite the Commission's implementation of the "knew or should have known" standard in theft of service cases. See *Darnell Fassett v. Philadelphia Gas Works*, Docket No. F-2014-2408541, 2015 WL 1957867 (2015); *Joacquin Scott v. Philadelphia Gas Works*, Docket No. F-2018-3001138, 2018 WL 6243035 (2018). Complainant's reliance on the word "willful" to support her position is particularly misplaced as, in this context, it harkens back to the Commission's holding in *Fassett* and stands for the proposition that when you know or should have known that you owe a duty and eschew that duty, you are acting willfully; see *Darlene Davis v. Philadelphia Gas Works*, Docket No. F-2016-2573100, 2017 WL 6018105 (citing to *Fassett* and finding the complainant was not responsible for the theft of service because she was prevented from discharging her duty of care by circumstances that physically excluded her from the property).

⁵ Hearing on the Merits of the Complaint PGW Exhibit 3.

⁶ Tr. at 27:5-21.

⁷ Tr. at 232:15-22.

⁸ Tr. at 29:22 through 30:15, Tr. at 334:10-23.

⁹ Hearing on the Merits of the Complaint Joint Exhibit 1, Stipulation 6.

¹⁰ Hearing on the Merits of the Complaint PGW Exhibit 16, p. 5; Tr. at 322:17 through 323:8.

she would have to pay her past due balance (\$1,970.70) as well as the reconnection fee (\$123.23).¹¹

On November 15, 2013, Ms. Palmer and Oliver Jackson visited PGW's Center City District Office and spoke to Orlando Santana, a PGW Customer Service Representative ("CSR").¹² Mr. Jackson presented a lease for the Service Address and requested a service turn-on, claiming to be the only occupant at the Property.¹³ Unknown to PGW at the time, the lease presented for the Service Address was fraudulent.¹⁴ Due to the service having been terminated for non-payment, Mr. Santana conducted a Cold Weather Survey with Ms. Palmer.¹⁵ During the Cold Weather Survey, Ms. Palmer denied that she still occupied the Service Address.¹⁶ Mr. Santana processed the turn-on request, which included an Experian credit check.¹⁷ The Experian report did not show Mr. Jackson as being linked to the Service Address.¹⁸ Because neither the credit check nor Ms. Palmer or Mr. Oliver indicated that Mr. Jackson had been residing at the Service Address, the service was transferred into Mr. Jackson's name without his having to pay Ms. Palmer's outstanding balance as a precondition for service pursuant to 52 Pa. Code § 56.35 (b).¹⁹ On November 19, 2013, PGW visited the Service Address and physically restored the gas service to the Service Address.²⁰

On July 30, 2014, PGW again terminated the gas service at the Service Address for non-payment.²¹

¹¹ Id.

¹² Hearing on the Merits of the Complaint PGW Exhibits 17 and 18; Tr. at 328:20 through 330:16.

¹³ Hearing on the Merits of the Complaint PGW Exhibit 17; Tr. at 329:15 through 331:2.

¹⁴ Tr. at 255:9-18.

¹⁵ 52 Pa. Code § 56.100(h).

¹⁶ Hearing on the Merits of the Complaint PGW Exhibit 18, p. 2; Tr. at 326:12-22.

¹⁷ Hearing on the Merits of the Complaint PGW Exhibit 17; Tr. at 329:15 through 330:4.

¹⁸ Id.

¹⁹ Tr. at 332:9 through 333:21.

²⁰ Hearing on the Merits of the Complaint PGW Exhibit 9; Tr. at 335:16 through 336:11.

²¹ Joint Exhibit 1, Stipulation 8. The issue raised by Complainant in her initial brief regarding PGW's alleged failure to conduct a Cold Weather Survey in the twelve months following after the service was terminated for nonpayment in 2014 is a mischaracterization of the documentation provided by PGW through discovery (PGW was asked to produce results of surveys

On June 27, 2017, DHS employees conducted an unrelated walk-through at the Service Address and happened to observe that gas was being stolen.²² The DHS employees ordered Ms. Palmer to call in a gas leak to PGW.²³ Idriss Byrd, a PGW Field Service Technician, arrived at the Service Address in response to the gas leak call, but was unable to find any evidence of a gas leak.²⁴ During his check of the Property, Mr. Byrd found the gas on.²⁵ When Mr. Byrd entered the basement, he observed the bypass.²⁶ Mr. Byrd immediately terminated the gas service and removed both the bypass and the meter, which was lying on the floor of the basement.²⁷

