

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held September 21, 2023

Commissioners Present:

Stephen M. DeFrank, Chairman  
Kimberly Barrow, Vice Chair  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

Victoria Whitaker

C-2022-3035783

v.

Philadelphia Gas Works

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) F. Joseph Brady, issued on May 25, 2023, in the above-captioned proceeding. The Initial Decision, *inter alia*, sustained the Preliminary Objections filed on October 24, 2022, by Philadelphia Gas Works (PGW or Company) in response to a Formal Complaint (Complaint) filed by Victoria Whitaker (Complainant or Ms. Whitaker) on September 30, 2022. No exceptions have been filed. However, we have exercised our right to review the Initial Decision pursuant to Section 332(h) of the

Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall adopt the Initial Decision, as modified, consistent with this Opinion and Order, and remand for further proceedings.

## I. Procedural History

On September 30, 2022, Ms. Whitaker filed the instant Complaint with the Commission,<sup>1</sup> wherein she alleged that: (1) PGW is threatening to or has already shut off her utility service; (2) PGW has not provided paperwork in a timely manner; (3) income that was used in previous payment arrangement was incorrect; and (4) her outstanding balance should not include a balance transfer that occurred in 2018.<sup>2</sup> Complaint at ¶ 4. As relief, Ms. Whitaker requested a payment arrangement.<sup>3</sup> Complaint at ¶¶ 4-5.

On October 24, 2022, in response to the Complaint, PGW filed an Answer and New Matter (Answer), as well as Preliminary Objections, both properly endorsed with a Notice to Plead. In its Answer, PGW admitted, in part, and denied, in part, various material allegations of the Complaint. PGW admitted that it had issued a shut off notice for the gas service at the Service Address. Answer at 1.

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<sup>1</sup> PGW was served with a copy of the Complaint on October 3, 2022.

<sup>2</sup> Under the “Other” section of “Reason for Complaint,” the Complainant stated that “Bills of previous owner should not be passed on to new owner as well.” Complaint at ¶ 4.

<sup>3</sup> The Complainant indicated that she would like the Commission to “revisit the payment plan based on income from November 2021 not current income correctly. To have a settlement or a deposit that is affordable and feasible for me to pay. To explain why the connection to the property would cause owner to pay when since 1990 owner has several addresses in the state and outside the state which shows that owner has not lived at property consecutive years. Have company explain why adequate time was not given for shut off.” Complaint at ¶ 5.

In its New Matter, PGW averred that the portions of the Complaint regarding the 2018 balance transfer are barred under the three-year statute of limitations at Section 3314 of the Code, 66 Pa. C.S. § 3314 (relating to limitations of actions and accumulation of remedies), which provides that no action for recovery of penalties or forfeitures, or any prosecution, may be maintained unless brought within three years from the date the liability arose. As such, PGW requested that the Complaint be dismissed. Answer at 2.

Also on October 24, 2022, PGW filed its Preliminary Objections, in which it reiterated its argument that the portions of the Complaint regarding the 2018 balance transfer are barred by the statute of limitations under Section 3314 and should be dismissed. The Complainant did not file an Answer to either the New Matter or the Preliminary Objections.

By Hearing Notice dated November 29, 2022, an Initial Telephonic Hearing was scheduled for February 2, 2023. Thereafter, the ALJ issued the Parties a Prehearing Order dated January 9, 2023, informing them about the procedural rules for the hearing.

On February 2, 2023, ALJ Brady convened the telephonic evidentiary hearing, as scheduled. The Complainant appeared *pro se*, testified on her own behalf and offered no exhibits for the record. PGW was represented by counsel who presented the testimony of one witness, Jessica Antonetti, a Customer Review Officer at PGW, who sponsored five exhibits (PGW Exhibits 1-5), which were admitted into the record.

At the commencement of the telephonic hearing, ALJ Brady noted that PGW had filed Preliminary Objections to a portion of the Complaint based on its statute of limitations arguments. The ALJ ruled on the Preliminary Objections by granting PGW's request to dismiss a portion of the Complaint. Accordingly, the ALJ determined

that the arguments of the Complaint pertaining to the transfer of the balance in 2018 would not be heard. *See*, Tr. at 5-6. Thereafter, the hearing moved forward on the consideration of the Complainant's request for a payment arrangement.

A transcript of the proceeding consisting of thirty-one pages was filed on March 1, 2023, at which time the record was closed. I.D. at 7.

