**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held January 29, 2015 |
| Commissioners Present:  Robert F. Powelson, Chairman  John F. Coleman, Jr., Vice Chairman  James H. Cawley  Pamela A. Witmer, Statement  Gladys M. Brown |  |
| Marcus Love |  |
| v. | F-2013-2355580 |
| Philadelphia Gas Works |  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Philadelphia Gas Works (Respondent or PGW) filed on August 27, 2014, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Marta Guhl, issued on August 7, 2014, in the above-captioned proceeding. No Replies to Exceptions were filed.

For the reasons stated below, we shall deny the Respondent’s Exceptions, in part, grant them, in part, and modify the Initial Decision, consistent with this Opinion and Order.

**History of the Proceeding**

On March 11, 2013, Marcus Love (Complainant or Mr. Love) filed a Formal Complaint against PGW, alleging that there were incorrect charges on his gas bill. In addition, Mr. Love averred that PGW installed a faulty meter, did not discover the error for four years and was improperly attempting to bill him for back charges. For relief, the Complainant requested removal of those charges. Complaint at 2-3. This case is a timely appeal of an informal decision of the Commission’s Bureau of Consumer Services at case number 3032047.

On April 22, 2013, PGW filed an Answer denying the material allegations of the Complaint. Answer at 1-2, I.D. at 2.

On November 26, 2013, a hearing was held in this matter. The Complainant appeared *pro se*, testified in support of his Complaint, and presented three exhibits, which were admitted into the record. Counsel appeared on behalf of PGW, presented the testimony of one witness and six exhibits, which were admitted into the record. The hearing generated a transcript of one hundred and thirty pages.

On March 6, 2014, ALJ Guhl issued an Order reopening the record and directing PGW to submit late-filed exhibits to complete the record. On April 7, 2014, PGW filed the requested exhibits.[[1]](#footnote-2) In response, Mr. Love submitted objections on April 14, 2014, arguing that PGW should not be allowed to strengthen its case after the hearing

had taken place. The Complainant also alleged that the meter test results contradicted the testimony of PGW’s witness.[[2]](#footnote-3) I.D. at 3. The ALJ closed the record on April 24, 2014.

In her Initial Decision, issued on August 7, 2014, the ALJ denied the Complaint, in part, finding that Mr. Love is responsible for his make-up bill of $6,535.45 for previously unbilled utility service resulting from the meter failure. However, the ALJ sustained the Complaint, in part, ruling that Mr. Love is entitled to a twenty percent Conservation Credit to reduce his remaining balance to $5,228.36. Furthermore, the ALJ concluded that PGW should be issued a civil penalty of $1,000 because of repeated failures to investigate usage discrepancies. I.D. at 21.

As noted above, PGW filed Exceptions on August 27, 2014. The Complainant did not file Exceptions or Replies to Exceptions.

**Background**

Mr. Love obtained gas service in his name at the Service Address on May 26, 2009. However, he and his three daughters did not begin residing at the Service Address until August 2011. The Service Address has an Automatic Meter Reading (AMR) device. Tr. at 16, 30; PGW Exh. 1 at 8.

According to PGW’s witness, the Complainant’s AMR device transmitted a zero meter reading on January 25, 2012.[[3]](#footnote-4) In August 2012, PGW requested access to the meter at the Service Address as part of its zero usage program. On September 20, 2012, PGW completed an investigation and exchanged the meter. Pursuant to its investigation, PGW found no evidence of theft but that the meter had forty months of zero readings at the Service Address. Tr. at 65-66, 71, 76.

PGW also determined that the meter index was 3880 and issued a make-up bill of $6,535.45 to the Complainant for May 26, 2009, to September 20, 2012, for the unbilled usage at the Service Address. Tr. at 72, 81.

According to PGW, the meter failed shortly after being installed and only provided readings once or twice. Tr. at 103, 117.

**Discussion**

**Legal Standards**

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that PGW is responsible or accountable for the problem described in the Complaint.  *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant’s evidence must be more convincing, by even the smallest amount, than that presented by the Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. 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).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the customer shifts to PGW. If the evidence presented by PGW is of co‑equal value or “weight,” the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of PGW. [*Burleson v. Pa. PUC,* 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d,* 501 Pa. 433, 461 A.2d 1234 (1983).](http://www.lexis.com/research/buttonTFLink?_m=0d7e78528297490763e78babd487bc42&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2006%20Pa.%20PUC%20LEXIS%20102%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=16&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b66%20Pa.%20Commw.%20282%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=44d0f4cf51bc1159652e85695542a09d)

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC,* 768 A.2d 1217 (Pa. Cmwlth. 2001) (*Milkie*).

