



Agenda Date: 11/22/13
Agenda Item: VIIB

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CUSTOMER ASSISTANCE

PETER TRIESTMAN,
Petitioner

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondent

ORDER OF EXTENSION

BPU DOCKET NO. EC12030239U
OAL DOCKET NO. PUC 03126-13
(ON REMAND PUC 05419-12)

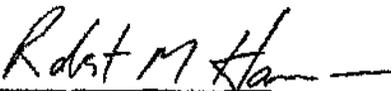
(SERVICE LIST ATTACHED)

The Initial Decision of the Administrative Law Judge was received by the Board of Public Utilities (Board) on October 11, 2013; therefore the 45-day statutory period for review and the issuing of a Final Decision will expire on November 25, 2013. Prior to that date, the Board requests an additional 45-day extension of time for issuing the Final Decision in order that it may examine the extensive record in this matter.

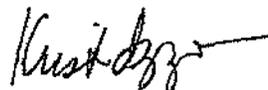
Good cause having been shown, pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8, **IT IS ORDERED** that the time limit for the Board to render a Final Decision is extended until January 9, 2014.

DATED: 11/22/13

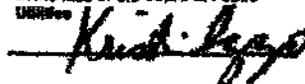
BOARD OF PUBLIC UTILITIES
BY:


ROBERT M. HANNA
PRESIDENT

ATTEST:


KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



¹ Authorized by Board to execute this Order of Extension on its behalf.

Date Board mailed Order to OAL: 11/25/13

cc: Service List Attached

DATED: 11/25/13



LAURA SANDERS, ACTING
DIRECTOR & CHIEF
ADMINISTRATIVE LAW JUDGE

Date OAL mailed executed Order to Board: 11/25/13 emailed

Date Board mailed executed Order to Parties:

11/30/13

PETER TRIESTMAN

V.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

BPU DOCKET NO. EC12030239U
OAL DOCKET NO. PUC 05419-12

SERVICE LIST

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on April 24, 2012. A prehearing conference was held on May 14, 2012. The hearing was held on July 27, 2012. I rendered an Initial Decision on August 14, 2012, finding that there was a diversion of service and that petitioner was incorrectly billed at commercial rates for gas until February 2011 and incorrectly billed at commercial rates for electric until December 2011. On December 19, 2012, the Board of Public Utilities remanded the case for a determination of the following issues:

1. if compliance with requirements as set forth in N.J.A.C. 14:3-7.8 regarding the diversion of gas service was satisfied;
2. provide findings of fact and conclusions of law on whether there is further diversion of electric service based on Petitioner's allegations that there are other electrical appliances in use that supply service outside of his unit which he is paying for and based on his allegation that PSE&G did not properly investigate the diversion of electric service; and
3. provide findings of fact to support the conclusion that there was a diversion of gas service.

The remanded matter was transmitted to the OAL and filed on March 5, 2013. A telephone conference was held on March 26, 2013. The hearing was held on June 24, 2013, and September 10, 2013. The record closed on September 10, 2013.

FACTUAL DISCUSSION AND FINDINGS

The following is undisputed, and therefore **FOUND** as **FACT**:

Treistman is a gas and electric customer of PSE&G. He lives at 115 Monroe Street, Newark, New Jersey. The building has four floors. Petitioner lives on the fourth floor.

Testimony

Peter Treistman

Treistman received a Bachelor of Arts degree from Yale University in 1979. While at Yale he took classes in math and physics. He does not have an engineering degree. He was issued an FCC amateur-radio-operator license in 1968. He has not used that license since 1970. He does mechanical design in the tool-and-die field. He helped design a nuclear power plant in 1977. He has testified as an expert on zoning issues. In the past twenty-five years he has not testified regarding electric or gas distribution. He was published in the area of telecommunications. He has been a general contractor since 1987. He is not an electrician or plumber. Treistman wanted to be allowed to testify as an expert.

Four cell-phone companies are tenants on the second floor of 115 Monroe Street. A photo of the building's electric-service panel showed how the electric service is distributed to the various tenants' meters. The roof has several five-ton air-conditioner condensers, as well as antennas for the cell-phone companies.

