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April 24, 2015

The Honorable Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building, 2nd Floor
Harrisburg, PA 17120

Re: Accept for Filing Complainants Main Brief for SBG Management Services, Inc./ Colonial Garden Realty, LP v. Philadelphia Gas Works, Docket No. C-2012-2304183 and SBG Management Services, Inc./Simon Gardens Realty, LP v. Philadelphia Gas Works, Docket No. C-2012-2304324

Dear Secretary Chiavetta:

Please accept for filing the document attached hereto the Main Brief of Complainants in the above-reference matter. I hereby certify I have served the foregoing instrument in the above referenced matters, upon the parties set forth below, via First Class, U.S. mail/ overnight delivery and/or by hand delivery to all parties and the presiding officer, ALJ Eranda Vero in accordance with the requirements of 52 Pa.Code Section 1.54 and the PA Public Utility Commission Orders.

Sincerely yours:

Donna S. Ross, /s/
Donna S. Ross, Esq.
Counsel for Complainants

cc: ALJ Eranda Vero, Presiding Officer
Mr. Laureto Farinas, Esq. PGW Counsel

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SBG MANAGEMENT SERVICES, INC./		
SIMON GARDENS REALTY CO., L.P.	:	**DOCKET NO. C-2012-2304324**
Complainant		
V.	:	
PHILADELPHIA GAS WORKS	:	
Respondent		
SBG MANAGEMENT SERVICES, INC./		
COLONIAL GARDEN REALTY CO., L.P.	:	**DOCKET NO. C-2012-2304183**
Complainant		
V.	:	
PHILADELPHIA GAS WORKS	:	
Respondent		

MAIN BRIEF
OF
COMPLAINANTS' SBG MANAGEMENT SERVICES, INC., agent acting on behalf and in the interest of SIMON GARDENS REALTY CO., L.P. and COLONIAL GARDEN REALTY CO., L.P.

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DATED: April 27, 2015

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STATEMENT OF THE CASE & HISTORY OF THE PROCEEDINGS

Complainants, ("Simon Gardens and Colonial Gardens", respectively) are owners and lessors of multi-family residential apartment rental complexes whose day to day operations and care of the complexes are managed by their agent, SBG Management Services, Inc., (hereinafter referred to as 'SBG' whose name is interchangeable with Complainants'). Complainants properties are located in the City of Philadelphia and receive gas service in various forms, ie, heating and/or cooking, from the City owned public utility, Respondent, Philadelphia Gas Works, hereinafter referred to as "PGW"). Complainants' accounts are billed at the GS rate and for PGW's purposes are deemed commercial service accounts.

Complainants have received gas service from PGW at their rental complexes since the late nineties and early 2000's. SBG, as the agent, receives reviews and submits payments on Complainants' gas bills for their accounts located at the property addresses. Complainant, Simon Garden is responsible for one gas account (Account number 539547187) with PGW, however, the account has three different SA's, ("Service Agreements") , (SA # 11623325601 associated with meter # 1944659); (SA # 4395848077 associated with meter # 2035836); and (SA # 8569221065 associated with meter # 2035831). The three separate meters and SA's are billed under the one account number. Complainant, Colonial Gardens is responsible for one gas account, (Account number 6128000245) with PGW, and like Simon Garden, has three different SA's and three meters billed under the umbrella of one account number. The SA's for Account number 6128000245 are as follows: SA # 1375369694 associated with meter # 1987516; SA # 1895894961 associated with meter #2115477, and SA # 4018739567 associated with meter # 2115477.

On or about May 11, 2012 Complainants' filed a Formal Complaint with the PUC against Respondent, PGW, after nearly ten years of trying to resolve its numerous attempts to obtain explanations and information on its accounts regarding high bill disputes, billing accuracy, application of payments, termination and shut off notices, accountings for gas debts for lien judgments paid at settlement through refinancing and disclosure on information for debts filed as liens against the properties, which forced foreclosure actions and constructive defaults on its properties.

Prior to filing suit, Complainants' engaged in numerous communications, conversations and negotiations, and entered into agreements with high level PGW management personnel, facilitated by the parties' legal counsel, in an attempt to get a reasonable, logical explanations and work towards resolution for their disputes with PGW. PGW personnel, including members of their law department, were very much involved with and aware of Complainants' disputes. From 2003 through 2009, Complainants' corresponded and met with John Dunn, the Director of the Commercial Resource Department, who throughout the years took action to stave off shut-offs notices and other collection activities while he purported to be attempting to investigate and resolve Complainants' complaints and disputes. While Complainants have been questioning PGW's billing and collection practices since at least 2001, from 2004 until the present, Complainants have been requesting an explanation from PGW as to a financial breakdown of their accounts regarding their payments applied to gas usage charges, credits, penalties, late payment charges, penalties, fees and verification of the source of lien judgments filed with the court that encumbered the properties. From 2006 through 2012, PGW gave Complainants continued assurances they would investigate and provide the information requested about their high bills and their source, and entered into an agreement to stop collection actions pending the resolution of the investigation. Complainants relied on PGW's actions and commitments to obtain material information, including supplying information on the application of payments on its accounts. During the course of dealing with PGW, PGW did not ask whether the customer was satisfied, nor did they direct Complainants to the PUC before March 2012. In March 2012, while awaiting a response from PGW to schedule a meeting with PGW's accountants, PGW sent Complainants notice apprising them of their rights to file a complaint with the PUC. Complainants filed its complaints, alleging numerous violations with the hope that through the discovery process they would glean the necessary information they needed to understand the accuracy of PGW's accounting, billing and collection practices and methodology, and other related issues.

As such, the allegations in the complaints disputed Complainants' outstanding balances based upon the following: 1) Dispute the accuracy of the billings; 2) Dispute the validity of the meter readings and/or estimated readings; 3) Dispute the calculation of interest and penalties assessed; 4) alleged PGW refused to address Complainants' concerns regarding the accuracy of the billings; 5) alleged that PGW failed to mitigate its damages and allowed large unpaid gas debts by tenants to accrue in lieu of

termination; 6) alleged that PGW has incorrectly collected payments on accounts from Complainants in error; 7) alleged that PGW uses unfair, unjust and untimely billing practices to collect unpaid debts from the wrong party; 8) alleged that PGW failed to mitigate its damages by refusing to or was unable to provide an accounting to Complainant; 9) alleged that PGW failed to resolve Complainants' disputes as a matter of law; 10) alleged that PGW has acted in bad faith; 11) alleged that PGW has refused Complainants' requests for [explanation and] information [on its accounts] [sic]; and 12) alleged that PGW has wrongfully encumbered the property causing Complainants' irreparable harm. Complainants' prayer for relief requested a refund and/or credit for all overpayments made to PGW, and requested adjustments to its accounts for excessive penalties and interest erroneously assessed by PGW.

In early June 2012, PGW filed its' Answer with New Matter to the complaints, alluded to, but did not plead an affirmative defense that Complainants' claims were barred by the statute of limitations. On or about June 28, 2012, Respondent filed Preliminary Objections to Complainants' complaints objecting to SBG's standing to bring the action on behalf of the Complainants and sought to strike and dismiss claims raised as being outside of the Commission's jurisdiction because they alleged a collateral attack on accuracy of liens filed by the City of Philadelphia under the Municipal Claim and Tax Lien Law, Act 153 of P.L. 207, 53 P.S. § 7101.

As a result of filing the complaints, PGW attached some information regarding Complainants' accounts as exhibits to its responsive pleadings, such as partial statements of accounts and PGW internal documents showing account numbers and lien docket numbers for liens entered into the judgment index with the Court.

Between June 2012 and December 2012, there were initial pre-hearings and conferences held whereby the Administrative Law Judge, Eranda Vero, issued orders that determined the issues pertaining to the validity of meter readings, and the calculations of interest and penalties assessed against the Complainants by a public utility fell squarely within the purview of the Commission's jurisdiction. In addition, Complainants' nine cases were consolidated for purposes of litigation, and Respondent's Preliminary Objections were disposed of by the presiding officer, SBG was founding to have standing to proceed as agent for the Complainants and Complainants were granted leave to file Amended Complaints.

On November 15, 2012, Complainants' new counsel, Scott DeBroff, Esq. entered his appearance, SBG was also represented by their general counsel, Ms. Francine Thornton-Boone, Esq., and she later became lead counsel for the consolidated cases, after Mr. DeBroff withdrew prior to the hearings in August 2013.

Prior to his withdrawal, on or about December 11, 2012, Mr. DeBroff propounded to PGW Complainants' Set I discovery requests for Interrogatories and Production of Documents. He also filed Complainants' Amended complaints which addressed SBG's standing as agent for Complainants and their ability to pursue their claims. The Amended complaints allege the nature of Complainants' disputes, as follows: 1) inaccurate actual meter reads; 2) inaccurate estimated meter reads; 3) wrongful and inaccurate transfer of liabilities from one account to another account; 4) failure to accurately and properly credit the accounts for prior payments and to reduce or eliminate resulting balances; 5) inaccurate and wrongful billing and collection practices, including but not limited to, sending bills to and trying to collect money from the wrong party; 6) disputes as to the calculation and imposition of interest and penalties assessed by PGW on accounts claimed to be delinquent; 7) alleged PGW's failure to respond in an appropriate, reasonable and expeditious manner and to provide Complainants with explanations and necessary material information on its accounts contributed to the accumulation of large arrearages and delinquencies on Complainants' accounts.

The Amended Complaints' prayer for relief requests that the Commission sustain the complaint and further requests the following: 1) PGW is required to supply all the necessary information for Complainants to determine the accuracy of any and all amounts PGW claims are owed on the disputed accounts where Complainants, SBG or the Realty Co. is the customer of record; 2) PGW is required to test the meters on the accounts in question in order to determine whether Complainant is being accurately billed; 3) PGW is required to correct the accounts listed and determined to be overpaid and refund Complainants for any and all overpayments made to PGW; and 4) Grant any other relief as the Commission determines to be in the public interest.

On or about January 8, 2013, Respondent filed its' Answer to the Amended Complaints, but raised no New Matter and plead no affirmative defenses, such as the statute of limitations as a bar to Complainants' claims.

On February 7, 2013, an Initial Hearing Notice was issued by the Commission, however, in June 2013, the Hearing was cancelled. From December 2012 until August 2013, even though Complainants' counsel, Scott DeBroff, had propounded discovery in Discovery 2012, PGW provided very little additional information in response to the discovery requests.

A pre-hearing conference was held on August 12, 2013, the consolidated matters were bifurcated into blocks of three cases. After the pre-hearing conference, Complainants' counsel, Mr. DeBroff withdrew as counsel and Ms. Thornton-Boone, SBG's general counsel, took the matters to hearing on August 26, 2013 though August 30, 2013. All of the consolidated matters were scheduled to be heard during the week of August 26, 2013 through August 30, 2103. Complainants cases in chief were not completed during the week allocated for hearing in all consolidated matters and only Complainants' witnesses provided initial testimony in the cases of SBG/Fairmount Realty Co.L.P. v. PGW, docketed at C-2012-2304183, SBG/Elrae Realty Co., L.P. v. PGW, docketed at C-2012-2304167, SBG/Marshall Square Realty Co., L.P. v. PGW, docketed at C-2012-2304303, SBG/Simon Garden Realty Co., L.P. v. PGW, docketed at C-2012-2304324, and SBG/Colonial Garden Realty Co., L.P. v. PGW, docketed at C-2012-2304183.[1] Complainants' witnesses testifying at these sets of hearings included Phil Pulley, SBG Director of Operations, Daniel McCaffery, Esq., Eric Lampert, SBG's Comptroller, former PGW, Director of Commercial Resource Center, John Dunn, current PGW, Director of Commercial Resource Center, Ralph T. Savage, III, PGW, Vice President of Billing and Collections, Bernard Cummings and Kathy Downs -Treadwell, SBG's Senior Accountant.

After the hearings, it was determined that the complexity of the cases and the sheer volume of information warranted more attention and the presiding officer determined that the Commission and the parties could benefit from rescheduling the matters to a later date.

Between September 2013 and October 2014, the parties engaged in vigorous litigation over discovery. Complainants propounded three additional sets of Interrogatories and Requests for Production of Documents and one set of Requests for Admissions. Respondent vigorously objected to Complainants' requests and provided incomplete and/or unresponsive information. Complainants filed no less than four Motions to Compel Respondent's responses to interrogatories, admissions and to

[1] Complainants presented witness testimony in the matter of SBG/Colonial Garden Realty Co., LP - Gas Conversion v. PGW, C-2012-230-8469, a case that challenged PGW's denial to convert the properties oil heat source to gas, however, Complainants' have withdrawn this Complaint.

produce documents as requested. The presiding officer issued numerous orders regarding discovery in these consolidated matters.

In July 2014, the presiding officer issued an order closing discovery as of September 23, 2014 and ordered that all Motions to be filed no later than October 6, 2014. In September 2014, Ms. Thornton-Boone left SBG's employ and Donna S. Ross, SBG's new General Counsel, entered her appearance in the consolidated cases.

Between November 29, 2014 and December 3, 2014, the presiding officer issued orders on Complainants' outstanding Motions to Compel and granted Complainants' relief in part. The chief ruling compelled Respondent to perform late payment analyses on all of Complainant's accounts at issue.[2] In November 2014, based upon the information gleaned from the documents PGW was ordered to produce in discovery in response to the Complainants' many motions to compel, Complainants were able to finally obtain a better understanding of how PGW conducts its accounting practices and applies payments to Complainants accounts. As a result, at the pre-hearing conference, held on November 24, 2014, SBG's counsel asserted to the presiding officer that many of the issues raised in the complaints had been addressed or explained through the discovery process and could be removed from the list of disputed transactions. Issues to litigate were narrowed to the gravamen of the complaints which pertains to the overpayment of post-judgment interest, overpayment of finance charges, late payment charges and penalties on the accounts as a whole from their inception to the present and high bill usage.