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**ALJ’s Initial Decision**

ALJ Guhl made twenty-four Findings of Fact and reached eleven Conclusions of Law. I.D. at 3-6, 18-19. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are

either expressly or by necessary implication rejected or modified by this Opinion and Order.[[4]](#footnote-5)

In her Initial Decision, the ALJ noted that the burden of proof for “high bill” complaints has been explained in *Waldron v. Philadelphia Electric Company,* 54 Pa. P.U.C. 98 (1980) (*Waldron*), and its progeny. The ALJ opined that in *Waldron*, the Commission stated that, while the accuracy of the meter is an important factor in resolving billing disputes, it is not the sole criterion. According to the ALJ, the Commission stated that it will also consider factors like billing history of the Complainant, any change in the number of occupants residing at the household, the potential for energy utilization, and any other relevant facts or circumstances that are brought to light during the complaint proceeding. I.D. at 6-7 (citing *Waldron* at 100).

The ALJ concluded that the Complainant failed to carry his burden of proving that PGW improperly issued a make-up bill for the previously unbilled service. Although the Complainant argued that he and his children did not live at the Service Address until August 2011, the ALJ noted that Mr. Love placed service in his name on May 26, 2009. The Complainant did not provide any testimony whether the appliances were not working or were not using gas during the time period in question. Further, the ALJ acknowledged that Mr. Love did not dispute using gas after moving into the Service Address in August 2011. I.D. at 10-11.

In contrast, the ALJ explained that PGW provided evidence showing the make-up bill was based on physical readings of the mechanical or manual portion of the meter and that the meter tested within the accuracy variance permitted under Section 59.22 of our Regulations, 52 Pa. Code § 59.22. Additionally, PGW’s make-up bill was based on the meter index of 3880 for the rebill period of May 26, 2009, to September 20, 2012. The ALJ also considered the make-up bill of $6,535.45 to be consistent with the historical usage at the residence. Explaining that a public utility is entitled to full payment for its utility service provided to a customer and is expressly permitted to issue a make-up bill under 52 Pa. Code § 56.14, the ALJ found that PGW was authorized to issue the make-up bill and the Complainant is responsible for paying it. I.D. at 11.

However, the ALJ recognized the period of the meter malfunction from May 2009 to September 2012 and that the Complainant did not receive adequate price signals related to his gas consumption during this time. The ALJ also noted that there was no record evidence to indicate that Mr. Love was at fault for the equipment malfunction. Under the circumstances, the ALJ awarded a conservation credit to reduce the amount of the make-up bill. I.D. at 12 (citing *Michael Prendergast v. Philadelphia Gas Works*, Docket No. F-2012-2317187 (Order entered February 27, 2014)). Accordingly, the ALJ applied the conservation credit to reduce the remaining balance to $5,228.36. *Id*.[[5]](#footnote-6)

In addition, the ALJ determined that a payment arrangement is required consistent with 52 Pa. Code § 56.14, which directs the company to enter into a payment arrangement if the under billing was the result of “utility billing error, meter failure, leakage that could not reasonably have been detected or loss of service, or four or more consecutive estimated bills . . .” The ALJ calculated the make-up period as accumulating over approximately forty months, from May 26, 2009, to September 20, 2012. Pursuant to 52 Pa. Code § 56.14(2), the ALJ ordered the Complainant to pay the balance of $5,228.36 in forty monthly installments of $130.71 each. I.D. at 13.[[6]](#footnote-7)

Although the ALJ found that PGW is authorized to issue a make-up bill for the previously unbilled gas service, the ALJ explained that the Respondent is not relieved of its obligation to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities…” under 66 Pa. C.S. § 1501. I.D. at 14. In this case, the ALJ found PGW’s failure to detect and address the multiple consecutive zero readings in a timely fashion to be a violation of Section 1501 of the Code. According to the ALJ, the Respondent’s failure to detect the zero readings is preventing it from collecting needed funds in a timely fashion or potentially not collecting them at all. The ALJ applied our statement of policy under 52 Pa. Code § 69.1201(c) to determine an appropriate civil penalty. Under the circumstances, the ALJ imposed a civil penalty of $250 for each year the Respondent failed to investigate the zero usage readings for 2009, 2010, 2011, and 2012. Thus, the ALJ ordered PGW to pay a civil penalty of $1,000. I.D. at 17-18.[[7]](#footnote-8)

**Exceptions**

In its first Exception, PGW argues that the ALJ’s issuance of a conservation credit constitutes impermissible compensatory damages. The Respondent contends that the conservation credit as applied does not represent a correction of an actual error in the bill, but is a reduction in the bill that permits the Complainant to pay less than what he actually used. According to PGW, this type of award compensates a customer for the missed opportunity to conserve consumption and for the inconvenience of being billed a lump sum for previously unbilled service. PGW avers that such a remedy represents compensatory damages, which the Commission is not authorized to award under Pennsylvania law. In response, PGW requests that the Commission modify the Initial Decision to remove the application of the conservation credit. Exc. at 3, 5.