The third floor has been vacant for several years. Treistman has inadvertently received mail from PSE&G addressed to "Occupant" at 113 Monroe Street, Suite 3, which he has repeatedly opened. The letters from PSE&G to the occupant at 113 Monroe Street consisted of a bill in the amount of \$54.56, which was sent on the following dates: September 11, 2012; October 11, 2012; November 10, 2012; December 11, 2012; February 8, 2013; March 13, 2013; May 10, 2013; and June 12, 2013. Treistman lives at 115 Monroe Street.

Treistman could not personally conduct any investigation as to diversion of gas or electric services on the first, second or third floors of the building. He determined that there was no gas plumbing, except in the basement and on the fourth floor. Treistman did an investigation as to diversion of electrical service. He did not do an investigation as to diversion of gas service. Treistman created a diversion report. Prior to his moving in, the air-conditioning duct carried its supply through the roof condenser to the fourth,

third and second floors. This shows that the building previously was used by one entity. Treistman stopped that by sealing up the concrete opening from the fourth floor to the third floor. However, a supply duct was never turned on when he moved in to the fourth floor. A conduit from the main junction box runs from floor to floor. There are several conduits from the ceiling to the roof. Treistman measured the electric usage of the hallway fixtures. He opined that the diversion-of-service investigation done by PSE&G could have been accomplished more efficiently.

There is heat supplied to the third floor even though there has not been a tenant there in five years. If no heat were supplied to the third floor the water pipes would freeze and burst in the winter, which has not happened.

Edward Sullivan

Edward Sullivan (Sullivan) has been employed by PSE&G for forty-six years in the areas of billing, collection, marketing, customer relations and regulatory services. He has supervised investigations for over twenty-five years. He is familiar with this case. Sullivan requested that Peter Sequeira (Sequeira) conduct a diversion-of-service investigation. The electric-diversion investigation consisted of Sequeira shutting off the electric breakers. This showed that the meter that supplied petitioner was the fourth-floor meter. The gas-diversion investigation consisted of going to the basement and telling Treistman to turn on his heat. Once this was done Sequeira observed the meter starting to spin. When Treistman turned the heat off, the meter stopped spinning. Sullivan does not believe that there was a diversion of service. Treistman did not complete a diversion-investigation form. PSE&G did not find a dangerous condition at 113–115 Monroe Street.

Diversion investigations, by regulation, should be conducted within two months of a complaint. There were several attempts to investigate petitioner's complaint of a diversion of service, but PSE&G initially had difficulty getting access to the building. Petitioner did not provide reasonable access to the premises.

PSE&G contacted petitioner's landlord, Jose Gomes (Gomes), regarding the Board's final decision in late February 2013 or early March 2013. Sullivan reviewed the BPU Order with Gomes. Gomes described the building as a commercial building. Gomes stated that the building was always a commercial building, and Treistman moved into the premises without a lease. However, the property was rented to him as a commercial property. Gomes told Treistman that he would be responsible for everything except cold water. The property is commercial and therefore diversion of service does not apply. Sullivan believes it is a commercial property because it is a four-floor building with commercial tenants and because of the fact that there was a request to change the meter from a commercial meter to a residential meter. Even if diversion of service applied to this matter, Treistman was the beneficiary of the diversion.

Treistman did not make any payments on his PSE&G bill from June 2009 through February 2013, although he admitted that in July 2012 he did not contest \$11,000 of the bill. Subsequent to that time, Treistman paid PSE&G \$10,776. Treistman has been receiving a credit of \$42.85 per month because of the Board's decision of a diversion of service regarding the stairway lights.

Jose Gomes

Jose Gomes is a principal of Tall Oak Builders, Inc., the owners of 115 Monroe Street, Newark, New Jersey. Treistman occupies the fourth floor of 115 Monroe Street. This unit is 5,000 square feet with high ceilings. Treistman did not sign a lease. The unit was rented to Treistman as a commercial tenant. There was no kitchen on the fourth floor when Treistman rented the unit. Gomes believes that there was no diversion of service in his building. The building's first-floor tenant is the office of a councilman. The second floor and third floor are vacant. There are antennas on the roof for three cell-phone companies—Verizon, Nextel and another cell-phone company. The cell-phone companies share one room on the second floor for their equipment. Representatives of the cell-phone companies come to the premises either once a month or once every two months.