On May 25, 2023, the Initial Decision of ALJ Brady was issued by Secretarial Letter wherein he first provided the rationale for granting PGW's Preliminary Objections because it was beyond the statute of limitations to bring a cause of action. I.D. at 4-7. Thereafter, addressing Ms. Whitaker's request for a payment arrangement, the ALJ found that the Complainant failed to carry her burden of proving that she is entitled to a second or subsequent Commission-issued payment arrangement or to an extension of the previous payment arrangement. Accordingly, ALJ Brady recommended that the remainder of the Complaint be dismissed. I.D. at 12.

As noted *supra*, no Exceptions were filed with the Commission.

## **II. Discussion**

### **A. Legal Standards**

#### **1. Burden of Proof**

As a matter of law, to establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Code, a

Commission Regulation or Order or a violation of a Commission-approved tariff.  
66 Pa. C.S. § 701.

Section 332(a) of the Code provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). The evidentiary burden of proof for actions before the Commission is the “preponderance of the evidence” standard. *Suber v. Pennsylvania Com’n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*); *see also North American Coal Corp. v. Air Pollution Commission*, 279 A.2d 356 (Pa. Cmwlth. 1971). To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *See, Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 48-49, 70 A.2d 854, 855 (1950).

The burden of proof comprises two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015; Final Order entered August 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party’s claim or affirmative defense. *Id.* It may shift between the parties during a hearing. If a complainant introduces sufficient evidence to establish the legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant’s evidence. *See, Id.* If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant’s burden of proof has not been satisfied and the burden of

going forward with the evidence shifts back to the complainant. The complainant then must provide some additional evidence favorable to the complainant's claim. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001) (*Milkie*); *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983) (*Burleson*).

Having produced sufficient evidence to establish the legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See, Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See, Milkie, Burleson; see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n.11 (Pa. Cmwlth. 1993). It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See, Moore*. In determining whether a complainant has met the burden of persuasion, the ultimate factfinder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See, Moore* (citing *Suber*).

Finally, adjudications by the Commission must be supported by substantial evidence in the record. 2 Pa. C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1983). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

## 2. Preliminary Objections

This case is before us, in part, on Preliminary Objections. Section 5.101 of our Regulations, 52 Pa. Code § 5.101, sets forth the grounds for granting preliminary objections. That section provides as follows:

### § 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

52 Pa. Code § 5.101(a).

Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v.*

*Pa. Dep't of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979). The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commonwealth of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep't of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

## **B. ALJ's Initial Decision**

In his Initial Decision, ALJ Brady made thirteen Findings of Fact and reached thirteen Conclusions of Law. I.D. at 3-4, 10-12. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

By way of background, the Initial Decision explained that the Complainant's account was established on November 27, 2018, when Ms. Whitaker requested service from PGW and PGW transferred the outstanding balance from the Complainant's mother, who was the prior customer of record at the Service Address, to the Complainant. I.D. at 3 (citing Answer at ¶ 8). Subsequently, the record evidence showed that Ms. Whitaker entered into and defaulted on a payment arrangement

established by the Commission’s Bureau of Consumer Services (BCS)<sup>4</sup> under BCS No. 3722204.<sup>5</sup> The record evidence further indicated that the Complainant filed an informal complaint on August 26, 2019, at BCS No. 3729350, wherein she disputed the transfer balance.<sup>6</sup> I.D. at 3.

As previously indicated, as a preliminary matter, the ALJ’s Initial Decision provided the rationale for granting the Preliminary Objection pertaining to the argument that Ms. Whitaker’s outstanding balance should not include a balance transfer that occurred in 2018. Referencing Section 3314 of the Code, 66 Pa. C.S. § 3314, the ALJ stated that the date at which the alleged liability arose is older than three years and, thus, is barred by the statute of limitations. Specifically, the ALJ determined that it was undisputed that the balance transfer occurred on November 27, 2018. Therefore, the ALJ reasoned that the Complainant had until November 27, 2021, to timely raise her

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<sup>4</sup> Informal BCS decisions are “determinations” whereas the result of a Formal Complaint is termed a “decision.” In addition, informal BCS determinations are governed primarily by Sections 3.111 to 3.113, 52 Pa. Code §§ 3.111, *et seq.*, whereas Formal Complaints are governed by Chapter 5, 52 Pa. Code Chp. 5. More importantly, informal BCS determinations expressly notify the Complainant of a right to appeal by filing a Formal Complaint. If filed, the Commission provides a hearing *de novo*. The BCS functions as an informal arbiter of disputes between a utility provider and customers. 66 Pa. C.S. § 308(d). This function usually produces cost-effective results without additional use of agency resources and time. However, the Commission has never agreed to be formally bound by these informal determinations. *See Derek Suggs & Beverly Marell v. The Bell Telephone Company of Pennsylvania*, Docket No. F-00162258 (Order entered July 15, 1993).