In its second Exception, PGW contends that the record in this proceeding fails to support a twenty percent conservation credit. The Respondent argues that the Initial Decision contains no analysis of the Complainant’s hypothetical lesser usage had he been issued bills based on actual usage during the disputed period. According to PGW, there was no evidence or discussion of Mr. Love’s usage after the meter exchange to determine whether the full twenty percent conservation credit is supported by a decrease in usage now that he can judiciously manage consumption. PGW also notes that the Commission in *Michael Prendergast v. Philadelphia Gas Works*, Docket No.

F-2012-2317187 (Order on Reconsideration entered August 21, 2014) (*Prendergast*) remanded a similar matter to the Office of Administrative Law Judge for further hearings to determine the level of conservation credit sufficient to remedy the inaccurate price signals. Without a similar analysis, the Respondent contends the award of a conservation credit is arbitrary and unsupported by the evidence. As such, PGW alternatively requests that the Commission remand the matter for further hearing and determination of the appropriate application of the conservation credit. Exc. at 4-5.

**Disposition**

Upon consideration of the record evidence in this proceeding, we will deny PGW’s Exceptions, in part, and grant them, in part.[[8]](#footnote-9)

In *Prendergast*, the complainant’s meter reported AMR readings of abnormally low gas consumption on numerous occasions from 2006 through 2012. Despite these readings occurring over several years, PGW failed to recognize or identify a problem with the meter until March 2012. In *Prendergast*, we explained:

[A]lthough Section 1303 of the Code, 66 Pa. C.S. § 1303, prohibits a public utility from demanding or receiving a rate less than that established in its applicable tariff, Section 1304 of the Code, 66 Pa. C.S. § 1304, “modifies that prohibition by providing that a utility shall not grant any *unreasonable* preference or advantage to any person.” *Mill v. Pa. PUC*, 447 A.2d 1100, 1102 (Pa. Cmwlth. 1982) (emphasis in original). The clear implication of the language in Section 1304 of the Code is that a rate preference for an individual is permissible so long as it is reasonable. *Id.* The Commonwealth Court in *Mill* concluded that the Commission has the authority “to determine under what circumstances and in what amounts such a preference would be reasonable.” *Id.*; *see also C. Leslie Pettko v. Pennsylvania-American Water Company*, Docket No. C-2011-2226096 (Order entered February 28, 2013).

*Prendergast* at 11.

Under the circumstances in *Prendergast*, we determined that it was reasonable to authorize a rate preference to the complainant in the form of a conservation credit. Accordingly, we rejected PGW’s argument that the conservation credit constituted compensatory damages. *Id.* at 16-17. Here, PGW raises the identical argument that a conservation credit constitutes impermissible compensatory damages. We again reject PGW’s contentions and confirm that the Commission has the authority to order a conservation credit in appropriate cases. Accordingly, we shall deny the Respondent’s first Exception, in part.

However, under the circumstances of this case, we agree that the Complainant has failed to carry his burden of proof that the bill for the previously unbilled service should have included a conservation credit. Thus, we shall grant PGW’s first Exception, in part.

As noted in the record, Mr. Love occupied the service location beginning in August 2011, which was thirteen months prior to the discovery of the AMR problem. Historically, the Commission has not directed a conservation credit with under billing for

this or a similar amount of time.[[9]](#footnote-10) Moreover, for the remaining twenty-seven months of the forty-month period of zero readings, the customer did not occupy the service location and arguably was not deprived of any meaningful opportunity to conserve during this period.[[10]](#footnote-11)

We will, therefore, modify the Initial Decision to remove the issuance of the $1,307.09 conservation credit. Thus, the Complainant must pay the make-up amount of $6,535.45 in forty monthly installments of $163.39 each month pursuant to 52 Pa. Code § 56.14(2) .[[11]](#footnote-12) In light of this determination, we need not address PGW’s second Exception.