Joseph Cauda

Joseph Cauda (Cauda) is an attorney who represented Gomes in real-estate and landlord-tenant matters. He testified that Treistman did not sign a lease for the fourth-floor premises, although Gomes presented Treistman with a lease. Gomes instituted an eviction action against Treistman that was withdrawn by Gomes without prejudice.

Peter Sequeira

Peter Sequeira (Sequeira) has worked for PSE&G for over thirty years. He has investigated diversion-of-service complaints for sixteen years. He said that on February 4, 2011, he went to 113–115 Monroe Street to determine if there was a diversion of electric service. Sequeira shut off Treistman's electric breakers. This caused the meter to stop. When he turned the electric breakers back on the meter moved. If no electrical appliances are on the electric meter will not move. Although Sequeira did not have full access to Treistman's unit, he saw a stove and a refrigerator in the unit. He also saw clothes in the unit. Treistman told him that it was a residential unit, and Sequeira requested that PSE&G change Treistman's billing from commercial to residential. PSE&G cannot do a diversion-of-service investigation on commercial premises.

Sequeira testified that in November 2011, he again went to 113–115 Monroe Street, this time to determine if there was a diversion of gas service. Sequeira turned off the heaters in Treistman's unit. Once the heaters were turned off the meter stopped. When he turned the heaters on the meter moved. If the heat is not on the gas meter will not move. Sequeira believes that there was no diversion.¹

PSE&G credited Treistman's bill for the hallway lights once there was a determination by the BPU that there was a diversion of electric service.

¹ Although Sequeira testified that he did the electric diversion investigation in February 2011 and the gas diversion investigation in November 2011, the PSE&G Field Report (P-10) show that Sequeira went to the premises on February 1, 2011, to determine if Treistman should be billed at residential rates. Sequeira returned to the premises on December 8, 2011, at which time he did the electric and gas diversion investigation according to the PSE&G Field Report (P-9)

In light of the contradictory testimony presented by respondent's witness and petitioner, the resolution of this matter requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting a witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I find that Sullivan, Gomes, Cauda and Sequeira were credible. Sullivan clearly outlined the steps that were taken by PSE&G in the diversion investigation and the steps that were taken after the BPU decision. Gomes clearly explained the rental agreement he had with Treistman, as well as how many tenants were in the building. He stated that he did not know the outcome of the eviction preceding that was instituted against Treistman. Cauda's testimony was clear and concise. Sequeira's testimony was credible, although he incorrectly stated the date of the gas and electric diversion investigation. He stated the steps he took during the diversion investigation. In addition, he admitted that he requested that PSE&G change Treistman's billing from commercial to residential, in part because Treistman stated that he was a residential tenant.

I did not find Treistman's testimony to be credible. Throughout the hearing, when he was cross-examining a witness, he would ask a question and not give the witness a chance to respond. In addition, he stated the various actions that he took when he

conducted a diversion-of-electric-service investigation, but he did not provide a foundation as to why the steps he took would provide a more reliable result than the PSE&G diversion investigation. He did not give Sequeira full access to his unit during the diversion investigation. He did not sign a lease to the premises, although a lease was given to him to sign. He also admitted to opening mail that he knew was not his.

Having heard the testimony, observed the witnesses, and reviewed the exhibits, I **FIND** the following additional **FACTS**:

Gomes rented the fourth-floor unit at 113–115 Monroe Street to petitioner as a commercial unit. The other tenants at 113–115 Monroe Street are commercial tenants. A councilman has an office on the first floor. Three cell-phone companies share a room on the second floor for their equipment, and have antennas on the roof. The third floor has been vacant for several years. Treistman does not rent a dwelling unit in a multi-family building. Treistman does not own a condominium at 113–115 Monroe Street. Gomes did not testify at the prior hearing. The building is a commercial building.

Petitioner contacted PSE&G in or about May 2009, stating that he was being billed at a commercial rate when he should have been billed at a residential rate and stating that there was a diversion of service. Petitioner did not complete a diversion-of-service application. PSE&G went to the premises on February 1, 2011. At that time Sequeira requested that PSE&G change Treistman's account from a commercial to a residential account. He noted that there was a range, refrigerator, microwave oven and dishwasher on the premises.