<sup>5</sup> The Complainant obtained a Commission-issued payment arrangement on August 6, 2019, based on a household size of one and monthly income of \$3,894, but defaulted on the payment arrangement. I.D. at 3-4 (citing Tr. at 20-22; PGW Exhs. 3, 4). On August 9, 2022, Ms. Whitaker filed an informal complaint at BCS No. 3856130, requesting a payment arrangement, which was dismissed by the BCS due to the Complainant having a previously unsatisfied Commission-issued payment arrangement at BCS No. 3722204. *See*, Tr. at 22-23; PGW Exh. 5.

<sup>6</sup> On February 26, 2020, the BCS issued its decision at BCS No. 3729350, wherein it dismissed the informal complaint. The Complainant did not appeal this BCS decision. I.D. at 3.

Complaint. According to the ALJ, even factoring in the periods of time that the statute of limitations were tolled due to the Complainant's filing of her informal complaint, any cause of action on this issue was still beyond the statute of limitations.<sup>7</sup> As such, the ALJ concluded that Section 3314 of the Code divested the Commission of jurisdiction to hear the Complainant's action on the balance, which is the reason the issue was struck at the outset of the hearing. I.D. at 6-7.

The remainder of the Initial Decision addressed Ms. Whitaker's request for a payment arrangement. In addressing the Complainant's request for a new payment arrangement, the ALJ found that the Complainant had been granted a payment arrangement by BCS but had defaulted on that payment arrangement. I.D. at 9. The ALJ noted that in accordance with Section 1405(d) of the Code, 66 Pa. C.S. § 1405(d), the Commission is not authorized to grant a second payment arrangement in the absence of a decreased change in income if the customer defaults on the first payment arrangement. The ALJ noted that the record evidence indicates that, rather than a decrease in household income, the Complainant's household monthly income increased from \$3,894 to \$4,342 since her last Commission-issued payment arrangement. *Id.*

Additionally, the ALJ noted that pursuant to Section 1405(e) of the Code, 66 Pa. C.S. § 1405(e), the Commission is authorized to reinstate a payment arrangement and extend the remaining term for an initial period of six months in those instances where a customer has defaulted on a payment arrangement as a result of a significant change in circumstance. The ALJ cited to Section 1403 of the Code, 66 Pa. C.S. § 1403, which defines "Significant change in circumstance." I.D. at 9-10. The ALJ found that the

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<sup>7</sup> The Complainant's informal complaint at BCS No. 3729350 was open from August 26, 2019, to February 26, 2020 (184 days). The ALJ explained that the addition of those days pushes the statute of limitations deadline from November 27, 2021, to May 30, 2022. I.D. at 7, fn. 3.

evidence does not reflect that she experienced a significant change in circumstance as that phrase is defined and applied in the Code.

Therefore, the ALJ concluded that the Commission is constrained from providing the Complainant with another Commission-issued payment arrangement or reinstating the previous payment arrangement based on Section 1405(d) and (e) of the Code. Accordingly, the ALJ dismissed the remainder of the Complaint. I.D. at 9-10.

### **C. Disposition**

As a preliminary matter, any argument that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. We are not required to consider expressly or at length each contention or argument raised by parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). On exercise of our independent review of the Parties' positions in their pleadings in this case, we shall adopt the Initial Decision, as modified, consistent with the following discussion.

Based upon our review and consideration of the record evidence, we agree with the findings in the Initial Decision with regard to the ALJ's dismissal of the portion of the Complaint pertaining to the request for a payment arrangement.

However, we do not agree with the ALJ's grant of the Preliminary Objection on the statute of limitations argument. The ALJ's application of Section 3314 of the Code (relating to limitations of actions and accumulation of remedies) is misdirected in this case. Section 3314 limits actions for the recovery of penalties or forfeitures incurred under the provisions of the Code to three years from the date at which

the liability arose. However, the present Complainant does not seek recovery of any penalties but rather she seeks a refund (or credit) from what had been billed to her.