On July 11, 2017, Ms. Palmer visited PGW's Germantown District Office to inquire about restoring gas service to the Service Address and was informed that she was being held responsible for bypass charges in the amount of \$6,571.15.²⁸ Ms. Palmer stated that she wished to appeal that decision and was told that she could submit proof of residence at another address to contest PGW's determination.²⁹

On August 1, 2018, Ms. Palmer visited PGW's North Philadelphia District Office and stated that she may be applying for service at 1763 Croskey Street; she was informed that the theft bill would have to be paid before she could establish service.³⁰

On August 17, 2018, Ms. Palmer called PGW regarding the bypass charges.³¹ When the CSR explained that she could not get a payment arrangement for unauthorized usage (bypass) charges, Ms. Palmer stated that she never lived at the property at 4244 N. Hicks Street; that her

not documentation of attempts to conduct surveys) as well as a mischaracterization of Cold Weather Surveys as a tool for detecting theft of service.

²² Tr. at 61:2-5.

²³ Tr. at 58:20-23.

²⁴ Hearing on the Merits of the Complaint PGW Exhibits 5 and 6; Tr. at 263:8-13.

²⁵ Hearing on the Merits of the Complaint PGW Exhibits 5 and 6; Tr. at 264:23 through 265:1.

²⁶ Hearing on the Merits of the Complaint PGW Exhibits 5 and 6; Tr. at 266:6-22; Tr. at 274:1 through 276:14.

²⁷ Tr. at 266:15 through 267:9; Tr. at 269:9-15.

²⁸ Hearing on the Merits of the Complaint PGW Exhibit 16, p. 3.

²⁹ Id.

³⁰ Id.

³¹ Id.; Tr. at 327:3-19.

spouse did and when he passed away, the unauthorized usage charges were placed on her account. Ms. Palmer also stated that she had proof that she had lived somewhere else. The CSR directed Ms. Palmer to visit a PGW District Office with the proof to which she was referring.³² The CSR further explained to Ms. Palmer, that, once she did so, she would not get an answer the same day, but that a PGW representative would make a copy of her proof and forward it to the correct department.³³

Ms. Palmer did not visit a PGW District Office to provide evidence that she resided somewhere other than the Service Address.³⁴

On September 25, 2018, Ms. Palmer filed an informal complaint with the Commission's Bureau of Consumer Services ("BCS") against PGW at Docket No. 3655035 wherein she disputed that she owed the theft balance because she did not reside at the Service Address during the period of time the balance accrued.³⁵ Three days later, on September 28, 2019, a BCS investigator spoke with Ms. Palmer to obtain clarification on her prior residency. During that conversation, Ms. Palmer falsely stated that she never resided at 4244 N. Hicks Street, Philadelphia, PA and further falsely stated that she had provided verification to that effect to PGW.³⁶

On October 15, 2018, the BCS dismissed Ms. Palmer's formal complaint, stating that Ms. Palmer must either pay the amount requested by PGW to restore service, or provide PGW with proof of residency (at another location) for the time period that the theft occurred.³⁷

To date, Ms. Palmer has not provided PGW with any evidence that she resided anywhere other than the Service Address between September 2012 and July 2017.³⁸

³² Id.

³³ Hearing on the Merits of the Complaint PGW Exhibit 16, pp. 2-3; Tr. at 327:3-19.

³⁴ Tr. at 327:20-24.

³⁵ Hearing on the Merits of the Petition Petitioner Exhibit 2.

³⁶ Id. at p. 2, No. 11.

³⁷ Id. at p. 3.

III. LEGAL ARGUMENT

A. Summary of Argument.

Ms. Palmer cannot succeed in this matter as she has failed to carry her burden of proving that PGW violated the Public Utility Code, a Commission Regulation or order, or PGW's Commission-approved tariff when PGW held her responsible for the theft at the Service Address. The record in this matter is devoid of anything approximating the substantial evidence necessary to find in Ms. Palmer's favor. In support of her Complaint, Ms. Palmer has supplied the Commission with nothing but testimony so incredible and contradictory that it has no evidentiary value and an argument of (im)plausible deniability.