On December 30, 2014, the presiding officer issued orders scheduling hearings on January 29th and 30th, 2015 for the SBG/Simon Garden Realty Co., L.P. v. PGW, docketed at C-2012-2304324, SBG/ Colonial Garden Realty Co., L.P., v. PGW docketed at C-2012-2304183 and SBG/Colonial Garden - Gas Conversion v. PGW, docketed at C-2012-2309465. Hearings were held on February 10th -12th, 2015 to complete the testimony for SBG/Fairmount Realty Co.L.P. v. PGW, docketed at C-2012-2304183, SBG/ Elrae Garden Realty Co., L.P., v. PGW docketed at C-2012-2304167, SBG/Marshall Square Realty Co., L.P., v. PGW docketed at C-2012-2304303. Hearings were held on March 25, 2015 on the matters of SBG/Fern Rock Realty Co.L.P. v. PGW, docketed at C-2012-2308465, SBG/Marchwood Realty Co., L.P., v. PGW docketed at C-2012-2308454, SBG/Oaklane Realty Co., L.P., v. PGW docketed at

[2] In response to ALJ's Vero's orders dated Nov. 14, 2013 and Dec. 11, 2013 issued on Complainants' Motions to Compel Set II Interrogatories and Requests for Production, PGW first produced a sample late payment analysis in January 2014. Complainants' subsequent Motions to Compel resulted in PGW being compelled to produce analysis' on all of the accounts subject to these complaints.

C-2012-2308462. To streamline the hearings, the parties agreed to enter certain portions of the transcript testimony from the August 2013 hearings of Complainants' witnesses: Phil Pulley, SBG's Director of Operations, Eric Lampert, SBG's Chief Financial Officer, Daniel McCaffery, Esq, former PGW, Director of Commercial Resource Center, John Dunn, and PGW, Vice President of Billings and Collections, Bernard Cummings, into the record as an exhibit in the cases for which they did not provide testimony in person at the 2015 hearing dates. In addition, the parties agreed and the presiding officer approved the admission of the Direct Testimony of Complainants' witness, Kathy Downs-Treadwell, PGW, witnesses, Diane Rizzo and Ralph T. Savage, along with Complainants' expert witnesses, Roger C. Colton, Esq. and Jeremy G. Gabell, C.P.A, February 10, 2015, testimony into the record as an exhibit in the matters of SBG/Fernrock Realty Co.L.P. v. PGW, docketed at C-2012-2308465, SBG/Marchwood Realty Co., L.P., v. PGW docketed at C-2012-2308454, SBG/Oaklane Realty Co., L.P., v. PGW docketed at C-2012-2308462 at the hearing held on March 25, 2015. At the hearings held in January and February 2015, Kathy Downs-Treadwell, Jeremy Gabell, and Roger C. Colton testified for Complainants. Bernard Cummings, Wendy Vacca, Diane Rizzo and Ralph T. Savage testified for Respondent..

The pivotal issue in this case involves PGW's underlying payment posting reordering accounting scheme and accuracy of the interest rate, penalties and late payment charges imposed on all accounts, and PGW's pricing decision to ignore application of the legal statutory post-judgment interest rate of 6% simple per annum to unpaid sums filed as lien judgments by the PGW with Court under the authority of the Municipal Claim and Tax Lien Law, Act 153 of P.L. 207, 53 P.S. § 7101. Complainants do not dispute the fact that PGW, as a municipally owned public utility has to the right to place a lien and encumber Complainants' property for debts owed on its gas accounts. The issue is whether a lien filed on behalf of PGW docketed with the court is a judgment subject to post judgment interest rate of 6% per annum. Respondent, PGW, continues to charge 1.5% compounded pre-judgment interest per month (18% compounded annually) on the unpaid balance which includes sums that have been filed as lien judgments with the court of common pleas, until such sums are satisfied. Complainants contend a lien is a judgment subject to the accrual of post-judgment interest rate of .5% per month or 6% simple interest per annum until the debt is satisfied.

Moreover, after reviewing the late payment analyses produced by PGW in discovery, Complainants learned that the reason their accounts do not zero out or the principle balances are not reduced in accordance with their payments is because PGW reorders the payment posting process by eliminating cumulative non-interest bearing late payment charges and deposits first before applying payments to more recent interest bearing gas usage charges. Complainants contend that this re-sequencing of the payment posting process to the account has the affect of compounding the statutory interest rate from 18% simple interest per annum to 19.562%, constituting an indirect means to increase revenue collections in excess of the authorized tariff. In addition, Complainants assert that neither the billing statements, statement of accounts, tariff, Public Utility Code, the regulations, nor PGW personnel disclose PGW's payment posting and accounting practices to the customer and that this methodology is an internal measure that is only known to PGW. Consequently, Complainants could not have known that this pattern and practice existed until PGW was ordered to produce the late payment analyses in discovery, after Complainants' filed suit.

Complainants' raise issues of first impression before the Commission. The nature of the claims have affected the Complainants accounts since their inception and continue to affect the overall balances on their public utility accounts.

The presiding officer issued an order on March 27, 2015 directing the parties to brief the questions presented and provide the Commission with legal arguments to support their respective positions. This brief is written in response to ALJ, Eranda Vero's order impose the following questions to the parties to answer:

a) **Statute of Limitation**

- *Should the statute of limitations be tolled for Complainants' claims which fall outside the three-year general limitation period contained in 66 Pa. C.S. § 3314? Why? List the legal grounds (legal doctrine, statute, case law or regulation) for your position. Provide the transcript page and exhibit references to show where the evidence appears in the record. Remember that some of the original transactions disputed in the Complaints have been withdrawn by the Complainants.*

b) **Late payment charges on outstanding balances which have been the subject of municipal liens for unpaid gas service.**

- *Does the Commission have jurisdiction to determine whether PGW has applied the correct interest rate in late payment charges to the portion of an outstanding balance that is also the subject of a lien filed by the City of Philadelphia? Provide legal grounds for your position.*

- *Explain whether or not a lien filed by the City of Philadelphia for unpaid gas service is considered a judgement under 42 Pa.C.S. § 8101? If yes, explain when a lien becomes a judgement. Provide legal grounds for your position.*

- *What is the correct interest rate in late payment charges that should be applied on that portion of an outstanding balance which is the subject of a municipal lien (or unpaid gas service) filed by the City of Philadelphia? Provide legal grounds for you position.*

SUMMARY OF THE ARGUMENT

Complainants claims are not time barred and should be tolled beyond the requirements of 66 Pa.C.S. §3314 and refunded overcharges under §1312 pursuant to the equitable principles invoked by the Continuing Violations Doctrine, the Discovery Rule and Estoppel. PGW's continued pattern, practice and conduct has violated Title 66, Ch. 1303, 1304, 1309; 1502 of the Pennsylvania Public Utility Code, the Commissions Regulations, promulgated at 52 Pa.Code §56.1, 56.15, 56.22, 56.23, 56.24, 56.99, 56.140, 56.141, 56.151, 56.152, 62.74 and 62.75(c)(10); and well-settled Pennsylvania law codified at 42 Pa.C.S §8101, and Pa.R.C.P Rule 3023.

The record shows that for many years Complainants engaged PGW by way of inquiries, disputes, negotiations, agreements ,and other diligent actions to obtain substantial and material information and explanations on PGW's billing, collections, accounting practices, policies and methodology it used to calculate Complainants bills, interest penalties, finance charges and application of payments to its accounts. Complainants communicated and met with the Company personnel, including PGW attorneys, several times per year from either through their own efforts or through their attorneys from 2004 through 2012 before initiating this suit in efforts to resolve the matters complained of.

From 2003 - 2011, PGW's managerial employees and legal counsel were aware and actively engaged with Complainants' to satisfactorily resolve disputes, made representations and entered into verbal agreements with Complainants to work with them to provide Complainants with the necessary answers, information and explanations regarding their billing, collection and account issues. In 2004/ 2005, in lieu of having to conduct a court ordered accounting in a foreclosure action brought against Complainants' Simon Garden and Fern Rock properties, PGW attorneys settled the matter and forgave $48,000 in late payment charges. Complainants made their requisite payments as agreed per the settlement, but PGW failed to timely post an installment of the agreement in a timely manner and the

account started to accrue late fees again. The final installment was posted some 3 months later. Complainants' counsel, Dan McCaffery had to track down the payment to ensure the credit was applied to the account.

In 2006, John Dunn, PGW Director of Commercial Resource Center, was assigned as a PGW point person for responding to Complainants' account investigations, complaints and inquiries. Mr. Dunn had been involved with the earlier agreements reached on the 2004/2005 matters for the Simon Garden and Fernrock Realty Co. properties and he established a working agreement with Complainants from 2006 to 2009, when he retired, including forestalling shut-offs and collection actions while he was conducting various investigations into their service, billing, accounting and collection disputes.

After a 2008 conference call with Complainant, their counsel David Hyman, Esq., PGW, counsel Raquel Guzman, and PGW's, John Dunn, it was agreed that the parties would work together to complete Complainants' requests for PGW to investigate and provide information, including explanations on how payments, penalties and finance charges were applied to their accounts at issue. As a result of this agreement between the parties, Mr. Dunn was charged with providing Complainants with specific financial accounting information on their accounts, but never produced any detailed information other a the statement of accounts for a property that showed gas usage, credits and accumulated late payment charges. He did not provide any specific information on how Complainants payments were applied to their accounts. Moreover, in accordance with the agreement reached in 2008, Complainant was instructed to contact John Dunn if any adverse collection taken on the account, ie shut off notices, and pending investigation Mr. Dunn assured Complainants he would take care of them. The agreement also called for the parties to work together and that if they reached an impasse the would work through their respective counsel to reach a solution.

When Mr. Dunn retired, Ralph T. Savage became the Director of Commercial Resources Center and the PGW point person for Complainants accounts. Mr. Savage was aware of PGW's agreement with the Complainants and their outstanding investigations and requests for a full transactional accounting. Mr. Savage did not satisfy Complainants' requests for an accounting and only supplied Complainants with a statement of accounts testifying at hearing they had enough information to see their transactions from the bills and statement of accounts. Under the guise of the working agreement between PGW and Complainants, PGW forestalled the production of the Late Payment Analysis and transactional

information , or at the very least, passively concealed the methodology of the posting payments process, demonstrating conduct that was either reckless, grossly negligent, intentionally designed to misrepresent, conceal or defraud Complainants. PGW's conduct was coordinated by managerial staff and PGW's law department, who acting in concert either passively or intentionally by concealing, refusing to provide or withholding material information from Complainants until after they filed suit. PGW's actions cannot be excused. PGW does not deny nor defend failing to disclose it's payment posting process to Complainants.

The Continuing Violations Doctrine and Discovery Rule Are The Appropriate Remedies To Preserve Claimants' Claims and Toll the Statute of Limitations Under §3314 and §1312 and Barr PGW 's Estoppel Defense.

Complainants have shown they are entitled to relief by substantial evidence supporting the conclusion its claims for relief should be granted pursuant to the equitable principles of the Continuing Violations Doctrine, Discovery Rule and Estoppel because Respondent maintains a continuing pattern and practice of concealing, omitting and failing to disclose substantially material facts, despite Complainants diligence to discover such material facts to prevent further injury, in a timely manner. Complainant has proven Respondent's misconduct occurred outside of the limitations period, and his predicate acts have continued within the limitations period; the malfeasance is a demonstrable pattern and practice of violative conduct that Respondent has not ceased, has harmed and continues to harm Complainants, constituting a violation that warrants invoking the equitable remedy under the continuing violations doctrine.

In addition, pursuant to the Discovery Rule, equity further dictates PGW's representations, assurances as to the ongoing investigations and agreements, which were not rescinded, between the parties for PGW to investigate and work towards resolving Complainants' claims caused detrimental reliance for which PGW should estopped from raising the claims are barred by the statute of limitations. PGW's scienter in misrepresenting Complainants' billing, collection actions, statement of accounts, and manipulating Complainant's good will by purporting to reassure them PGW was investigating their claims, is evident PGW intentionally or passively concealed, omitted and failed to disclose material information that prevented Complainants from bringing their claims earlier, such conduct warrants PGW being estopped from raising limitations defenses.

Pursuant to the continuing violations doctrine and the discovery rule doctrine, as reasoned above, Complainants' requests for a refund pursuant to 66 Pa.C.S. §1312 should be granted. Complainants have demonstrated their claims are supported by substantial evidence that PGW fails to disclose that it conducts an established pattern and continued practice implementing a payment posting reordering accounting scheme that wrongfully charges and collects pre-judgment and post judgment interest penalties and late fees in excess of the approved interest rates authorized by law. PGW has maintained this scheme since the inception of Complainants' accounts, and that PGW affirmatively misled, misrepresented and omitted disclosing substantially material facts regarding their billing and collection practices such that Complainants' reliance on the technical information supplied by PGW concealed the fraudulent billing and collection practices, the depth of which was not discovered by Complainants until after they had filed suit caused them undue delay and injury.

A Lien is a Judgment. A judgment creates an immediate lien against real property. A judgment shall bear the interest rate of 6% per annum.

Pursuant to **Pa.R.C. P. Rule 3001**, a judgment is defined as a judgment or order requiring the payment of money or adjudicating the right to possession in an action of replevin. **Pa.R.C.P. Rule 3021.Verdict. Order. Judgment.** Entry in Judgment Index, the prothonotary shall immediately enter in the judgment index a verdict or order or a specific sum of money with the notation "verdict" or "order." The entry shall state the amount of the verdict or order. Section 8142(e) of the Judicial Code, 42 Pa.C.S. § 8142(e), requires the prothonotary to "note on the dockets in such office where each verdict, judgment, order, instrument or ***writ creating a lien against real property*** is entered, the time it was recorded, rendered, left for filing, or issued." The rule presumes a channel of communication between the court and prothonotary so that the prothonotary may "immediately" docket a judgment entered by the court. **Pa.R.C.P. Rule 3023. Judgment. Lien. Duration.** (a)Except as provided by subdivision (b), a judgment when entered in the judgment index shall create a lien on real property located in the county, title to which at the time of entry is recorded in the name of the person against whom the judgment is entered. **42 Pa.C.S.§8101, Interest on judgments.** Except as otherwise provided by another *statute*, a judgment for the specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not

entered upon a verdict or award. *41 P.C.S. §201* establishes that the legal interest rate in Pennsylvania is 6%, which comports to the comments and notes of decisions in 52 Pa.Code .§56.22.