Rather, the ALJ had the discretion to apply a four-year statute of limitations provision pertaining to requests for refunds or credits under Section 1312 of the Code, 66 Pa. C.S. § 1312.<sup>8</sup> Thus, the ALJ should have permitted the presentation of evidence pertaining to the transfer of the service balance in 2018 because it occurred within the four years of the filing of the instant Complaint.

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<sup>8</sup> Section 1323(a) of the Code provides in pertinent part:

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

66 Pa. C.S. § 1312(a).

This matter is similar to prior Commission decisions in which we have determined that the application of Section 3314 of the Code was misapplied.<sup>9</sup> In the reasons for her Complaint, Ms. Whitaker alleged that the bills of the previous owner should not have been passed on to her as the new owner and that the amount she owed was much less. Complaint at 3. In other words, Ms. Whitaker requested removal of the balance of the previous owner and essentially a credit for the arrearage of the prior owner. Under these circumstances and consistent with prior Commission precedent, it would have been appropriate under the authority of Section 1312(a) of the Code for the ALJ to permit the presentation of evidence pertaining to this balance transfer occurring within four years of the filing of the Complaint.

Without the presentation of evidence related to the transfer of the prior owner's balance, there is no evidentiary record for the Commission to determine if the

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<sup>9</sup> See, e.g., *Beverly Layne v. PGW*, 98 Pa. P.U.C. 95, Docket No. F-00820471 (Order entered February 24, 2003) (*Layne*) and *Rivera v. PGW*, Docket No. C-20028491 (Order entered March 9, 2004) (*Rivera*). In *Layne*, the Commission explained that the ALJ's application of Section 3314 was misplaced because the complainant in that proceeding sought a refund or credit for changes on a make-up bill. The Commission stated that Section 1312(a) of the Code specifically addresses the limitations in a refund proceeding. *Layne* at 4 (citing *LP Water and Sewer Co. v. Pa. PUC*, 772 a.2d 733 (Pa. Cmwlth. 1988)). Similarly, in *Rivera*, the Commission found that the ALJ's application of Section 3314 was misdirected because the complainant did not seek recovery of any penalties or forfeitures incurred under the provision of the Code but sought a refund or credit from what had been billed to him in make-up or back bills. Rather, the Commission reiterated that Section 1312(a) specifically addresses the limitations in such a refund proceeding. *Rivera* at 3.

transfer of the balance to the Complainant was appropriate or if the total arrearage owed should be adjusted or reconciled as alleged.<sup>10</sup>

Accordingly, we shall reverse, in part, the Initial Decision and remand the proceeding to the Office of Administrative Law Judge (OALJ) for additional proceedings as deemed necessary related to the limited issue of the balance transfer occurring in 2018 to the Complainant's account and for the issuance of an Initial Decision on Remand.

### **III. Conclusion**

Based on our review of the ALJ's Initial Decision, the pleadings, and the applicable law, we shall adopt the Initial Decision of ALJ Brady, as modified, by denying the Preliminary Objections, reinstate the Complaint against PGW, and remand the proceeding to the OALJ for the limited issue of determining whether PGW properly transferred the account balance to the Complainant in 2018, consistent with this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Initial Decision of Administrative Law Judge F. Joseph Brady, issued on May 25, 2023, is adopted, as modified, consistent with this Opinion and Order.

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<sup>10</sup> This matter is distinguishable from the Commission's decision in *Souders v. PECO Energy Company*, Docket No. C-2008-2053281 (Order entered April 30, 2009) (*Souders*). In *Souders*, the presiding ALJ did not find any evidence that the utility overbilled the complainant and thus the Commission determined there was no basis for ordering a refund or finding that the four-year limit under Section 1312(a) should apply in those circumstances. In contrast here, there is no evidentiary record related to the transfer of the prior balance in order for the Commission to make a determination at this point on whether a refund or credit would be appropriate.

2. That the Preliminary Objections filed by Philadelphia Gas Works on October 24, 2022, are denied.

3. That the Formal Complaint of Victoria Whitaker, filed on September 30, 2022, at this docket, is reinstated.

4. That the record herein is remanded to the Office of Administrative Law Judge for further proceedings as deemed necessary related to the limited issue of determining whether Philadelphia Gas Works properly transferred the account balance to Victoria Whitaker in 2018, culminating in the issuance of an Initial Decision on Remand.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: September 21, 2023

ORDER ENTERED: October 16, 2023