B. Burden of Proof and Legal Standards.

As the proponent of a rule or order, the Complainant, Ms. Palmer, bears the burden of proof pursuant to 66 Pa. C.S.A. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent, PGW, is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa.P.U.C. 196, 1990 WL 10702674 (1990). Such a showing must be by a preponderance of the evidence, which is to say that the evidence is more convincing than the evidence presented by the other party. *Samuel J Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, (Pa.Cmwth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992).

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwth. 1993); 2 Pa.C.S. § 704. Substantial evidence consists of evidence that a reasonable mind would accept as adequate to support a conclusion; more is required than a

³⁸ Tr. at 87:6 through 89:15.

mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dep't of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlt. 1984). Moreover, mere bald assertions, personal opinions, and/or perceptions do not constitute evidence to bolster a claim. *Pa. Bureau of Corrections v. City of Pittsburgh*, 516 Pa. 75, 532 A.2d 12 (1987).

If the Complainant presents evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant, shifts to the Respondent. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlt. 2001). While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. *Id.* The burden of proof always remains on the party seeking affirmative relief from the Commission. *Id.* So, even if the evidence presented by the Respondent is of co-equal weight and no greater, the Complainant still has not satisfied her burden of proof; in order to succeed, the Complainant would then have to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlt. 1982), *aff'd*, 501 Pa.433, 461 A.2d 1234 (1983).

C. Ms. Palmer Failed to Provide the Substantial Evidence Necessary to Carry her Burden of Proof.

Despite an informal complaint investigation on her behalf,³⁹ two continuances at her request,⁴⁰ three attorneys working on her case,⁴¹ and two separate in-person hearings where she

³⁹ BCS Docket No. 3655035.

⁴⁰ February 4, 2019 and March 13, 2019.

⁴¹ Josie B. H. Pickens, Esq., Lydia R. Gottesfeld, Esq., and Robert W. Ballenger, Esq. have all entered their appearances in this case.

could submit evidence,⁴² Ms. Palmer has failed to offer the Commission any substantial evidence to support her claims. Instead, Ms. Palmer offers arguments that are implausible and outlandish by turns and rely on her testimony, which completely lacks credibility.

i. Ms. Palmer’s arguments are unfounded and unpersuasive.

First, Ms. Palmer would have the Commission believe that, notwithstanding her lease, her status as the ratepayer for other utilities at the Service Address,⁴³ and her testimony to the contrary,⁴⁴ she only resided at the Service Address “intermittently;”⁴⁵ that she spent long periods of time living with her mother, her sister and a family friend and away from her husband due to “disputes.”⁴⁶ While alleging that these disputes were enough to cause her to vacate her home, Ms. Palmer’s testimony characterized the disputes she had with her husband as the kind you have “with most marriages” and not of a nature that ever caused Ms. Palmer and her husband to stop seeing each other.⁴⁷ Also, although she testified that there were times when she would be out of her house for “months,”⁴⁸ Ms. Palmer failed to give a single description of a period of time (month, season, or even year) that she was not living at the Service Address. Perhaps most telling is that, despite testifying that her mother, sister and family friend were still available to her as resources,⁴⁹ Ms. Palmer failed to produce a single witness to corroborate her story that she ever lived away from her home.

Next, Ms. Palmer argues that, even when she was living at the Service Address, she was unaware of the bypass that was installed in her basement.⁵⁰ Ms. Palmer makes this argument regardless of the fact that she never denied utilizing the basement of her home, but rather

⁴² March 21, 2019 and May 7, 2019.

⁴³ Hearing on the Merits of the Complaint PGW Exhibit 1; Tr. at 76:17-24.

⁴⁴ Tr. at 27:12-21; Tr. at 65:17 through 66:14; Tr. at 73:7-15; Tr. at 232:15-22.

⁴⁵ Palmer Initial Brief, p. 4.

⁴⁶ Tr. at 28:1-23.

⁴⁷ Id.

⁴⁸ Tr. at 74:8-10.

⁴⁹ Tr. at 119:13-22.