PGW Compounds and Collects finance charges, late payment charges, penalties in excess of the approved 18% Simple Interest Rate Approved in the Tariff and Wrongfully Charges the Pre-Judgment Interest Rate on Post- Judgment Debt in Excess of the Statutorily Prescribed Rate of 6%.

PGW does not dispute nor does it defend that PGW did not timely disclose its payment posting re-ordering scheme, accounting practices and methodologies. PGW's imposes the unjust rate of 18% compounded interest (19.562%) per annum to post judgment debt. PGW admits it does not apply the statutory post-judgment interest of 6% rate per annum to amounts filed as lien judgments. PGW admits it commingles lien debt with active account balances and applies the pre-judgment interest rate of 18% to the post-judgment debt. PGW does not refute or defend Complainants were unaware of financial accounting practices until after they had filed suit and did not discover the full extent of their injuries until 2014. PGW refuses to apply the post-judgment debt interest rate of 6% to lien judgments.[3]

PGW's Practice of Charging and Collecting Pre-Judgment Compounded Interest for Lien Judgments Violates State Law

Pursuant to 66.Pa.C.S.§1303. No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility. PGW's billing and collection practices wrongfully collect finance charges by way of interest penalties and late fees by re-ordering payment postings in a way that compounds the legal interest rate for collections from 18% simple interest to 19.562% APR compounded, which indirectly increases company revenue[4] and rates in excess of the approved tariff which violates PGW's Tariff, the Public Utility Code, Title 66 Pa.C.S. Ch. §1303, 1304, 1309, 1502, the Commissions

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[3] ***See also, Perel v. Liberty Mutual Insurance Co.***, 839 A.2d 426 (Pa. Super. Ct. 2003), reiterating *Equitable Gas v. Wade, Supra.*, the court finding the statute clearly indicates that interest begins to accrue at the entry of the award; ***In Re Upset Sale, Tax Claim Bureau of Berks***, 505 Pa. 327(Pa. 1984), finding that the judgment represents binding judicial determination of the rights of the parties and establishes their debtor creditor relationship for the world to see when the judgment is recorded in the Prothonotary's Office.

regulations at 52 Pa.Code §56.22, 56.23, 56.141. 56.152 62.74 and 62.75(c)(10). PGW's practice is not disclosed to the public is misleading and breaches the implied duty to deal honestly, fairly, in good faith.

Complainants' assertions are well-founded and supported by case law. *See,* **Waterman v. Jurupa Community Services,** 53 Cal.App.4th 1550, 62 Cal.Rptr.2d 264, 1996 Cal. App. LEXIS 1228, holding that manner in which water company applied payments and computed penalties, late fees and charges to customer water bill account resulted in compounded interest in violation of public utility statute. **PPL Electric Utilities Corporation v. Pennsylvania Public Utility Commission,** 912 A.2d 386; 2006 Pa.Commw., LEXIS 665); *See also,* **Kentucky West Virgina Gas v. Pennsylvania Public Utility Commission**, 837 F.2d 600; 1988 U.S. App. LEXIS 463; 92 P.U.R.4th 542; and **LP Water and Sewer Co. v. Pennsylvania Public Utility Commission**, 722 A.2d 733; 1998 Pa. Commw. LEXIS 912.

In addition, PGW refuses to acknowledge well settled Pennsylvania law pertaining to collecting post-judgment interest and refuses to comply with 42 Pa.C.S. §8101, Pa.R.C.P. §§3021, 3022, 3023 by applying the post judgment statutory rate of interest of (6%) to gas debt filed as a lien with the court. In Complainants cases, PGW charges the compounded interest rate of 18% for finance charges to amounts liened, until satisfied. Moreover, the post-judgment debt is commingled with current interest bearing, whereby the post judgment debt accrues finance charges at the same rate as the pre-judgment balance. PGW's practice of ignoring the statute creates a discriminatory rate and service class for ratepayers. *See* **Equitable Gas v. Wade, 812 A.2d 715 (Pa. Super. 2002)**, **See also, Perel v. Liberty Mutual Insurance Co.**, 839 A.2d 426 (Pa. Super. Ct. 2003), reiterating *Equitable Gas v. Wade, Supra.*, the court finding the statute clearly indicates that interest begins to accrue at the entry of the award; **In Re Upset Sale, Tax Claim Bureau of Berks**, 505 Pa. 327(Pa. 1984), finding that the judgment represents binding judicial determination of the rights of the parties and establishes their debtor creditor relationship for the world to see when the judgment is recorded in the Prothonotary's Office. **Waterman v. Jurupa Community Services,** 53 Cal.App.4th 1550, 62 Cal.Rptr.2d 264, 1996 Cal. App. LEXIS 1228.

Complainants' prior claims should be included with ripe claims within the limitations period under the equitable principles of the Continuing Violations Doctrine, Discovery Rule and Estoppel because Complainants acted diligently in trying to ascertain their harm by PGW. PGW's affirmative acts and passive concealment, misrepresentations, substantial and material omissions prevented Complainant from ascertaining their harm for some of their claims outside of the limitations period. Moreover,

PGW's continuously wanton, willful and wrongful practices constitute a pattern and practice that existed prior to the statute running and continues to harm Complainants today. The Commission must balance PGW's misrepresentations, concealment, substantial omissions of material facts with Complainants diligent efforts to uncover their injuries sooner and estop PGW from raising the statute of limitations as a bar to Complainants claims. **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450. **Nesbitt v. Erie Coach Company**, 416 Pa. 89, 92, 96 (1964), **West v. Philadelphia Electric Company,** 45 F.3d 744, 1995 U.S. App. LEXIS 1070, **Merck & Co., Inc. v Reynolds**, 559 U.S. 633; 2010 U.S. LEXIS 3671, **Mary Esther Battle v.PECO Energy Co.**, C-00003804 (Order entered July 16, 2001). **In Re Providian Financial Corporation Securities Litigation**, 152 F. Supp.2d 814, 2001 U.S. Dist. LEXIS 9084.

Therefore, PGW's conduct warrants the Commission invoking the Equitable Tolling Doctrines under the continuing violation doctrine, discovery rule and estoppel presents an option appropriate remedy to fashion for Complainants to bring their claims to prevent PGW's continued pattern and practices from continuing and to protect the public interest. The Commission has the right to reform and revise contracts, order refunds, when required and in the public's interest. 66 Pa.C.S. §508, PGW's continuous patterns and practices of maintaining a scheme designed to indirectly collect revenue by wrongfully billing and collecting sums that exceed their authorized Tariff and in violation of the Public Utility Code and its regulations and Pennsylvania law breaches the implied duty of good faith, honesty and fair dealing, along with its fiduciary duty to disclose materially relevant terms of its approved tariff to its ratepayers. **In Re Providian Financial Corporation Securities Litigation**, 152 F. Supp.2d 814, 2001 U.S. Dist. LEXIS 9084.

Therefore it is in the purview of the Commission to order PGW to cease and desist its payment posting reordering accounting scheme and grant Complainants' relief refunding the monies PGW has wrongfully collected under the Public Utility Code from Complainants.**Grace Scrutching v. Philadelphia Gas Works,** 2003 Pa. PUC LEXIS 70, **LP Water and Sewer Co. v. Pennsylvania Public Utility Commission**, 722 A.2d 733; 1998 Pa. Commw. LEXIS 912;. **PPL Electric Utilities Corporation v. Pennsylvania Public Utility Commission,** 912 A.2d 386; 2006 Pa.Commw., LEXIS 665); *See also*, **Kentucky West Virgina Gas v. Pennsylvania Public Utility Commission**, 837 F.2d

600; 1988 U.S. App. LEXIS 463; 92 P.U.R.4th 542, **Waterman v. Jurupa Community Services,** 53 Cal.App.4th 1550, 62 Cal.Rptr.2d 264, 1996 Cal. App. LEXIS 1228.

ARGUMENT

I. The Commission Has The Authority To Toll Complainants' Claims That Fall Outside of The Limitations Period Under 66 Pa.C.S. §3314 and §1312 Based Upon The Equitable Legal Doctrines The Continuing Violations Rule, Discovery Rule and Estoppel Embraced By The Court.

A. *The Continuing Violations Rule Is An Appropriate Remedy To Preserve Complainants Claims.*

Complainants claims are not time barred and should be tolled beyond the limitations period ascribed of 66 Pa.C.S. §3314 and §1312 pursuant to the equitable principles invoked by the Continuing Violations Doctrine, the Discovery Rule and Estoppel because PGW's conduct has violated Title 66, Ch. 1303, 1304, 1309; 1502 of the Pennsylvania Public Utility Code, the Commissions Regulations, promulgated at 52 Pa.Code §56.1, 56.15, 56.22, 56.23, 56.24, 56.99, 56.140, 56.141, 56.151, 56.152, 62.74 and 62.75(c)(10); 42 Pa.C.S §8101, and Pa.R.C.P Rule 3023.

The record shows that for many years Complainants engaged PGW by way of inquiries, disputes, negotiations , mutual agreements (not rescinded by the parties) and other diligent actions to obtain substantial and material information and explanations on PGW's billing and collections, accounting practices and methodology used to calculate Complainants bills, interest penalties, finance charges and application of payments to its accounts. (Tr. 8/26/13 -Hearing Test. Phil Pulley, pg. 60, lines 2 22, 159); (Tr. 8/26/13 Hearing Test. Dan McCaffery, Esq., pg. 187, lines 4 - 16, pg. 196, lines 4 - 12, 18 - 25, pg. 197, lines 20 - 25, pg. 198 lines 1 - 20, pg. 199, lines 8 - 25, pg. 200, lines 1- 25, pg. 201, lines 1 - 19, pg. 202, lines 2 - 6, pg. 216, lines 1 - 20).

Complainants approached, communicated, met with, and relied on the assurances and agreements made by PGW personnel, including PGW attorneys in efforts to resolve the matters complained of from 2004 through 2012, before initiating this suit. (Tr. 8/26/13 Hearing Test. Phil Pulley, pg. 60, lines 2 - 22, pg. 61 lines 10-24, pg. 62 lines 19-25, pg. 63 lines 1 - 10, pg. 65 lines 14 -25, pg. 66 line 1, pg. 95 lines 3 - 16, pg. 99 lines 7 - 24 , pg. 100 lines , pg 106 lines 3 - 25, pg.107 lines 2 - 15, pg. 112 lines 1 -25, pg. 113 lines 1 -2, pg.116 lines 14 - 25, pg. 130 lines 7 - 25, pg. 159, pg. 167 lines 4 - 25, pg.168 lines 1 -23, pg.169, lines 4 - 11); (Tr. 8/26/2013 Hearing Test. Eric Lampert,, pg. 225, lines 1 -24; pg. 229, lines 5 -12, pg. 230, lines 17 -25, pg. 232, lines 8 25, pg., 233 lines 4 - 25, pg. 234, lines 1 -25, pg. 236, lines

18 -24, pg. 237, lines 1 -25, pg. 258 lines 2 - 25, pg. 263, lines 5 -25, pg. 264, lines 1 -25, pg. 265 , lines 1 -7, pgs. 266 - 268.)

From 2003 - 2012, PGW's managerial employees and legal counsel were aware and actively engaged with Complainants regarding their disputes and made representations, and agreements to work work with them to provide Complainants with the necessary information and explanations regarding their billing issues. Complainants relied on this conduct, PGW's statements and actions in good faith.In 2004/ 2005, in lieu of having to conduct a court ordered accounting in a foreclosure action brought against Complainants' Simon Garden and Fern Rock properties, PGW attorneys settled the matter and forgave $48,000 in late payment charges. Complainants made their requisite payments as agreed per the settlement, but PGW failed to timely post an installment of the agreement in a timely manner and the account started to accrue late fees again. The final installment was posted some 3 months later. Complainants' counsel, Dan McCaffery had to track down the payment to ensure the credit was applied to the account. (Tr. Hearing 8/26/2013 pgs. 181 - 187). (SBG CG-SG All Correspondence_binder 00011-00013). In 2006, John Dunn, PGW Director of Commercial Resource Center, was assigned as a point person for Complainants account complaints and inquiries. Mr. Dunn had been involved with the earlier agreements reached on the 2004 -2005 foreclosure matters for the Simon Garden and Fernrock Realty Co. properties and he had a working agreement with Complainants from 2006 to 2009, when he retired, to forestall shut-offs and collection actions while he was conducting various investigations into their billing disputes. (Tr. 8/28/2013 Hearing Test. Ralph T.Savage, pg. 609, lines 18 -24,), (Tr. 8/26/2013 Hearing Test. Phil Pulley, pg. 61, lines 10-24, pg. 62, lines 19-25; pg. 63, lines 1 -10, pg. 83, lines 7 - 24, pg. 95, lines 3 - 16), (Tr. 8/27/2013 Hearing Test. John Dunn, pg. 346, lines 5 -10, pg. 360., lines 2 -24, pg. 361, line 8 -25, pg. 362, lines 1 -25, pg. 363, line 1.)

After a 2008 conference call with Complainant, their counsel David Hyman, Esq., PGW, counsel Raquel Guzman, and John Dunn, it was agreed that the parties would work together to complete Complainants' requests for PGW to investigate and provide information, including explanations on how payments, penalties and finance charges were applied to their accounts at issue. (Tr. 8/27/2013 Hear. Test. John Dunn, pg. 420, lines 9 -20). As a result of this agreement between the parties, Mr. Dunn was supposed to provide Complainants with specific financial accounting information on their accounts, but never produced more information to them than the statement of accounts and an alleged spreadsheet that

showed gas usage, credits and accumulated late payment charges. Moreover, as part of the agreement facilitated by counsel for the parties, Complainant was instructed to contact John Dunn if adverse collection was affecting the account, ie shut off notices, and Mr. Dunn would take care of them. The agreement also called for the parties to work together and that if they reached an impasse the would work through their counsel to reach a solution. (Tr. 8/26/2013 Hearing.Test. Dan McCaffery, pg. 200, lines 1 -11), (Tr. 8/26/2013 Hearing Test. Eric Lampert, pg. 264, lines 1 -25), (Tr. 8/27/2013 Hearing Test. John Dunn, pg. 346, lines 5 -10, pg. 360., lines 2 -24, pg. 361, line 8 -25, pg. 362, lines 1 -25, pg. 363, line 1, pg. 374, lines 22 - 25, pg. 375, line 1 -24, pg. 390, lines 10 -25, pg. 391, lines 10 -25, pg. 392, lines 1 - 21).