On December 8, 2011, Sequeira did a diversion-of-service investigation of Treistman's unit. His electric-diversion investigation consisted of shutting off the electric breakers, which caused the meter to stop. When he turned the electric breakers on again, the meter resumed. His gas-diversion investigation consisted of turning the heaters off in Treistman's unit, which caused the gas meter to stop. When he turned the heaters back on the meter resumed. The diversion investigation was more than two months after Treistman's request. PSE&G had difficulty getting access to Treistman's

unit. At the time of the December 8, 2011, investigation, Treistman allowed Sequeira limited access to his unit.

There are conduits that run from floor to floor. There are antennas and air conditioner units on the roof. Petitioner did not provide any evidence that he was billed for air conditioning that was provided to other tenants in the building. Treistman received a bachelor of Arts degree from Yale University in 1979, where he took math and physics classes. He was issued an FCC amateur-radio-operator license in 1968. He has not used that license since 1970. He does mechanical design in the tool-and-die field. He helped design a nuclear power plant in 1977. He has testified as an expert on zoning issues. Treistman is not an engineer. Treistman's experience does not qualify him as an expert in the area of electric and gas distribution.

Petitioner provided PSE&G bills that he inadvertently received and repeatedly opened marked occupant for the third floor in the amount of \$54.56. Petitioner did not access the first, second or third floor to do his diversion-of-service investigation. His investigation consisted of the roof, the basement, the fourth floor and the stairwell from the basement through the roof. On the fourth floor a conduit runs from the main service panel to areas outside of the fourth floor. Five separate conduit lines run from the ceiling to the roof. PSE&G does not do diversion-of-service investigations on commercial premises.

LEGAL ANALYSIS AND CONCLUSIONS

In this administrative proceeding, the petitioner bears the burden of proof by a preponderance of the competent, credible evidence as to those matters that are justifiably before the OAL. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the facts alleged and generates reliable belief that the tended hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div.), certif. denied, 31 N.J. 75 (1959).

"Tenant-customer" is a residential customer of record at the time of the complaint who rents a dwelling unit in a multi-family building or owns a condominium. N.J.A.C. 14:3-7.8(a). Petitioner did not rent a unit in a multi-family building. The office of the councilman and the cell-phone companies were commercial customers. Petitioner admitted that there were no third-floor tenants in the building for years. There was no testimony that petitioner's unit was a condominium. Petitioner did not sign a lease for the unit, although one was presented to him. The landlord's testimony regarding the tenants in the building was not presented at the prior hearing. I **CONCLUDE** that petitioner was not a tenant-customer in accordance with N.J.A.C. 14:3-7.8(a), and therefore was not eligible for a diversion-of-service investigation.

N.J.A.C. 14:3-7.8 provides in part:

(b) Each electric, gas, water and/or wastewater utility shall include in its tariff provisions ensuring that tenant-customers shall not be required to pay for service supplied outside their premises without the tenant-customers' consent.

(c) Each electric, gas, water and/or wastewater utility shall notify tenant-customers who apply for service that if the utility's tariff provides for billing through one meter for the tenant-customers' own usage and for service diverted outside the tenant-customers' premises, the tenant-customers may not be required to pay for such diverted service absent their consent or cooperation for such service.

(d) Each utility shall investigate alleged diversions as follows:

1. When a tenant-customer alleges in good faith that the level of consumption reflected in his or her utility bill is unexplainably high, the tenant-customer may request the utility supplying gas, electricity, water and/or wastewater service to conduct a diversion investigation at no cost to the customer;

2. Such request shall be made in writing by the tenant-customer by completing and returning to the utility a diversion investigation application provided by the utility;

3. The application shall state that, if the tenant-customer has made one or more previous diversion complaints in the previous 12-month period, which failed to uncover a diversion of utility service, the utility may bill the customer for the cost of the second and subsequent investigations;

4. The utility shall investigate the alleged diversion within two months of the receipt of the investigation request. Each diversion investigation shall include a meter test conducted in accordance with N.J.A.C. 14:3-4.4;