⁵⁰ Palmer Initial Brief, pp. 6-8.

testified that the meter was in the basement and that she had access to it.⁵¹ Ms. Palmer's argument here appears to be two-fold: that she did not see the bypass, but, even if she did, she did not know what it was. The record evidence patently contradicts both parts of Ms. Palmer's argument. First, the testimony of two independent witnesses places the meter set, and consequently any meter bypass, squarely in the line of sight of anyone who enters the basement.⁵² Second, there are photographs of the meter set which clearly show that the entire meter set is on the wall of the basement near a window (natural source of light).⁵³ The photographs, while not taken on the date of discovery, were authenticated by Mr. Byrd, the PGW worker who discovered the bypass as being a true and accurate representation of what the basement and the meter set looked like on the date of discovery absent the bypass that had since been removed.⁵⁴ The PGW worker also testified that there was nothing covering the meter set or obstructing the view to the meter set on the day that he found the bypass.⁵⁵ The Complainant's suggestion that the photographs submitted by PGW fail to show that the bypass was visible is specious given the testimony given by both Mr. Schwartz and Mr. Byrd. Third, we have Ms. Palmer's own testimony regarding the behavior of the DHS workers on the day PGW was called to the Service Address. Ms. Palmer testified that during the walk-through with DHS one of the DHS workers saw the bypass, told her the gas was being stolen, and ordered her to call PGW.⁵⁶ The DHS workers were there that day to investigate child neglect, not find gas theft.⁵⁷ The DHS workers were "laypeople" just as Ms. Palmer argues she is, yet they were able to see that

⁵¹ Tr. at 57:3-10.

⁵² Tr. at 257:21 through 258:13; Tr. at 278:16 through 279:11.

⁵³ Hearing on the Merits of the Complaint PGW Exhibit 4, p.1; Tr. at 258:14-21.

⁵⁴ Tr. at 274:14-23.

⁵⁵ Tr. at 278:16 through 279:11.

⁵⁶ Tr. at 58:20 through 61:10; Tr. at 225:8 through 230:3.

⁵⁷ Tr. at 58:2-5.

something was wrong during their very first walk-through of the house;⁵⁸ something that Ms. Palmer claims she never noticed even though she lived there for years. The DHS workers may not have known exactly what it was (it was called in as a leak, not theft), but it was so obviously wrong, that they knew PGW needed to be contacted right away and ordered Ms. Palmer to do so. Ms. Palmer's testimony that she was ordered to call PGW is corroborated by PGW's records⁵⁹ while her attempts to pass DHS's behavior off as the result of an actual gas leak from the stove⁶⁰ are belied by her own admission that she did not smell any gas⁶¹ and PGW's records indicating that there was no gas leak.⁶²

In addition, Ms. Palmer argues that her behavior following the death of Mr. Jackson⁶³ is consistent with someone who did not know there was a bypass.⁶⁴ This argument is based on the fact that Ms. Palmer contacted PGW in May of 2017 to ask about the status of grant money and that she seemingly took no action to conceal the bypass or obstruct access to the basement. Ms. Palmer's attempts to bolster her argument that she was unaware of the bypass with her own behavior fail spectacularly. First and foremost, the call that Ms. Palmer refers to in her brief is in no way consistent with someone who is acting in good faith. In fact, the call contradicts Ms. Palmer's own testimony regarding why, if she believed the gas was in Mr. Jackson's name up until he died,⁶⁵ she did not contact PGW to transfer the account into her name once he passed away. When asked if she ever contacted PGW after Mr. Jackson's passing to transfer the service into her name, Ms. Palmer testified that she did not because she was "not in the right state of

⁵⁸ Tr. at 241:7-10.

⁵⁹ Hearing on the Merits of the Complaint PGW Exhibit 5, p.1 (DHS did not leave the call up to Ms. Palmer; "Robyn" of DHS was on the phone with her.).

⁶⁰ Tr. at 59:12 through 60:2. Of note is Ms. Palmer's use of the phrase "my house" to describe a place that she now claims to have lived only "intermittently."

⁶¹ Tr. at 58: 7-10.

⁶² Hearing on the Merits of the Complaint PGW Exhibit 5, p.6; Exhibit 6, p.6; Tr. at 263:8-13; Tr. at 265:5 through 266:5.

⁶³ Hearing on the Merits of the Complaint Palmer Exhibit 1 (February 6, 2017).

⁶⁴ Palmer Initial Brief, p. 5.