When Mr. Dunn retired, Ralph T. Savage became the Director of Commercial Resources Center and the PGW point person for Complainants accounts. Mr. Savage was aware of PGW's agreement with the Complainants and their outstanding investigations and requests for a breakdown of the underlying accounting, inclusive of payments applied to usage, interest and penalties.

In explaining his actions for not providing the underlying accounting as requested by Complainants, Mr. Savage testified that he believed Complainants had enough information from the billing statements and the few statement of accounts provided and did not need more. [sic] At no time did PGW or its representatives explain or provide to Complainants the internal data only known to PGW necessary to discern the payment posting process for their accounts. From 2009 until March 2012, Mr. Savage, knowing that the customer was dissatisfied, did not advise them to contact the PUC. Mr. Savage did not rescind the working agreement between the parties as established in 2008. Moreover, Mr. Savage, while acknowledging that Complainants had complaints about their accounts, he never believed their complaints rose to the level of a dispute. He stated he did not provide the documents as requesting the application of payments. He never satisfied Complainants requests for information, he neither provide no such documentation . He never testified that the information was not accessible to PGW to provide to Complainants. He just failed to do it. Complainants eventually received the material information by an order issued through discovery and conclude the information was available to Complainants, PGW simply refused to provide it to satisfy Complainants inquiry. PGW's decision not to provide the available documentation was intentional, not a mistake, not an oversight. The decision to stonewall the Complainant and refuse to provide material information that could have satisfied the inquiry was an

intentional action taken by PGW representatives in concert with their legal counsel, who presumably know the regulations, responsibilities and duties the public utility owes to a customer.

It is disingenuous for PGW to hold that from 2006 through 2012, they were working in good faith to resolve the customers complaints and to deny that there were disputes. Mr. Savage never supplied the breakdown of accounting Complainants requested in all of the years that he served as the company representative interacting with Complainants. There is nothing in the record to support a finding that the agreement between the parties ended before March 2012, when Mr. Savage referred Complainants to the PUC. (Tr. 8/28/2013 Hearing Test. Ralph T. Savage, PGW Director of Commercial Resources Center, pg. 516, lines 3 -5, pg. 521, lines 20 -25, pg. 522, lines 1-5, pg. 523, lines 10 - 25, pg. 524, lines 1 - 25, pg. 525, lines 1-25, pg 526, lines 1 17, pg. 548 , lines 1 25, pg. 549, lines 1 -25, pg, 550, lines,1 -25, pg. 551, lines, 1 -25, pg. 552, lines 1-25, pg. 553, lines 1 -25, pg. 554, lines 1 -25, pg. 555, lines 1 -18, pg. 566, lines, 4 - 10, pg.609, lines 12 - 25, pg. 610, lines 1-3, pg. 615, lines 1 -25, pg. 617, lines 19 25, pg. 618, lines 6 - 8, pg. 619, lines 15 - 25, pg. 620, lines 1 - 6). (Tr. January 20, 2015, Hearing Test. Ralph T. Savage, PGW, Director of Commercial Resources Center, pg. 897, lines 13 -25, pg. 898, lines 1 - 17, pg. 900, 2 - 25, pg. 901, lines 1 -23, pg. 902, lines 1 - 14, pg. 909, lines 20 -25, pg. 910, lines 1 -9, pg. 913, lines 2 - 25).

To the extent that the correspondence and testimony frequently refers to members of PGW's legal department and their knowledge of the Complainants' repeated efforts to obtain internal data , it is incumbent upon the utility to follow the regulations under §56.151, provide the customer with a report about the company's resolution of dispute, and file a utility report under §56. 152 with specific notices informing the customer of their rights and contents of the report.

At the January 29, 2015 hearing, Complainants presented the testimony of three witnesses, Ms. Kathy Downs-Treadwell, Senior Accountant for SBG, Jeremy Gabell, C.P.A. and Roger C. Colton, Esq. an expert in public regulatory economics. Complainants advance the following theories: 1) PGW maintains a continuing, pattern and practice of overcharging Complainants for late fees, finance charges and interest penalties in excess of 18% simple interest rate per annum leading to collection of compounded rate of 19.562 % interest per annum on unpaid balances; 2) PGW fails to apply the 6% post judgment simple rate under the regulations to amounts filed as liens and docketed in the county judgment index, both actions of which violate 52 Pa.Code §56. 22 and 42 Pa.C.S.§8101, and violates the

approved Tariff and filed rate doctrine, and other provisions of Title 66 of the Public Utility Code, Chps. 13 and 15, 3) PGW maintains a payment posting hierarchy that resequences and reorders Complainants payments to its account balances such that the interest rate collected is compounded and is not explained or disclosed to Complainants either through its billing and account statements, Tariff, nor its representatives and 4) PGW affirmatively misleads and misrepresents the customer by not adhering to acceptable billing and collection practices, as well as, 5) PGW breaches its duty to deal fairly, honestly and in good faith owed to Complainants.

Complainants first witness, Kathy Downs-Treadwell, testified and sponsored the following Exhibits: SBG/CG-SG 1- billing statements, SBG/CG-SG 2 - Statement of Accounts with Late Payment Analysis, SBG/CG 3 - Calculation Sheets, SBG/CG-SG 4 - Lien Sheets, SBG/CG 5 - Monthly statement for Colonial Garden for January 2006, and SBG/CG-SG 6 - May 2004 bill for Simon Garden. Ms. Treadwell, who is an accountant with a forensic accounting background provided testimony and evidence that prove Complainants theory on the detrimental effect PGW's payment posting procedures has had on Complainants accounts since inception and how the practice results in compounded interest in excess of the 18% simple interest rate and 6% simple interest rate for post judgment interest proscribed by law. Complainants' sponsored exhibits demonstrate how PGW's over-collection practices results in PGW's increased revenues in excess of the approved Tariff and in violation of the law. (Tr. January 29, 2015 Hearing Test. Ms. Kathy Downs- Treadwell, pg. 490 - 562).

Simply stated when you take interest and add it on to principle and then you charge again on the prior principle, the interest is compounded. It has the effect of charging penalties on top of penalties. Ms. Treadwell's hypotheses considered the regulations under 52 Pa.Code §62.74 which provides a theoretical hierarchy of order in which to apply payments in accordance with the order of the billing statements. While the law and regulations do not specifically prescribe this method for a public utility to apply payments, however, if implemented, it does produce the most advantageous rate for the consumer and does not result in compound interest, but rather conforms to the 18% simple interest rate for the collection of finance charges under the Tariff. Furthermore, it is a manner for the Commission to look to for guidance on the appropriate payment posting hierarchy procedure to impose on PGW since it comports with the tenets of the regulations. Ms. Treadwell's testimony was supported by the expert witness testimony and not contradicted by PGW, with any verifiable methodology at the hearing.

Jeremy Gabell, supported Ms. Treadwell theory and methodology, and testified that based upon his analysis PGW's practice compounds the annual 18% simple rate to 19.562%, and concluded the practice effectively has the same effect on the account as charging late fees upon late fees, because PGW is playing semantics by trading sums in one tranche for another. (Tr. 1/29/2015 Hearing Test. Jeremy G. Gabell, CPA, pg. 592, lines 6 -25, pg. 594, lines 3 - 25, pg. 595, lines 1 - 11, pg. 605, lines 2 - 23, pg. 606, lines 1 - 24, pg. 608, lines10 -19).

Roger C. Colton, Esq. explained the 'reordering of payment is a term of art". It is a process comprised of two components, the principal component on which the public utility may charge a late charge and you have the late payment charge component on which no additional late payment charge can be imposed. (Tr. 1/29/2015 Hearing Test. Roger C. Colton, Esq., pg. 614, lines 1 - 25). *The term of charging late fees upon late fees is called "pyramiding" and it is an illegal practice 12 C.F.R. §227.15.* He explained that when a customer does not pay their bill, there is a growing balance of late payment charges. The reordering occurs when the customer makes a payment and then PGW posts the payments out of time, posting the payment to the more recent non-interest bearing late charges before paying the older interest bearing debt down and reducing the overall principle balance and then applying a new late charge to the more recent charge reduced the payment on the principle balance. He further opined that PGW's practice that violates 66 Pa.C.S. §§ 1301, 1303 serving as a pricing decision that is an indirect means of charging more than 18% simple interest for finance charges which maximizes billed revenue to the utility company. (Tr. 1/29/2015 Hearing Test. Roger C. Colton, Esq., pg. 616 - 620). Furthermore, Mr. Colton concluded that there is no way for the customer to derive PGW's resequencing scheme from the bill or the statement of accounts. Stating that the bill actually affirmatively misleads people into forming an opinion about how payments are applied and not even the most sophisticated customer would be able to discern the re-ordering process as to a customer's payment application. (Tr. 1/29/2015 Hearing Test. Roger C. Colton, Esq., pg. 623, lines 2 - 25, pg. 624, lines 1 -24). In addition, PGW's practice is a pricing decision that is designed to indirectly increase revenues and fees for the company. The practice not only violates the Tariff by increasing the 18% simple interest rate, but §1303 as well. He also determined that PGW's resequencing practice is not just and reasonable. (Tr. 1/29/2015 Hearing Test. Roger C. Colton, Esq., pg. 626, lines 2 - 25, pg. 627, lines 1 -24, pg. 628, lines 1 - 19, pg. 631,lines 20 -25, pg. 632, lines 1 -25, pg.633, lines 1 -25, pg. 636, lines 1-25, pg. 634, 1-25, pg. 635, lines 1 - 25,

pg. 636, lines 1 - 25, pg. 637, lines 1 - 25, pg. 638, lines 4 - 23, pg. 644, lines 2 - 25, pg. 645, lines 1 -25, pgs. 646, 647, 648, lines 1 -25, pg. 651, lines 4 - 25, pg. 659, lines 6 -25, pg. 660, lines 1 - 25, pgs. 661 - 677).

In **Waterman v. Jurupa Community Services,** 53 Cal.App.4th 1550, 62 Cal.Rptr.2d 264, 1996 Cal. App. LEXIS 1228, a public utility, a water company perfectly illustrates PGW's reordering process practice. The court plainly holding that manner in which water company applied payments and computed penalties, late fees and charges to customer water bill account resulted in compound interest in violation of public utility statute.

The customer in **Waterman**, 53 Cal.App.4th 1550, a hospital, challenged the method of computing penalties, late fees and charges maintaining the utility's methods violated the public utility code. The code provided a 10% basic penalty for unpaid balance and, that if the *charges and basic penalty remain unpaid* an additional .5% penalty could be applied. The utility applied an additional 10% late charge on the unpaid balance for months in which the only unpaid balance was a late penalty fee. The utility argued that the statute did not set forth the manner in which payments were to be applied to an account, thus it did not violate the statute. ***Id.*** at 1552.

The Court of Appeals reversed summary judgment for the utility in favor of the appellant, hospital, holding that the utility was charging a 10% penalty on prior 10% penalties by applying the current monthly payment to any earlier outstanding bill, if the current bill thereby became fully unpaid, a new 10% penalty was applied to the outstanding balance of the current bill. The court also found that the statute authorized a basic penalty of not more than 10 % for late payments, ***not a penalty for partially unpaid monthly account balances.*** The court accepted plaintiff's argument that after the first penalty is calculated, this initial penalty merges with the initial delinquent payment to become the new delinquency upon which the next month's penalty is to be calculated. ***Id.*** at 1555. There was no legislative intent in the statute to allow for compounding penalties. Where the utility argued, like PGW, that their late payment charges would never be paid, the court discounted that argument stating the statute allowed for an additional .5% per month penalty for non-payment of the charges and basic penalty. Like PGW, the court took notice of the utility's accounting and collection practices, finding that the application of monthly payment to the preceding month's unpaid penalty generated an unpaid cumulative balance in the current month which then provided the basis for another 10% penalty, which

compounded the penalty in clear violation of the statute. ***Id.*** at 1556. ***See also,*** **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

A. ISSUE PRESENTED

The Statute of Limitations Should Be Tolled Under the Continuing Violation Doctrine and Discovery Rule

In these matters before the Commission, there are four equitable principles that support Complainants position that the statute of limitations period should be relaxed and the equitable tolling doctrine should apply to their claims. Moreover, while the remedies are somewhat mutually exclusive, Complainants have put forth enough evidence to show that PGW should be estopped from asserting the statute of limitations as a bar to recovery.

The equitable principles at issue in the matters before the Commission for considerations are as follows: 1) The Discovery Rule, which holds that the statute of limitations does not begin to run until the plaintiff knows or should have known of the essential facts underlying the cause of action. 2) Equitable Tolling allows courts to suspend the statute of limitations from running under certain conditions when the plaintiff does not know that they have been wronged. 3) Equitable Estoppel can be used to preclude a defendant from arguing a statute of limitations defense when the defendant has induced the plaintiff to not file suit in time. Lastly, 4)[5] The Continuing Violations Doctrine encompasses elements of the aforementioned rules. The theory behind the doctrine is the continuing conduct of the defendant will justify the aggregation or parsing of its malfeasance, with the effect of rescuing plaintiff's claim from the statute of limitations.