5. The utility shall have the right of reasonable access pursuant to N.J.A.C. 14:3-3.6. For purposes of utility access, the alleged diversion is presumed to constitute a hazardous condition until the utility investigates;

6. If, as a result of such investigation, the utility determines that the service from the pipes and/or wires serving the tenant-customer has been diverted, the utility shall notify the landlord or his or her agent and instruct him or her to correct the diversion within 30 days through rewiring or repiping. However, this provision shall in no way prohibit a utility from disconnecting service if the utility determines that an unsafe condition exists;

7. If a diversion is found, the utility shall attempt to determine the identity of the beneficiary;

8. A tenant-customer seeking relief shall be responsible for furnishing to the utility the identity and address of the landlord or agent, and of the beneficiary, if known;

9. Additionally, the tenant-customer shall provide any other information, which may assist the utility in its investigation;

10. The utility shall furnish to the tenant-customer, the tenant-customer's landlord, and to the beneficiary (if different from the landlord) within 14 days of the investigation, a written report on the findings of the investigation. This report shall include information on the estimated cost of diverted service based upon prior use, degree day analysis, load study and/or cooling degree hours, whichever is appropriate;

11. If the utility locates a diversion, the utility shall attempt to reach an agreement with the parties involved or, in lieu of such agreement, proceed to the conference described in (f) below; and

12. If no diversion is located, these diversion proceedings shall end when the utility has completed and filed its investigation report pursuant to (j) below.

Petitioner notified PSE&G of his concerns about a diversion of service in or around May 2009. Petitioner did not complete a diversion-of-service application. When Sequeira went to petitioner's unit in February 2011, he did not do a diversion investigation. The diversion investigation was done in December 2011. Although PSE&G had difficulty accessing petitioner's unit, it should not take two years from the time of a complaint of diversion of service, to a diversion investigation.

N.J.A.C. 14:3-7.8(d) does not set forth how the diversion investigation should be conducted. Sequeira did an electric-diversion and gas-diversion investigation. A unit on the third floor had an outstanding balance from September 2012 through June 2013 in the amount of \$54.56. The fact that the third-floor pipes did not burst does not prove that there was a diversion of gas. Although petitioner did his own diversion investigation, he did not show by a preponderance of the credible evidence that there was a diversion of gas or electric service beyond the light bulbs in the hallway. Although petitioner believes that PSE&G's diversion investigation was not properly done, the regulation does not state how the physical diversion investigation must take place.

I **CONCLUDE** that PSE&G did not conduct the diversion investigation in accordance with N.J.A.C. 14:3-7.8(d), because the investigation was not done within two months of the complaint; however, there was no showing by a preponderance of the credible evidence that there was a gas or electrical diversion of service other than the hallway lights. In addition, petitioner was not entitled to a diversion investigation, because he is not a tenant-customer in accordance with N.J.A.C. 14:3-7.8(a).

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition is **DISMISSED**.

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, 44 South Clinton Avenue, P.O. Box 350, Trenton, NJ 08625-0350**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

10-7-13
DATE

[Signature]
KIMBERLY A. MOSS, ALJ

Date Received at Agency:

[Signature]

Date Mailed to Parties:

OCT - 8 2013

DIRECTOR
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

WITNESSES

For Petitioner:

For Respondent:

Ed Sullivan
Peter Sequeira
Jose Gomes
Joseph Cauda

EXHIBITS

For Petitioner:

- P-1 Photo of Electric Service Panel
- P-2 Photo of Gas Meters
- P-3 Photo of First Floor Hallway
- P-4 Photo of the Roof
- P-5 Photo of Air Conditioner Units and Antennas on the Roof
- P-6 Bills Addressed to Occupant 113 Monroe Street, Ste. 3, in the Amount of \$54.50
- P-7 Supplemental Facts Report Submitted by Treistman
- P-8 Diversion of Service Report of Treistman
- P-9 PSE&G Field Report Dated December 8, 2011
- P-10 PSE&G Field Report Dated February 1, 2011

For Respondent:

- R-1 N.J.A.C. 14:3-7.8
- R-2 Subpoena of Jose Gomes
- R-3 Certification of Jose Gomes
- R-4 Statement of Account of Treistman