⁶⁵ Tr. at 118:16 through 119:3.

mind.”⁶⁶ Ms. Palmer further testified that her state of mind also prevented her from finding it odd that the household was not receiving a gas bill.⁶⁷ Yet when Ms. Palmer finally did reach out to PGW, she only asked about whether LIHEAP grant money had been deposited into her account.⁶⁸ Ms. Palmer did not inquire as to the balance owed and made no attempt to transfer the service from Mr. Jackson’s name into to her name. If she really believed Mr. Jackson was paying the bill up until he died and was contacting PGW in good faith, wouldn’t she want to know how much was owed on the account since no one was paying the bill? For that matter, wouldn’t she want to know why there were no bills coming to the house? Most importantly, wouldn’t she want put the gas service in her name since she was still living at the Service Address with her children?⁶⁹

Ms. Palmer’s contention that the fact that she took no action to conceal the bypass or obstruct access to the basement is indicative of her being unaware of the bypass fares little better. There is no evidence, not even Ms. Palmer’s testimony, to support the premise that Ms. Palmer had any knowledge that DHS would be visiting her house that day to do a walk-through. There is similarly no evidence to support that Ms. Palmer believed DHS would be entering the basement if she let them in or even that she was given a choice as to whether to let them into the house at all. The same goes for obstructing access to the basement. The record indicates that the police were there when PGW arrived;⁷⁰ it is unclear how early in the DHS visit they were summoned or to what extent they facilitated DHS’s access to the property.

Last, Ms. Palmer argues that other people had access to the property, so she cannot be held responsible for the theft of service. This argument is rubbish and cannot prevail as a matter of

⁶⁶ Tr. at 112:3-24.

⁶⁷ Tr. at 113:16-23.

⁶⁸ Hearing on the Merits of the Complaint PGW Exhibit 16, p.5; Tr. at 323:20 through 324:22.

⁶⁹ Tr. at 75:2-7; Tr. at 112:3-8; Tr. at 232:19-22.

⁷⁰ Tr. at 268:16-23.

law. It rests on the premise that, despite entering into a contract that made her the sole person responsible for the property, Ms. Palmer lacked “a right of exclusion or control” because she did not own the property and did not live there alone. Under this argument, no renter would ever be able to be held responsible for the theft occurring during their tenancy and neither would anyone (renter or owner) who lives with any other adult individual. In Ms. Palmer’s distorted view, the mere fact that there were “adults other than Ms. Palmer in the property”⁷¹ means that she cannot be held responsible for what happens in that property. Ms. Palmer further points to the fact that PGW did not rebut that she lived at home with her family and that the company managing the property had access to it as a purportedly compelling legal argument that she should not be held responsible for the theft, but there is simply no need for PGW to even attempt to rebut that evidence as Ms. Palmer living completely alone, barring anyone from entering her home, is in no way a precondition for her being held responsible for the theft. It stands to reason that Ms. Palmer lived at the Service Address with her family. There is also nothing out of the ordinary with the arrangement between Ms. Palmer and Bricks Management regarding Bricks’ access to the property.⁷² Besides, the only people, apart from her family, that Ms. Palmer claims had access to the Service Address are the owners of the building⁷³ and there is no support for the suggestion that they would tamper with the meter. In light of the physical damage that can occur as the result of gas explosions and the fact that the lessees, not the lessors, are responsible for paying for gas, tampering with the meter actually runs counter to any property interest the owners have without supplying them with a single benefit.

There is similarly no support for Ms. Palmer’s alternate suggestion that her husband somehow acted alone in stealing gas. Instead of showing that Mr. Jackson acted alone, the

⁷¹ Palmer Initial Brief, p. 8.

⁷² Tr. at 89:19 through 91:8.

⁷³ Hearing on the Merits of the Complaint PGW Exhibit 2; Tr. at 251:6-22; Tr. at 253:7 through 254:10.

record is replete with evidence that he acted in concert with Ms. Palmer. Ms. Palmer said it best when she described them as a “team.”⁷⁴ Ms. Palmer and Mr. Jackson were together for over 23 years.⁷⁵ They moved into the Service Address at the same time and lived there together.⁷⁶ And after Ms. Palmer was terminated for nonpayment, she and Mr. Jackson engaged in fraud against PGW when they visited a PGW District Office,⁷⁷ lied about Ms. Palmer no longer occupying the Service Address,⁷⁸ presented a fake lease for the property,⁷⁹ and lied about Mr. Jackson being the only occupant.⁸⁰ After they were both terminated for non-payment with outstanding balances they did not intend to pay to legitimately restore service, Ms. Palmer and Mr. Jackson went beyond fraud and engaged in theft.

ii. Ms. Palmer’s testimony is not credible.