The continuing violations doctrine offers distinct methods of analysis depending upon the facts presented. The first analysis of the doctrine invokes a last predicate wrong theory with at least one wrong continuing into the limitations period. The doctrine considers scenarios where a series of related wrongful acts, decisions, failures to act (each of which on their own may be insufficient to form the basis of a claim) *occurring both within and outside the limitations period* prior to suit, but the court will aggregate them into a single unit for limitations purposes. In this instance, the doctrine permits plaintiff to recover for the wrongs committed beyond the statute of limitations period because of their connections to the more recent wrongful predicate acts within the limitations period. Under this analysis of the doctrine, the "limitations period on a claim does not begin to run as soon as the essential elements

[5] Kyle Graham, *The Continuing Violations Doctrine*, Vol.43:2 Gonzaga Law Review, 271 (2007/2008)

first occur or when the plaintiff becomes aware that there is a cause of action, rather a claim will continue to build and absorb new wrongful acts for so long as the defendant perpetuates the misconduct. The statute of limitations will start to run upon the entirety of this accumulated malfeasance only when defendant's misbehavior ceases." Vol.43:2 GONZ.L.REV., at 281. The analysis dissects defendant's misconduct instead of aggregating the separate misdeeds. The theory flows from the premise that defendant's perpetual misconduct, or failure to redress prior misconduct constitutes individually separate and actionable fresh claims accruing within the limitations period on a day-to-day, act -by-act basis. The activity may comprise multiple acts or omissions, that occurred outside of the of the limitations period, but because the wrongful acts continue and are ongoing within the limitations period the claim holds and is not time barred. Where there are related continual unlawful acts that extend into the limitations period, the courts reason that it is not in the interest of justice for the plaintiff to bring separate actions to advance its claims and therefore, the last predicate wrongful act can toll the limitations period.

In **Taylor v. Mierick,** 712 F.2d 1112 (7th Cir. 1983), Judge Posner opined that "allowing the plaintiff to sue for infringements occurring both within and outside of the limitations period prior to suit 'strikes a balance between the plaintiff's interest in being spared having to bring successive suits, and the two distinct interests . . .if the last act in the 'unlawful course of conduct' occurred within the limitations period, '[s]ome of the evidence of this . . . misconduct will be fresh." ***Id.*** at 1119.

Courts have also applied a more hybrid theory of the continuing violations doctrine requiring related wrongful acts that extend into the limitations period, and courts will consider, a defendant's failure to improve his misconduct or inaction, giving rise to continuing claim, especially where the wrongful acts produce continuing injuries. Vol.43:2 GONZ.L.REV., at 287. In practice, courts tend to dovetail elements of the discovery rule when considering whether the doctrine applies. The discovery rule does not allow the plaintiff to rest on their laurels and await discovery that they have been wronged, the plaintiff must make reasonably diligent efforts to uncover the wrongs alleged and but for the defendant's fraudulent (passive or active) concealment, plaintiff would have known to file a claim prior to the expiration of the limitations period. Or, "where defendant's fraud or concealment causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the statute of limitations as a bar to the claim...[T]his does not mean fraud in the strictest sense encompassing an intent to deceive, but rather fraud in the broadest sense which includes an unintentional

deception." **Nesbitt v. Erie Coach Company**, 416 Pa. 89, 92, 96 (1964) (where plaintiff was misled by defendant's agents that her case would be settled when all the facts were in, thus lulling her into sleeping on her rights). "If the circumstances are such that a man's eyes should have been open to what is occurring, then the statute begins to run from the time when he could have seen, but if by concealment, through fraud or *otherwise,* a screen has been erected by his adversary which effectually obscures the view of what has happened, the statute remains quiescent until actual knowledge arises." **Nesbitt**, at 96, quoting **Schwab v. Cornell**, 306 Pa. 536, 539, 160 A. 449, 450 (1932).

The Commission does not have to look to seventh circuit courts for guidance on the continuing violations doctrine, our own third circuit has applied the doctrine several times and it has been upheld by the US Supreme Court. In the case of **West v. Philadelphia Electric Company,** 45 F.3d 744, 1995 U.S. App. LEXIS 1070, the third circuit court of appeals vacated the judgment of the district court and remanded for a new trial in a Title VII discrimination lawsuit. The court applied the equitable exception of the continuing violations doctrine to plaintiff's claims outside of the limitations period holding plaintiff's claims for discriminatory conduct that began prior to filing period could be pursued if he could demonstrate that the act was a part of an on-going practice or pattern of discrimination of the defendant. ***Id.*** at 754. The court further reasoned that in showing the claim falls under the continuing violations theory, at least one act occurred within the limitations filing period, whether any present violation exists and where the plaintiff can show the occurrences were not sporadic or isolated but rather a persistent, on-going pattern of discrimination. ***Id.*** at 755.

The US. Supreme Court adopted a different approach to the continuing violations rule which addressed a securities regulatory issue which relied more heavily on the discovery rule, in **Merck & Co., Inc. v Reynolds**, 559 U.S. 633; 2010 U.S. LEXIS 3671, an action alleging a 10-b violation for securities fraud whereby plaintiff did not discover the facts of the violation until after the statute of limitations period had run, the court held that a cause of action accrues 1) when the plaintiff did in fact discover, or 2) when a reasonably diligent plaintiff would have discovered, 'the facts constituting the violation' - whichever comes first. The court also include among its factors to consider as facts constituting the violation exists is defendants' scienter, a mental state embracing intent to deceive, manipulate, or defraud. The court rejected Merck's argument that the plaintiff was on inquiry notice, ie had knowledge of facts that would lead a reasonable person to begin investigating the possibility that his

rights had been infringed and consequently acquire actual knowledge of the defendant's misrepresentations. Id. at 650, 651. Regarding inquiry notice, the court found that the discovery of facts that put a plaintiff on inquiry notice does not automatically begin the running of the limitations period. Id. at 652.

Complainants believe that the facts of their case can fit squarely into any of the variations of the continuing violations doctrine and that equitable remedies are necessary to redress their injuries. The record shows that Complainants relied on PGW's assurances to stave collections while their PGW representative investigated their billing collection and payment application matters and would provide explanations to these questions. In good faith, they worked with John Dunn, PGW's Director of Commercial Resources Center, who from 2006 through 2009. Complainants relied on the agreement made in 2008 with PGW attorneys and John to to continue to work together, give Mr. Dunn time to investigate and work towards resolution. Mr. Savage acknowledged the agreement existed when he replaced Mr. Dunn, and Mr. Savage never testified that the agreement had ended. Furthermore, his conduct led Complainants to believe that he, too, was working on obtaining information for Complainants' review. With the knowledge and supervision of PGW attorneys, Raquel Guzman and Gerald Clark, Mr. Dunn suspended collection actions, negated shut off notices, and made representations that he was investigating their claims and would supply Complainants with information regarding their application of payments. (Tr. 8/27/2013 Hearing Test. John Dunn, pgs.277 - 428). Upon his retirement, Mr. Dunn told his successor, Ralph T.Savage, that we are working with the client and its an ongoing process. (Tr. 8/27/2013 Hearing Test. John Dunn, pg. 346, line 5-10). Mr. Dunn worked in concert with PGW counsel, Raquel Guzman and Complainants' counsel, David Hyman to establish a working dialogue and established concrete action steps PGW would take to provide Complainants with the information they requested concerning application of payments. (Tr. 8/27/2013 Hearing Test. John Dunn, pg. 374, lines 22-25, pg. 375, lines 1-24, pg 385, lines 1-3, 15 -24; pg. 390, lines 18-25, pg. 391, lines 21 -25, pg. 392, lines 3 - 21, pg. 420, lines 9-20). Mr. Savage also confirmed that during his tenure, the Complainants were working with PGW attorneys on matters related to their accounts.

Complainants' repeatedly requested an accounting with specific breakdowns of how payments were applied to their accounts. When PGW did provide account information, they only supplied partial statement of accounts on some, but not all of their properties. The statement of accounts do not show the

payment ordering application hierarchy nor did any PGW personnel provide any assistance on how to decipher the statement of accounts. (Tr. 8/26/2013 Hearing Test. Dan McCaffery, Esq. pg. 196, lines 4 -12, 18 - 25, pg. 197, lines 1-25, pg. 198, lines, 1-20; Tr. 8/29/2013 Hearing Test. Kathy Downs-Treadwell, pg.183, line 16 - 24). Ms. Treadwell's testified that while attending a technical conference at PGW after the filing of the complaints, she was told that she could decipher the applicable interest rate PGW charges on late payment charges, just by looking at the statement of accounts. What has been proven at subsequent hearings is that the neither PGW billing statements, the Tariff, statement of accounts, or any other data , nor PGW representatives John Dunn, Ralph T. Savage, Bernard Cummings, attorneys, Raquel Guzman or Gerald Clark, demonstrated or disclose the manner and order in which Complainants payments are posted and applied to their accounts.

It is uncontroverted that Complainants did not discover how the payments were posted until 2014, nearly two years after the suit had been filed, when they received a sample late payment analysis report, prepared by retired consultant, and former PGW employee, Diane Rizzo, who prepared the analysis in response to this litigation. (Tr. 1/30/2015 Hearing Test. Diane Rizzo, pg. 864, line 8 - 20). Ms. Rizzo testified that such a report was only prepared for SBG and in response to the litigation. The late payment analysis is not a document that regularly completed or dispersed to ratepayers in PGW's normal course of business.(Exh. PGW Exhibit 1B, PGW page 17, SBG/SG-CG Exh. 3). Ms. Rizzo testified that there is software available to PGW employees who can review and apply the late payment charges. (Tr. 1/30/2015 Hearing Test. Diane Rizzo, pg. 858, lines 16 -24).

Ms. Rizzo also testified that late payment charges are assessed in advance of the due date of the bill, which is not prescribed in the Tariff. (Tr. 1/30/2015 Hearing Test. Diane Rizzo, pg. 860, lines 13 -24). Ms. Rizzo testified there is a computer algorithm that posts the hierarchy of payments by first applying to security deposits, late payment charges, then arrearages before payments are posted to current charges. (Tr. 1/30/2015 Hearing Test. Diane Rizzo, pg. 870, lines 7 -24). Ms. Rizzo also testified that when PGW receives a payment during the grace period, but a late charge has been pre-assessed on the account, the late payment charge is not taken off of the account, unless the customer calls and complains. (Tr. 1/30/2015 Hearing Test. Diane Rizzo, pg. 876, lines 1 - 25).

After receiving the late payment analysis, Complainants could finally ascertain the requisite knowledge to discern the true payment posting method that PGW uses to apply its payments. Because

PGW applies payments to cumulative late charges first, payments made on the accounts do not reach principle gas charges in the amounts required to reduce the balances in accordance with the payment posted. The court in **Waterman v. Jurupa Community Services,** 53 Cal.App.4th 1550, 1556 strictly prohibited this type of payment posting finding that it resulted in penalties not afforded under the statute and compounded interest charges paid by the customer.

Complainants have shown that in dealing with PGW, Complainants diligently and actively pursued their investigation of their claims, relied on PGW's assurances and agreements reached between the parties, and tried to obtain material information and explanations pertaining to the charges and application of payments on their accounts. No one from PGW ever attempted to explain the hierarchy of the payment posting process PGW uses when applying payments to Complainants accounts. No one from the PGW legal department, not the PGW managers who were assigned to provide Complainant with fiscal information, ever disclosed the payment posting scheme until PGW was forced to turn over the information in discovery. These facts are uncontroverted and PGW offers no defense as to why they did not supply the information sooner.

PGW's clandestine behavior is reprehensible and should not be rewarded by precluding Complainants from bringing claims outside of the limitations period. In **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450, the Bankruptcy Court found Wells Fargo's conduct to be willful and egregious when it violated the automatic stay in a bankruptcy action. Wells Fargo misapplied Mr. Jones payments pre-petition and post-petition, this application method was directly contrary to the terms of Jones' note and mortgage, as well as standard form mortgages and notes. Those forms required the application of payments first to outstanding principal, accrued interest, and escrowed charges, then fees and costs. The improper amortization resulted in the assessment of additional interest, default fees and costs against the loan. Wells Fargo applied payments received from a bankruptcy debtor or trustee to the oldest charges outstanding on the mortgage loan rather than as directed by confirmed plans and confirmation orders. This resulted in the incorrect amortization of mortgage loans post-petition. The evidence established the utilization of this application method for every mortgage loan in Wells' mortgage portfolio. As a result, monetary defaults claimed by Wells Fargo on the petition date were incorrect.In fashioning an award for punitive action because Wells Fargo's conduct throughout the history of its dealings with Mr. Jones, the court considered the following: 1) Wells Fargo's practices

resulted in over charges to Mr. Jones' loan and all of loans similarly situated. 2) Wells' conduct was determined to be clandestine, because when Mr. Jones questioned the amounts owed, Wells refused to explain its calculations or provide an amortization schedule and accounting. Rather than provide Mr. Jones with a complete history of his debt on an ongoing basis, Wells stopped communicating once it deemed him in default. Only through litigation was Wells' dubious accounting practices discovered. 3) Wells admitted to the practice. 4) Wells denied responsibility to refund payments demanded in error.

Upon consideration of Wells Fargo's misapplication of payments and the net effect, their unrepentant conduct in denying culpability and the breath and scope of the injury and harm, the court ordered Wells to pay punitive damages in the amount of $3,171,154.00. *See*, **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

In Re Providian Financial Corporation Securities Litigation, 152 F. Supp.2d 814, 2001 U.S. Dist. LEXIS 9084, is a securities case where high level managers scienter gave way to a strong inference of knowledge or recklessness in failing to disclose material information to investors on revenues collected from finance charges was based upon unscrupulous revenue generating tactics to customers, by delaying posting customer payments to generate late fees, and absent customer complaints, the company strongly discourage reversal of erroneous late fees. Ms. Rizzo testified that PGW engages in similar practices. (Tr. 1/30/2015, Hearing Test. Diane Rizzo, pg. 860, lines 13-21, pg. 876, lines 3 -20).