**Conclusion**

Consistent with the foregoing discussion, we shall deny the Respondent’s Exceptions, in part, grant them, in part, and modify the Initial Decision of ALJ Guhl, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of Philadelphia Gas Works, filed on August 27, 2014, to the Initial Decision of Administrative Law Judge Marta Guhl are denied, in part, and granted, in part, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Marta Guhl, issued on August 7, 2014, is modified, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Marcus Love on March 11, 2013, against Philadelphia Gas Works at Docket No. F-2013-2355580 is sustained, in part, and denied, in part, consistent with this Opinion and Order.

4. That Marcus Love is entitled to a payment arrangement over a period of forty (40) months, which is comprised of the monthly billed amount for his actual usage plus $163.39 per month toward the arrears, consistent with this Opinion and Order.

5. That as long as Marcus Love adheres to the terms of the payment arrangement in Ordering Paragraph No. 4, Philadelphia Gas Works shall not assess any late payment charges or interest charges on the make-up amount.

6. That Philadelphia Gas Works is hereby directed to pay a civil penalty of $1,000.00 pursuant to Sections 3301 and 3315 of the Public Utility Code,

66 Pa. C.S. §§ 3301 and 3315, payable by certified check or money order, to “Commonwealth of Pennsylvania” and sent to:

Secretary

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

7. That Philadelphia Gas Works cease and desist from further violations of the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.,* and the Regulations of this Commission, 52 Pa. Code §§ 1.1, *et seq.*

8. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

9. That this proceeding be marked closed.

**BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: January 29, 2015

ORDER ENTERED: February 18, 2015

1. The late-filed exhibits are testing results from the meter removed from the Complainant’s Service Address, a document describing the adjustments in PGW’s make-up bill to the Complainant, and a copy of PGW’s zero usage procedure. [↑](#footnote-ref-2)
2. The ALJ ruled on these objections in her Initial Decision. [↑](#footnote-ref-3)
3. PGW’s Customer Account Comments indicate a zero reading on the Complainant’s AMR device on November 10, 2010, and a need for PGW to access the Service Address to check the meter. PGW Exh. 1 at 8. [↑](#footnote-ref-4)
4. Initially, the ALJ considered the Complainant’s objections to the admission of PGW’s late-filed exhibits. The ALJ determined that the meter test results do not directly contradict the testimony of PGW’s witness and overruled the objections. I.D. at 7. [↑](#footnote-ref-5)
5. The ALJ calculated the credit as follows:

   Make-up bill of $6,535.45 x 20% = $1,307.09 conservation credit;

   Make-up bill of $6,535.45 - $1,307.09 = $5,228.36. [↑](#footnote-ref-6)
6. $5,228.36/40 = $130.71. [↑](#footnote-ref-7)
7. For a discussion of the application of the civil penalty factors and standards, see pages 14-18 of the Initial Decision. [↑](#footnote-ref-8)
8. PGW did not file Exceptions to the assessment of a civil penalty of $1,000. Upon review, we agree with the ALJ that the imposition of the civil penalty is appropriate under the circumstances of this case. [↑](#footnote-ref-9)
9. *See, e.g., Szczepanski-Galindez v. PGW*, Docket No. F-2011-2279555 (Order entered February 6, 2014) (the customer was under billed for approximately two and one-half years due to a faulty AMR device). [↑](#footnote-ref-10)
10. In contrast, the complainant in *Prendergast* occupied the service address during the entire period of the meter malfunction which was over five years (from June 2006 to March 2012). *Prendergast* at 6, 13-16.

    We also note that in *William Edney v. Philadelphia Gas Works*, Docket No. F-2013-2393858 (Tentative Order entered December 18, 2014) (*Edney*), the complainant’s meter reported AMR readings lower than the actual readings for gas consumption for several years (from approximately 2007 to 2013). Although the complainant in *Edney* had service transferred to his name in 2007, he did not begin residing at the service address until January 2014. However, an analysis of usage during a six-year period indicated that once the complainant began receiving accurate usage signals after the meter was exchanged in May 2013, he began to significantly conserve usage over a nine-month period (from July 2013 to March 2014). Under these circumstances, we directed the issuance of a conservation credit pursuant to a Tentative Order entered on December 18, 2014, and provided PGW the opportunity to file objections within ten days. PGW did not file objections to the Tentative Order, which became final on December 29, 2014. *Edney* at 11-19. Thereafter, PGW notified Commission Staff that it issued the conservation credit to the complainant in *Edney* on January 7, 2015. [↑](#footnote-ref-11)
11. $6,535.45/40 months = $163.39 per month. [↑](#footnote-ref-12)