As the party with the burden of proof, Ms. Palmer must not only bear the burden of production, she must also bear the burden of persuasion if she is to obtain a verdict in her favor. While the burden of production may shift during a proceeding, the burden of persuasion does not. “[T]he ultimate burden of persuasion remains with the complainant.” *Milkie v. Pa. Pub. Util. Comm’n*, 768 A.2d 1217 (Pa.Cmwlt. 2001). It is entirely possible for a party to successfully bear the burden of production but not be entitled to a verdict in his favor because the party did not bear the burden of persuasion. *Ann Castaneira v. PPL Electric Utilities Corp.*, Docket No. F-2014-2404158, 2015 WL 4873763 (2015). Unlike the burden of production, the burden of persuasion (generally a fact question) includes determinations of credibility and acceptance or rejection of inferences. *Id.* Even un rebutted evidence may be disbelieved. *Id.*

⁷⁴ Tr. at 117:15-18.

⁷⁵ Tr. at 112:13-15.

⁷⁶ Tr. at 232:15-22.

⁷⁷ Tr. at 328:4 through 331:2

⁷⁸ Hearing on the Merits of the Complaint PGW Exhibit 16, p.5; PGW Exhibit 18; Tr. at 325:20 through 326:22.

⁷⁹ Tr. at 255:9-18.

⁸⁰ Hearing on the Merits of the Complaint PGW Exhibit 17; Tr. at 329:15 through 330:4.

citing to *Suber v. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa.Cmwlth. 2005), *app. den*, 586 Pa. 776, 895 A.2d 1264 (2006). The law is clear that, in order to bear the burden of proof and be entitled to a decision in her favor, a complainant must meet both the burden of production and the burden of persuasion. Ms. Palmer's incredible testimony makes it impossible for her to meet her burden of persuasion. It is clear from the record that Ms. Palmer will say or do whatever she thinks necessary to get what she wants and, when confronted, claim other people are lying or mistaken in order to cover her own falsehoods.

By way of illustration, the following are some instances, aside from the instances already mentioned, which illustrate Ms. Palmer's lack of credibility:

- Ms. Palmer testified that Mr. Jackson was on her lease for the Service Address.⁸¹ When confronted with a copy of her lease showing her to be the only lessee, she then testified that, notwithstanding her signature on the document, the lease presented was not her lease.⁸²
- Despite living at the Service Address with Mr. Jackson and her five children (seven individuals total),⁸³ Ms. Palmer consistently reported only six people in the household to PGW when attempting to obtain payment arrangements or apply for PGW's CAP program.⁸⁴ Since both payment arrangements and CAP are income sensitive, Ms. Palmer was most likely neglecting to include Mr. Jackson and his income on these occasions, which would be in keeping with Mr. Jackson in turn lying about the number of individuals in the household to get on CAP when the service was in his name.⁸⁵

⁸¹ Tr. at 77:19 through 78:4.

⁸² Tr. at 79:11 through 80:13.

⁸³ Tr. at 232:15-22.

⁸⁴ Hearing on the Merits of the Complaint PGW Exhibit 16, pp.5-6; Tr. at 320:14 through 323:8.

⁸⁵ Hearing on the Merits of the Complaint PGW Exhibit 19; Tr. at 331:3 through 332:1.

- Ms. Palmer testified that she was not with Mr. Jackson when he visited PGW's District Office to place the service into his name.⁸⁶ This is the visit during which Mr. Jackson presented a fake lease and lied about being the only occupant of the Service Address and during which Ms. Palmer denied residing at the Service Address. This is the visit that resulted in Mr. Jackson being able to transfer the service into his name and having the service restored without first having to pay the balance that was accrued under Ms. Palmer's name and, ultimately, getting the household on CAP. When questioned about that visit, Ms. Palmer, who testified she could not even recall a specific period of time she lived at the Service Address,⁸⁷ testified that she was not present at PGW's District Office on that day.⁸⁸ In fact, without even needing to know what date or day of the week it was, Ms. Palmer testified without hesitation that she was at work that day.⁸⁹
- Once she was terminated for theft, Ms. Palmer, in an attempt to have service restored, told PGW that she never lived at the Service Address.⁹⁰
- After filing her informal complaint with the BCS, Ms. Palmer told the BCS investigator that she never lived at the Service Address.⁹¹
- When questioned about stating that she never lived at the Service Address, Ms. Palmer testified that she never said that.⁹²

Even if the Commission were to somehow find portions of Ms. Palmer's testimony credible, she has provided nothing more than her statements to support her claim and mere assertions

⁸⁶ Tr. at 233:6-23.