PGW admits the parties were engaged in ongoing conversations and inquiries, which they alleged continued even after Complainants filed suit[6]. There is testimony that even after filing suit the parties continued to engage in technical conferences at PGW's offices whereby the Complainants requested information on PGW's methodology as to payment application on their dispute accounts. Complainants required the internal technical information to reconcile their accounts which was only available through PGW's internal fiscal operations to better understand the accounting methods and practices.[7] The

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[6] See PGW's Answers to Complainants' Requests for Admissions.

[7] **66 Pa.C.S.§ 3309. Liability for damages occasioned by unlawful acts. (a) General rule.**--If any person or corporation shall do or cause to be done any act, matter, or thing prohibited or declared to be unlawful by this part, or shall refuse, neglect, or omit to do any act, matter, or thing enjoined or required to be done by this part, such person or corporation shall be liable to the person or corporation injured thereby in the full amount of damages sustained in consequence thereof. The liability of public utilities, contract carriers by motor vehicles, and brokers for negligence, as heretofore established by statute or by common law, shall not be held or construed to be altered or repealed by any of the provisions of this part.

testimony at trial revealed that PGW has maintained its payment posting practices and finance charge scheme for over thirty years. (Tr. 1/30/2015 Hearing Test. Diane Rizzo, pg. 845, lines 22-25, pg. 846, lines 1 - 7). If this practice has been in place for thirty years, why didn't PGW answers these questions back in 2002 or 2004 or 2006 or 2010, or 2012? Why did PGW fight so hard in discovery, objecting to every set of requests Complainants' propounded? *See* **Waterman v. Jurupa Community Services,** 53 Cal.App.4th 1550, 62 Cal.Rptr.2d 264, 1996 Cal. App. LEXIS 1228.

Perhaps the answer lies in PGW's Vice President of Billing and Collections, Bernard Cummings' testimony, who in response to questioning by Ms. Boone states as follows, Ms. Boone, Question: "I want to understand how PGW ensures that a property that has been liened is no longer being charge the 18 percent interest and instead has been converted to six percent. The late payment charge doesn't indicate what lien charge, what interest is being charged on the debt. Witness, Bernard Cummings, V.P, PGW, Answer: I understand the question. It's my understanding that late payment charges are applied at 18 percent for all unpaid balances. That means if they're liened or not liened. So if a balance has not been paid, it's my understanding that the 18 percent late payment charges apply."(Tr. 8/26/2013 Hearing Test. pg.14.lines 5-9, 14 -19); Ms. Boone, Question: So even after a lien is imposed, you continue to charge 18 percent? Witness, Bernard Cummings, V.P. PGW Billing and Collections, Answer: That is my understanding right now. Ms. Boone, Question: ...The authority to continue to charge 18 percent, where do you get that from? Witness, Bernard Cummings, V.P, PGW, Answer: The 18 percent, I believe, is a tariff rate that we can charge. .. Or maybe the rate, the highest rate that is applicable by state law, I believe." (Tr. 8/26/2013 Hearing Test. pg.15, lines 5 -11, 13 -14).

Another telling statement about PGW's scienter on its practices related to imposing late fees and penalties on customer accounts is evident in the record when the context of Mr. Cummings' testimony was reiterated by PGW counsel, Laureto Farinas, who in the course of oral argument before the court on the appropriate interest rate to be applied to docket post judgment liens, offers to the court, Mr. Farinas, PGW counsel: "Your Honor, as I stated, and I can bring a witness tomorrow that will testify as to how interest is charged. My witness will state that municipal interest is not charged on municipal liens and we can explain ***the scheme*** in which the tariff rate is continued to be charged, because it is not a finalized account. We can explain ***our scheme*** for that, and I believe it is consistent with both the municipal lien code and with the tariff." (Tr. 8/29, 2013 Hearing Test. Mr. Laureto Farinas, Esq., PGW

counsel, pg. 209, lines 20 -25, pg 210, lines 1 - 4). Scheme, defined as 'a large scale systematic plan or arrangement for attaining some particular object or putting a particular idea into effect', is an odd word choice for what has been determined by some authorities as a dubious business practice.

The Commission should look to both **In Re Providian Financial Corporation Securities Litigation**, 152 F. Supp.2d 814, 2001 U.S. Dist. LEXIS 9084 and **Merck & Co., Inc. v Reynolds**, 559 U.S. 633; 2010 U.S. LEXIS 3671 when evaluating applicability of the discovery rule and equitable tolling. In **Merck**, the Supreme Court, affirming the court of appeals ruling finding plaintiffs claims were timely evaluated the elements for invoking the discovery rule doctrine to toll the limitations period. Citing a treatise, 2 Corman §11.1.1 at 134, describes "the discovery rule" as allowing a claim to accrue when the litigant first knows *or with due diligence should know facts* that will form the basis for an action. . .in addition to actual knowledge of the fraud, once a reasonably diligent party is in a position that they should have sufficient knowledge or information to have actually discovered the fraud, they are charged with discovery. ***Id.*** at 646. In rejecting *Merck's* premise that plaintiffs were on inquiry notice prior to the limitations period expiring, the court found that discovery of facts that put a plaintiff on inquiry notice *does not* automatically begin the running of the limitations period. The limitations period begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting the violation - whichever comes first. ***Id.*** at 653. The court also held that facts constituting the violation include, but not solely, the fact of scienter, a mental state embracing intent to deceive, manipulate, or defraud.

In considering Complainants case, Complainants had no reason to believe that PGW's internal accounting practices were the cause of their claims. Complainants, without having explanations from PGW, initially believed that there were high bills due to bad meter reads, back billings, liens imposed, they really had no idea what was the underlying root of their issues. The statement of accounts proffered by PGW did not offer any assistance to help them uncover the source of the problem either. PGW's concealment, intended or not, omission of a material facts may give rise to a finding of scienter. In fact, PGW's insistence the Complainants' payment history was the primary source of their large arrearages and disputed accounts reinforces their scienter in not wanting to reveal the underlying cause of the disputes. It works for PGW to blame the victim and paint them with a broad brush as 'deadbeats'.

While the presiding officer may want to hold Complainants to a higher standard for not filing

sooner, the Commission must consider that Complainants did file suit without knowing the extent of and actual cause of their injuries. They did not rest on their laurels and wait for the fraud to be exposed. From 2006 until 2012, PGW toyed with Complainants, stringing them along, in concert with PGW legal counsel, the organization took affirmative steps by entering into agreements and arrangements with Complainants, relying on PGW's assurances to investigate their claims, took PGW at their word they were all dealing in good faith. And while mere negotiations will not give rise to estoppel, where there is concealment, omissions of material facts, or unintentional deception by the defendant may be estop from barring Complainants claimsl. **Nesbitt v. Erie Coach Co.**, 416 Pa. 89, 96. (1964). **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

Instead of looking at the Complainants as the bad actors, a vivid picture that PGW wants to paint, let's look at PGW's sins. They could have very easily provided Complainants with answers and provided a late payment analysis. They chose not to. And, regarding the 2005 Simon/Fernrock settlement agreement made between the parties, that was no agreement, because there was no full disclosure. That agreement was akin to a pre-nuptial agreement that is voidable, if one party fails to disclose all of their assets. If PGW had to produce their books back then the entire scheme would have been found out, so their magnanimous gesture to settle and waive the late payment charges, was not magnanimous. Everyday PGW waives a statement of accounts in a customer's face and proclaims the statements are right and the bill is correct as rendered, when we now know that it is not true. But PGW will not admit their culpability in this action. Blaming the Complainants for their own problems is easy, it is like blaming the rape victim and saying she was asking for it because she wore a mini-skirt. But that does not excuse the crime or the criminal. **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

PGW knew its scheme, and knows its scheme is wrong, and yet, PGW continues its abusive billing and collection practices. Moreover, PGW adds insult to injury by over-collecting interest through by using the safe harbor of the Municipal Lien Law to further enrich their coffers at the property owner/ Complainant ratepayers expense. PGW arrogantly ignores state law that has been in enacted for years, without stating the statutory authority that allows them to ignore the law under 42 §Pa.C.S. 8101 regarding post judgment interest. ***In Re: Michael L. Jones v. Wells Fargo***, 2012 Bankr. LEXIS 1450.

PGW's pattern and practice was in existence long before Complainants had an account with PGW. Under the continuing violations doctrine accepted in this jurisdiction, the aggregate claims theory

advanced by the court in **West v. Philadelphia Electric Company,** 45 F.3d 744, 1995 U.S. App. LEXIS 1070 decision is applicable. In **West,** the court reasoned the discriminatory conduct that began prior to the filing period constitutes an ongoing pattern and practice and has its last occurrence within the limitations period it is reasonable to measure the running time from the last occurrence and not from the first occurrence. PGW's pattern and practice has not ceased and therefore is a continuing violation in the purest sense. In **National Railroad Passenger Corp. v. Morgan,** 536 U.S. 101, 122 S.Ct. 2061, 2002 U.S. LEXIS 4214, the plaintiff was able to bring claims outside of the statute of limitations period, provided that an act contributing to the claim occurred within the filing period, the entire time period of the hostile environment may be considered by a court for purposes of determining liability. Under the holdings in both the **West** and **National Railroad Passenger Corp. v. Morgan,** cases, Complainants claims outside of the limitations period should be allowed since the claims that occurred outside of the limitations period are not sporadic, but rather are a pattern and practice of misconduct upon which claims are still accruing and continue inside the limitations period.

In completing an analysis under **Merck & Co., Inc.** 59 U.S.at 633, Complainants have demonstrated they acted with diligence in pursuing their claims against PGW. PGW provided the same billing statements, statement of accounts that they would have provided any customer. Diane Rizzo testified that the late payment analysis had not been prepared for any other customer before Complainants filed suit. Looking at the four corners of the bills and statement of accounts, no customer, not even the PGW's Vice President of Billing and Collections, Bernard Cummings can tell the payment posting order from the document on its face. (Tr. Hearing Test. Bernard Cummings, V.P., PGW 2/12/2015, pgs. 1204 -1210,lines, 3 - 10, pg. 1214, lines 2 - 14). (Tr. Hearing 1/29/2015, Hearing Test. Roger C. Colton, pgs. 623 - 625). Only PGW's employees with access to internal data can decipher the reordering scheme. It took Complainants about 12 years and filing a lawsuit to gain access to the information. One cannot genuinely argue that Complainants were not diligent in their efforts to pursue PGW for billing, collection and payment explanations, which §56.1 requires PGW to do for customers, regardless of their status as residential or commercial customer.

Therefore, if PGW was confident that their accounting practice and payment posting process complied with the Tariff and regulations, explaining their accounting practices and methodology to the customer should have been a 'no brainer'. Disclosing their payment posting practices back in the early

2000's would have saved the Complainants time and money and provided them with the requisite knowledge to better understand their account management. But PGW did not explain their methodology on their application of late fees other than to say 'we comply with the tariff and charge 1.5% per month on overdue balances.' **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

In fact, as far back as 2003, when Complainants inquired about getting calculations on their bills, John Dunn did not provide the then presumably available payment posting system and hierarchy; Ted Savage strung Complainants along from 2009 until 2012 reiterating that he was working on the matter, requesting information from Complainants in 2009, 2010, then again in 2012, claiming to have lost or misplaced the list of accounts (Late Filed Exh. SBG SG-CG All correspondence-binder 00222, 00229, 00237 00239, 00483,00484, 00485,00486, 00487,00488, 00489, 00490, 00491, 00492). In March 2012, without providing any of the documents or explanations as requested, Mr. Savage sent an email advising Complainants to file a PUC Complaint. No one from PGW ever filed a public utility report regarding Complainants' disputes. PGW continued to deny that the Complainants had disputes up until the filing of their complaints.

The presiding officer took judicial notice that Phil Pulley made a representations that he was not aware that filing with the PUC was available to him, prior to 2011. He qualified his statement by saying that he did not realize the PUC was an option for them because because the Complainants are commercial entities, yet filings show that he signed off on PUC complaints for Rink properties against PECO in 2009. Mr. Pulley's statements may color his testimony with the presiding officer, but his mis-statements do not sufficiently undercut the real facts at issue which is that PGW has failed to disclose material information to Complainants showing the true nature of how their billing and accounting practices scheme misrepresents and fraudulently collects more finance charges, late payment penalty charges from ratepayers than what is approved in the Tariff. The Tariff limits collection of finance charges on past due balances to 18% simple interest and 6% post judgment interest pursuant to 52 Pa.Code §56.22, 42 Pa. C.S.§8101, and **Equitable Gas v. Wade**, *Ibid.*

PGW's pricing scheme to re-sequence payments serves as an additional indirect revenue stream that is neither contemplated, nor disclosed to patrons in the approved Tariff and thus violates Pennsylvania state law, various chapters of the 66 PaC.S.§1303 and 1304 and 1502. and The Commissions regulations at 52 Pa.Code §56.1, §56.22. PGW has maintained this pattern and practice of

abusive billing and collections practice, reordering payments process for thirty years and they have never been caught. PGW failed to disclose the practice to ratepayers. PGW breaches its fiduciary duty the regulations as a public utility to deal honestly, fairly and in good faith with the ratepayer and to charge the rate payer the most advantageous rate available. Complainants relied on PGW's conduct. PGW concealed or recklessly, negligently omitted, misrepresented material facts that prevented Complainants from knowing about PGW's over-collection of late fees and finance charges scheme. Complainants diligently pursued discovery of their claims, but for PGW's continued pattern and practice of misconduct, Complainants would have known of their injuries earlier. PGW's actions should estop them from raising a bar to Complainants claims. **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

Complainants complaints should be sustained. Their claims should not be time barred under the equitable principles of the continuing violations doctrine and discovery rule.

B. ISSUE PRESENTED II

B. Late payment charges on outstanding balances which have been the subject of municipal liens for unpaid gas service.

Question Presented:

> II. *Does the Commission have jurisdiction to determine whether PGW has applied the correct interest rate in late payment charges to the portion of an outstanding balance that is also the subject of a lien filed by the City of Philadelphia? Provide legal grounds for your position.*

II. The Commission Has the Authority to Consider the Accuracy of the Underlying Accounting Accuracy of Complainants' Utility Bills and to Determine Whether Respondent Has Applied the Correct Interest Rate When It Applied Late Payment Charges to Complainants' Outstanding Balances That Were Docketed In the Judgment Indexes By Respondent With the Court of Common Pleas for Philadelphia County And Charged In Excess of the Statutorily Prescribed Post-Judgment Rate of Interest of 6% in Violation of 42 Pa.C.S.§8101, 66 Pa.C.S. §1303, 1304, 1502, 52 Pa.Code §56.1, and 56.22 and the Approved PGW Tariff.

The Commission has the authority to review the matters complained of pursuant to the Pennsylvania Public Utility Code codified at Title 66 Pa.C.S. Ch. 101 et al and the Commissions'

regulations promulgated at 52 Pa.Code 56.1 et al.[8] and 62.74 and 62.75; along with applicable Pennsylvania statutes and rules enacted by its legislature, and case law. Respondent, PGW, is a public utility owned by the City of Philadelphia. The City of Philadelphia is the only municipality in the state that owns and oversees the operation of a municipally owned public gas service utility. Pursuant to the Municipal Claims and Tax Lien Law, Act 153 of P.L. 207, 53 P.S. § 7101, PGW has a unique relationship with the City of Philadelphia because it has the power to direct the filing and entry of liens into the judgment index and dockets of the Court of Common Pleas for Philadelphia County for unpaid gas service without having to provide due process requirements to the property owners.[9]

As such, PGW in the ordinary course of its daily business activities files unpaid gas debts with the City of Philadelphia. If the liened debts are unpaid, PGW's readily admits its practice is to continue to charge finance charges (late payment fees) on the outstanding balance of the account at a rate of 1.5% month until they are satisfied. The liened indebted amount remains included in the customer's outstanding balance and as new charges accrue, the entire balance is subject to the 1.5% monthly finance charge, if the amounts remain unpaid.

The above described scenario has repeatedly occurred on Complainants' accounts whereby unpaid paid gas debts were docketed in the Court of Common Pleas judgment index without Complainants' knowledge, and they became aware that the property was encumbered with the liens. While Complainant does take issue with the wanton practice PGW exercises in encumbering a property owners interest without sufficient notice to the property owner to validate the underlying debt prior to

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[8] **52 Pa.Code §56.1. Statement of purpose and policy.**

(a) This chapter establishes and enforces uniform, fair and equitable residential public utility service standards governing eligibility criteria, credit and deposit practices, and account billing, termination and customer complaint procedures. This chapter assures adequate provision of residential public utility service, to restrict unreasonable termination of or refusal to provide that service and to provide functional alternatives to termination or refusal to provide that service while eliminating opportunities for customers capable of paying to avoid the timely payment of public utility bills and protecting against rate increases for timely paying customers resulting from other customers' delinquencies. Public utilities shall utilize the procedures in this chapter to effectively manage customer accounts to prevent the accumulation of large, unmanageable arrearages. Every privilege conferred or duty required under this chapter imposes an obligation of good faith, honesty and fair dealing in its performance and enforcement. This chapter will be liberally construed to fulfill its purpose and policy and to insure justice for all concerned.

(b) ***This subchapter and Subchapters B—K apply to electric distribution utilities, natural gas distribution utilities and water distribution utilities. Subchapters L—V apply to wastewater utilities, steam heat utilities, small natural gas utilities*** and to all customers who have been granted protection from abuse orders from courts of competent jurisdiction. Authority: The provisions of this § 56.1 amended under Chapter 14 of the Public Utility Code (66 Pa.C.S. Chapter 14). ***(emphasis added).***

[9] Complainants are not raising a collateral attack on the Municipal Claims and Tax Liens Law, but rather reciting a fact.

filing the lien, PGW has the right to levy property to secure its unpaid gas debt, so long as it has the safe harbor afforded under the Municipal Claims and Tax Lien Act.

Nevertheless, Complainant does dispute that PGW has the right to obtain a judgment which encumbers the property and subjects the property to the potential for foreclosure and continue to impose either 1.5% per month simple or compounded interest for finance charges on the same amount that has been reduced to judgment and is of record on the lien judgment docket in the Office of the Prothonotary of the Court of Common Pleas.

Question Presented.

III. *Explain whether or not a lien filed by the City of Philadelphia for unpaid gas service is considered a judgement under 42 Pa.C.S. § 8101? If yes, explain when a lien becomes a judgement. Provide legal grounds for your position.*

III. Yes, The Commission Has the Authority to Determine That A Lien Filed By The City of Philadelphia on Behalf of the Respondent For Unpaid Gas Service That is Docketed In the Judgment Indexes With the Court of Common Pleas for Philadelphia County, Pennsylvania Is A Judgment Pursuant To Pa.R.C.P. Rule 3021, Pa.R.C.P. 3023, and Under 42 Pa.C.S. § 8101 and is Subject to Accrual of Post-Judgment Interest Only At the Statutory Rate of Six Percent (6%) Per Annum Until The Judgment Is Satisfied.

Pursuant to **Pa.R.C. P. Rule 3001**, a judgment is defined as a judgment or order requiring the payment of money or adjudicating the right to possession in an action of replevin, including a final or interlocutory order for the payment of costs entered in any court which is subject to these rules....Under **Pa.R.C.P. Rule 3021.Verdict. Order. Judgment.** Entry in Judgment Index, the prothonotary shall immediately enter in the judgment index a verdict or order or a specific sum of money with the notation "verdict" or "order." The entry shall state the amount of the verdict or order. Section 8142(e) of the Judicial Code, 42 Pa.C.S. § 8142(e), requires the prothonotary to "note on the dockets in such office where each verdict, judgment, order, instrument or ***writ creating a lien against real property*** is entered, the time it was recorded, rendered, left for filing, or issued." The rule presumes a channel of communication between the court and prothonotary so that the prothonotary may "immediately" docket a judgment entered by the court. (*emphasis added*).

Immediately following Rule 3021 of Pennsylvania Rules of Civil Procedure is the proscription for further defining the effect of a judgment lien entered county index to which the property sits:

Pa.R.C.P. Rule 3023. Judgment. Lien. Duration.

(a)Except as provided by subdivision (b), a judgment when entered in the judgment index shall create a lien on real property located in the county, title to which at the time of entry is recorded in the name of the person against whom the judgment is entered.

(b) A judgment upon a verdict or an order, when entered in the judgment index, shall
(1) continue the lien upon real property located in the county which is subject to the lien of the verdict or order upon which the judgment is entered, and

The lien of a verdict or order dates from the time the verdict or order is entered in the judgment index. See Rule 3022(a).

(2) create a lien upon all other real property located in the county, title to which at the time of entry in the judgment index is recorded in the name of the person against whom the judgment is entered.

In the Pennsylvania Supreme Court case **In Re Upset Sale, Tax Cl.Bureau of Berks,** 505 Pa. 327, 334 (Pa. 1984), *479 A.2d 940.*1984 Pa. LEXIS 292, the court reasoned "judgment liens are a product of centuries of statutes which authorize a judgment creditor to seize and sell the land of debtors at a judicial sale to satisfy their debts out of the proceeds of the sale. . . .when the judgment is entered of record, the judgment also operates as a lien upon all real property of the debtor in that county, 42 Pa. Pa.C.S.A Sections 4303(a)(b, 1732(b) and 2737(3)". "The judgment lien thus constitutes a liquidated claim...." ***Id.*** at 355. All lawfully imposed or assessed municipal claims are liens on the property by operation of law. Section 3 of the Municipal Liens Act, 53 P.S. § 7106; **N. Coventry Twp. v. Tripodi,** 64 A.3d 1128,1132 (Pa. Cmwlth. 2013). The Municipal Liens Act provides for a specific, detailed and exclusive procedure that must be followed to challenge or collect on a municipal lien placed in cities of first class, such as the City. Tripodi, 64 A.3d at 1133, cited in **Agnes Manu v. City of Philadelphia**, 84 C.D 2012, 2013 Pa. Commw. LEXIS 446.

Wherefore, in accordance with statutory rules of construction found in the Pennsylvania Rules of Civil Procedure, reiterated in **Agnes Manu v. City of Philadelphia**,*Supra.*, a lien imposed by the City of Philadelphia constitutes a judgment which is entered by operation of law with the prothonotary upon proper docketing, much like a child support judgment .

Question Presented.

> IV. *What is the correct interest rate in late payment charges that should be applied on that portion of an outstanding balance which is the subject of a municipal lien (or unpaid gas service) filed by the City of Philadelphia? Provide legal grounds for you position.*

IV. The Commission Has the Authority to Determine That The Correct Interest Rate Respondent May Apply to Unpaid Gas Debt Filed As A Lien and Docketed In the Judgment Indexes With the Court of Common Pleas for Philadelphia County, Pennsylvania Is A Judgment Subject to the Collection of Post-Judgment Interest At the Statutory Rate of Six Percent (6%) Per Annum Only Until The Judgment Is Satisfied Pursuant to 42 Pa.C.S. §8101, 41. Pa.S. §202, 66 Pa.C.S. §1303, 1304, 1502, and 52 Pa.Code §56.22.

In considering the proper statutory rate of interest to impose on post-judgment liens, the Pennsylvania legislature has contemplated this matter and has enacted **42 Pa.C.S.§8101, Interest on judgments.**

> Except as otherwise provided by another *statute*, a judgment for the specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.
> *41 P.C.S. §201* establishes that the legal interest rate in Pennsylvania is 6%, which comports to the comments and notes of decisions in 52 Pa.Code .§56.22

Moreover, the legislative intent to treat a lien as a final judgment worthy of having the effect to encumber the real property is reiterated by the legislature's enactment of the Pennsylvania rule of civil procedure codified at Pa.R.C.P. Rule 3023 and the ***statutory*** construct of *§8101* and the rule of civil procedure, both legislative mandates, are further reinforced by the Commission's own regulations which are subordinate to statutory law. At 52. Pa. Code **§ 56.22. Accrual of late payment charges.**

> **§ 56.22. Accrual of late payment charges.**
> (a) Every public utility subject to this chapter is prohibited from levying or assessing a late charge or penalty on any overdue public utility bill, as defined in §. 56.21 (relating to payment), in an amount which exceeds 1.5% interest per month on the overdue balance of the bill. These charges are to be calculated on the overdue portions of the bill only. **The interest rate, when annualized, may not exceed 18% simple interest per annum. (*emphasis added*).**
> (b) An additional charge or fixed fee designed to recover the cost of a subsequent rebilling may not be charged by a regulated public utility.
> (c) Late payment charges may not be imposed on disputed estimated bills, unless the estimated bill was required because public utility personnel were willfully denied access to the affected premises to obtain an actual meter reading.

(d) A public utility may waive late payment charges on any customer accounts. The Commission may only order a waiver of late payment charges levied by a public utility as a result of a delinquent account for customers with a gross monthly household income not exceeding 150% of the Federal poverty level. See 66 Pa.C.S. § 1409 (relating to late payment charge waiver).

Authority

The provisions of this § 56.22 amended under the Public Utility Code, 66 Pa.C.S. § § 331, 501, 504, 1301, 1305, Chapter 14, 1501 and 1504.

Source

The provisions of this § 56.22 adopted June 16, 1978, effective June 17, 1978, 8 Pa.B. 1655; amended April 8, 1983, effective April 9, 1983, 13 Pa.B. 1250; amended October 7, 2011, effective October 8, 2011, 41 Pa.B. 5473. Immediately preceding text appears at serial pages (337342) to (337343).

Notes of Decisions

Conflict with Statute: Since 42 Pa.C.S. § 8101 (relating to interest on judgments) limits post judgment interest to 6% per year unless otherwise provided by another statute, it supersedes the regulation that provides for 18% interest per year on amounts owed to a public utility. Equitable Gas Co. v. Wade, 812 A.2d 715 (Pa. Super. 2002).

The notes of decisions read in conjunction with the regulations set forth at 52 Pa.Code § 56.22 regarding the accrual of late payment charges is crystal clear and is further supported by caselaw. The note clearly states that the ***statute, 42 Pa.C.S. § 8101***, controls over the regulatory pre-judgment interest rate, and cites a case directly on point which reinforces the proposition that the statutory post-judgment interest rate is the legal rate after judgment. **Equitable Gas v. Wade, 812 A.2d 715 (Pa. Super. 2002).**

Moreover, when a lien is docketed in the judgment index of the county in which the real or personal property exists, the doctrine of merger is initiated and the statutory construct controls, i.e. as articulated in **Equitable Gas v. Wade, 812 A.2d 715 (Pa. Super. 2002)**, which is squarely on point. As the court reasoned in **Equitable Gas v. Wade**, "[a]ppellant, [Equitable] was certainly entitled to charge 18% per year pursuant to the tariff until ...it obtained a final judgment in the Court of Common Pleas. At that point, the doctrine of merger applies...Appellant's choice to take recourse with the court system required it to be governed by the rules governing actions at law, including statutory provisions governing post-judgment interest. "

Moreover, the ***Wade*** court was quite clear when it stated ' neither the regulations nor the Tariff supercedes § 8101, for the simple reason that neither one is a "statute" as that term is defined by statutory and case law."***Id.*** at **717.** The court went onto conclude that "[b]ecause the judgment extinguishes any claims with respect to the overdue bill, and because the only legal rate of interest on a judgment is set forth at §8101, we conclude that the trial court did not err in dismissing Appellant's

claims for 18% interest after the judgment was entered." **Id.**, at 718,719. Simply stated, PGW has no choice but to limit its collection of post-judgment interest to 6% in accordance with the statute, when it elects to file a lien by operation of law. Likewise, under 66 Pa.C.S. §1303, PGW is held to charging a rate in accordance with the approved Tariff and can in no way whatsoever charge a patron a rate in excess thereof, moreover, PGW has a duty to charge the ratepayer the most advantageous rate under the Tariff. PGW's practice of charging in excess of 18% on post-judgment debt violates state law, the Pennsylvania Public Utility Code and the regulations promulgated by the Commission. **LP Water and Sewer Co. v. Pennsylvania Public Utility Commission**, 722 A.2d 733; 1998 Pa. Commw. LEXIS 912;. **PPL Electric Utilities Corporation v. Pennsylvania Public Utility Commission**, 912 A.2d 386; 2006 Pa.Commw., LEXIS 665); *See also,* **Kentucky West Virgina Gas v. Pennsylvania Public Utility Commission**, 837 F.2d 600; 1988 U.S. App. LEXIS 463; 92 P.U.R.4th 542, **Waterman v. Jurupa Community Services**, 53 Cal.App.4th 1550, 62 Cal.Rptr.2d 264, 1996 Cal. App. LEXIS 1228.