⁸⁷ Complainant's Petition for Interim Emergency Relief, Verified Statement of Facts No. 3; Tr. at 62:24 through 63:24.

⁸⁸ Tr. at 233:6-23.

⁸⁹ Id.

⁹⁰ Hearing on the Merits of the Complaint PGW Exhibit 16, p. 3; Tr. at 327:2-19.

⁹¹ Hearing on the Merits of the Petition Palmer Exhibit 2, p. 2, No. 11.

⁹² Tr. at 83:2 through 85:7; Tr. at 244:18 through 245:5.

cannot form the basis of a finding in her favor. Assertions, personal opinions, and perceptions do not constitute factual evidence.⁹³

iii. Ms. Palmer's case is distinguishable from the cases she has presented to support her argument that she is not responsible for the theft.

In her initial brief, Ms. Palmer primarily relies on three cases to support her position: *Darlene Davis v. Philadelphia Gas Works*, Docket No. F-2016-2573100, 2017 WL 6018105 (2017); *Cynthia Oduwole v. Philadelphia Gas Works*, Docket No. F-2018-3001419, 2019 WL 1506839 (2019); and *Nicole Pitman v. Philadelphia Gas Works*, Docket No. F-2013-2395041, 2014 WL 4644291 (2014), all cases where the complainants were able to establish that they either did not owe a duty of care for the property where the theft occurred or, if they did owe such a duty of care, did not neglect to exercise that care. These cases do not lend Ms. Palmer the support she seems to believe they do nor is she as similarly situated with those complainants as she thinks she is.

Unlike Ms. Palmer, Darlene Davis faced issues (legal and otherwise) that physically prevented her from residing in her home or even exercising her duty of care with respect to the building during the time that the theft was occurring. Also unlike Ms. Palmer, Ms. Davis provided evidence (other than her own testimony) to support her claims. Ms. Davis was found to be responsible for the bypass charges because the property was her responsibility, but was granted a payment arrangement because she established that the theft was not the result of her abdication of her responsibility for the property. Similarly, Cynthia Oduwole faced circumstances that prevented her from adequately protecting her property from tampering and theft of service. As the victim of domestic abuse, Ms. Oduwole came before the Commission under the shelter of a Protection From Abuse ("PFA") Order. In an attempt to leave her abusive

⁹³ *Pa. Bureau of Corrections v. City of Pittsburgh*, 516 Pa. 75, 532 A.2d 12 (1987).

situation, she vacated her property to live elsewhere and while there, she established gas service in her name. Circumstances forced her to return to her property and, having to reside there, she ultimately had to seek a PFA to stay safe. As an individual who cannot even keep her own person safe from harm without court intervention, it understandable that the Commission found her to be in no position to keep her property safe from harm. Nicole Pittman's case is distinguishable from Ms. Palmer's in that Ms. Pittman's circumstances and credibility allowed her to make a *prima facie* case that she was not responsible for the theft, which PGW did not rebut. Ms. Palmer failed to make a *prima facie* case to support her claims and, even if she had, PGW presented sufficient evidence to rebut it.

It is clear that the cases cited by Ms. Palmer do nothing to support her position. Rather, these cases support the Commission's dismissal of Ms. Palmer's complaint against PGW.

IV. CONCLUSION

WHEREFORE, Respondent, Philadelphia Gas Works, respectfully requests that the Commission dismiss the Complaint in its entirety for the Complainant's failure to carry her burden of proof.

Respectfully Submitted,



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Dated: 7/19/2019

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tomisha Palmer	:	
<i>Complainant</i>	:	
v.	:	Docket No. F-2018-3006197
	:	
Philadelphia Gas Works	:	
<i>Respondent</i>	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Philadelphia Gas Works' Response to the Initial Brief of the Complainant, Tomisha Palmer in accordance with the requirements of 52 Pa.Code §§ 1.55 and 5.421(b)(4):

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