PGW's interest in securing indebtedness is protected because the lien serves as a judgment against the property for which they have the right to foreclose upon and be made whole and recoup their monies owed.

Furthermore, PGW exercised their remedy to recoup on its judgments entered against the property interest by instituting foreclosure proceedings on Complainants' properties with the Court of Common Pleas. The matters are still pending before the court until the Commission decides on the underlying accounting issues presented in these consolidated cases.

While the foreclosure proceedings are stayed before the Court of Common Pleas, Complainants accounts continue to accrue per-judgment interest. Therefore, it is disingenuous for PGW to assert that the lien is not a judgment, but rather a marker as alleged by PGW, counsel, Laureto Farinas. (Tr. 8/29/2013 Hearing pg, 212, lines 18-25.) *If the judgment were only a marker, then PGW would not be* able to enter the judgment by operation of law with an instant property right vested for the creditor. It is fundamentally unfair to institute an action in foreclosure to deprive a property owner of his property and still collect pre-judgment interest when the judgment creditor has the remedy at law to take the property securing the amount of the indebtedness. It amounts to a double dip and unjust enrichment.

The statutory construction codified at 42 Pa.C.S. § 8101, 41 P.S. §202, in the regulations promulgated under 52 Pa.Code § 56.22 and the court's ruling in **Equitable Gas v. Wade**, Ibid. at 718 is clear, *PGW may not impose the lien* **and** *allow the balance to continue to accrue finance charges at the*

18% *simple interest* rate per annum, while vesting an encumbering property interest on the property. PGW may charge the higher **simple** interest rate (18%) to the accruing balance and wait for the property to be sold by the owner on his own and collect on the unpaid balance at settlement. Or, PGW can file the lien which seals the judgment and still accrue post judgment interest at the lower rate of 6% per annum and foreclose and take the property, but equity and statutory construction dictates that PGW cannot do both. "After the plaintiff recovers a final judgment, his original claim is extinguished and rights upon the judgment are substituted for it". **Equitable Gas v. Wade**, Ibid. at 718. The legal doctrine of merger precludes PGW having both pre-judgment interest and a secured property interest in Complainants property.

At the hearing held on January 29th and 30th, 2015, Complainants' witness, Kathy Downs-Treadwell, sponsored exhibits that demonstrated the effect that PGW's accounting practices have had on the SBG/Simon Garden and SBG/Colonial accounts as it pertains to finance charges accruing at 18% *compounded* per annum[10] versus assessing the statutory simple interest rate of 6% per annum post judgment for the periods that the liens remain docketed as judgments in the Prothonotary' Office. The analysis is limited by the decision of the presiding officer to not look beyond the filing date of the amended complaints, therefore her analysis considers known liens on these accounts from the inception of the accounts through December 2012, and the impact is striking and shows the amounts Complainants' have paid in finance charges at the compounded18% interest rate $471,351.38 versus 6% simple interest per annum $141,582.47 for SBG/Simon Garden, the difference Complainants have been charged between the two rates is $329,768.91 for the SBG/Simon Garden property. Conducting the same analysis for SBG/Colonial Garden, Complainants paid finance charges on the judgment liens of $94,626.23 at 18% compounded per annum, versus being charged the legally statutory rate of 6% simple interest per annum which would have been, $28,668.50, a SBG/Colonial Garden, a difference of $65,957.73.. Ms. Treadwell's conclusions were supported by Complainants' the testimony of its expert witnesses, Mr. Jeremy G. Gabell, CPA and public utility regulatory expert Roger C. Colton, Esq. (Tr. 1/29/2015 Hearing Test. Roger C. Colton pgs. 659, pg 6 -16;), (Tr. 1/29/2015, Hearing Test. Ms. Kathy

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[10] At the 2015 hearings Complaints' witnesses, Kathy Downs-Treadwell, Jeremy Gabell, C.P.A., and Roger C. Colton, Esq., illustrated, testified and/or confirmed that PGW's accounting methods and practices as to re-sequencing customer payments to pay-off cumulative finance charges first results in compounding the 18% simple interest rate and affectively raises the APR interest rate of the finance charges to 19.562% annually. (See SBG SG/CG Exhs. 3 and.7) *See also,* ***Waterman v. Jurupa Community Services,*** 53 Cal.App.4th 1550, 62 Cal.Rptr.2d 264, 1996 Cal. App. LEXIS 1228, holding that manner in which water company applied payments and computed penalties, late fees and charges to customer water bill account resulted in compound interest in violation of public utility statute.

Downs-Treadwell, pgs. 490 - 562). (Tr. 1/29/2015, Hearing Test. Jeremy Gabell, pg. 606, lines 1-24, pg. 608, lines 10-19).

PGW has maintained this dubious practice for years, and despite the fact that the Commission's regulations under 52 Pa.Code §56.22 conspicuously displays a cautionary note and cites the holding in **Equitable Gas Co. v. Wade, 812 A.2d 715 (Pa. Super. 2002)**, which clearly, unambiguously states that the statutory rate applies to post-judgment interest, PGW has not seen fit to change its' practices. PGW's rationale is that [we] do not collect the 6% post judgment interest to which they are statutorily entitled is meaningless, since, of course, it is in the company's best interest to increase its revenues by continuing to accrue finance charges on the higher *compounded* interest rate of 18% per annum[11] accruing on the higher balances, inclusive of the balance for which they already have a judgment locked up and attached to a real property. Notwithstanding, the ruling in **Equitable Gas v. Wade**, *Supra,* strictly forbids PGW's practice, the practice is discriminatory on its face as it creates a discriminatory class of ratepayers who are penalized for property ownership. Residential renter ratepayer tenants who do not have their property interest jeopardize by operation of law as Complainants and other similarly situated property owners have at stake for non-payment of their gas bill.

Moreover, the testimony and record shows that PGW's record keeping and accounting practices when it comes to filing liens is suspect at best, where in 2011, there was a discrepancy of $60,000 in the amount of lien debt PGW, attorney Gerald Clark and Ted Savage supplied Complainants. (Tr. 8/29/2013 Hearing Test. Phil Pulley, pgs, 62 - 66, SBG/SG-CG Exhibit PGW.Corr0025, PGWCorr00028, PGWCorr00029, PGW Corr00033, PGWCorr00034).

Complainant's Expert witness, Roger C. Colton, Esq., a public utility regulatory expert testified that PGW's accounting practices and methodology of continuing to apply the pre-judgment interest rate to post judgment amounts secured by liens is part of its pricing decision and violates the tariff, because it allows PGW to collect monies in excess of the approved tariff and violates 66 Pa.C.S. §1303[12], the

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[11] PGW's 2014 Comprehensive Annual Report at pages 17 and 24 show that at least 19% of its operating revenues was derived from finance charges collected from customers. (See References Appendix: 1) 2014 PGW Comprehensive Annual Report)

[12] **66 Pa.C.S §1303. Adherence to tariffs.** No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

statute that imposes an absolute duty on PGW to adhere to the approved tariff and to compute bills under the most favorable advantageous rate to the customer. He further opined that the utility shall [not] institute any device [practice] directly or indirectly, whatsoever or in anywise, that directs [payments] to the utility from the customer in any greater rate other than the specified tariff. Complainants submit that PGW's collection practices are not unauthorized by the tariff, constitute a breach of contract, are fraudulent and misleading, are in contravention to well-established Pennsylvania law and violate 66 Pa.C.S. §1303. Furthermore, PGW's lien imposition practice disproportionately discriminately disaffects property owners similarly situated because it creates a different rate class of customers who in affect are charged a disadvantageous and higher rate in violation and the scheme allows for PGW to collect more monies to which they are not entitled under the Tariff thus, unjustly enriching the collection to take equitable action to balance the equities between parties to a public utility gas contract.[13]

To the extent that the Commission has the power and authority to enforce the authorized Tariff against a public utility, so does the Commission have the authority to reform and revise contracts entered into by a regulated public utility, ie. PGW when it is in the public interest pursuant to 66 Pa.C.S.§508. PGW's pricing decisions regarding choosing not to assess finance charges of 6%per annum (or .5% per month) on Complainants account balances reduced to lien judgments in favor of maintaining the higher

[13] ***66 Pa.C.S §508. Power of commission to vary, reform and revise contracts.***The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the public interest and the general well-being of this Commonwealth, the commission shall determine and prescribe, by findings and order, the just, reasonable, and equitable obligations, terms, and conditions of such contract. Such contract, as modified by the order of the commission, shall become effective 30 days after service of such order upon the parties to such contract.

compounded interest finance charge of 18% per annum or 1.5% compounded monthly also violates the 'fixed rate' doctrine codified at 66 Pa.C.S. §1309[14].

Furthermore, the Commission's rulings to strictly hold public utilities accountable to ratepayers where their conduct has resulted in unauthorized rate increases or violations to its Tariff, the courts have ruled in favor of the Commission's authority to revise terms found to be "unjust, unreasonable, inequitable, or otherwise contrary or adverse to public interest. **PPL Electric Utilities Corporation v. Pennsylvania Public Utility Commission,** 912 A.2d 386; 2006 Pa.Commw., LEXIS 665); *See also.* **Kentucky West Virgina Gas v. Pennsylvania Public Utility Commission**, 837 F.2d 600; 1988 U.S. App. LEXIS 463; 92 P.U.R.4th 542; and **LP Water and Sewer Co. v. Pennsylvania Public Utility Commission**, 722 A.2d 733; 1998 Pa. Commw. LEXIS 912.

Inasmuch as PGW's admits to and does not defend its accounting methodologies and practices charging compounded interest of 18% per annum on amounts liened instead of the statutory post judgment rate of 6% per annum, the scheme also creates a discriminatory rate and service solely attributable to property owners which violates 66 Pa.C.S.§1502.[15] Property owners in the City of Philadelphia are penalized for property ownership by PGW , because when the gas debt is unpaid, the safe harbor of the Municipal Claim and Tax Lien Act allows for PGW's judgment to attach and encumber the property, subjected to foreclosure, all the while the unpaid debt continues to be over-charged at the higher compounded interest rate of 18% in violation of state law and the PUC

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[14] **66 Pa.C.S.§ 1309. Rates fixed on complaint;investigation of costs of production.**
(a) General rule.--Whenever the commission, after reasonable notice and hearing, upon its own motion or upon complaint, finds that the existing rates of any public utility for any service are unjust, unreasonable, or in anywise in violation of any provision of law, the commission shall determine the just and reasonable rates, including maximum or minimum rates, to be thereafter observed and in force, and shall fix the same by order to be served upon the public utility, and such rates shall constitute the legal rates of the public utility until changed as provided in this part. Whenever a public utility does not itself produce or generate that which it distributes, transmits, or furnishes to the public for compensation, but obtains the same from another source, the commission shall have the power and authority to investigate the cost of such production or generation in any investigation of the reasonableness of the rates of such public utility.

[15] **66 Pa.C.S.§1502. Discrimination in service.** No public utility shall, as to service, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to service, either as between localities or as between classes of service, but this section does not prohibit the establishment of reasonable classifications of service.

regulations.[16] PGW has the financial accounting ability to segregate disputed amounts and suspend late payment/finance charges from accruing therefore, properly accounting for lien judgments and assigning a 6% per annum simple interest rate to accrue against the unpaid debt is not overly burdensome and is in accordance with Pennsylvania law. Lastly, if PGW were to make such a correction to its billing and collections practices, customer balances would not likely accrue such large arrearages, would be more manageable, would represent the true debt owed and in all likelihood be repaid faster. **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

The Commission has the authority and duty to act in the public interest to fashion an order to discontinue PGW's practice of maintaining both accounting and collection practices which allows for wrongful collection, violates its Tariff, produces discriminatory rate and service classes. Where PGW has imposed liens and secured judgments with the court, PGW should be prohibited from charging 18% compounded interest on post judgment debt, and limited to collecting the statutory interest of 6% simple interest as prescribed in 42 Pa.C.S.§ 8101, Pa.R.C.P. 3023 and reiterated by the court in **Equitable Gas v. Wade,** *(Supra, at 718).*

In the instant case, based upon the applicable statutes, regulations, rules, Tariff and case law, and the evidence presented, Complainants have demonstrated that PGW wrongfully collects post-judgment interest in violation of the laws that govern it and has collected from and overcharged Complainants in the amount of: SBG/Simon Garden, $$329,768.91and SBG/Colonial Garden, $65,957.73 for post-judgment interest. In accordance with their prayer for relief as set forth in their complaints[17], and they continue the practice today, continuing to cause Complainants great harm. Therefore, Complainant respectfully request that the accounts be recalculated up to the presents and order refunds in the amount

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[16] **66 Pa.C.S.§ 1304. Discrimination in rates.** No public utility shall, as to rates, make or grant any unreasonable preference or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any unreasonable prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service. Unless specifically authorized by the commission, no public utility shall make, demand, or receive any greater rate in the aggregate for the transportation of passengers or property of the same class, or for the transmission of any message or conversation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or any greater rate as a through rate than the aggregate of the intermediate rates. This section does not prohibit the establishment of reasonable zone or group systems, or classifications of rates or, in the case of common carriers, the issuance of excursion, commutation, or other special tickets at special rates, or the granting of nontransferable free passes, or passes at a discount to any officer, employee, or pensioner of such common carrier. No rate charged by a municipality for any public utility service rendered or furnished beyond its corporate limits shall be considered unjustly discriminatory solely by reason of the fact that a different rate is charged for a similar service within its corporate limits.

of at least $329,768.91 for overcharges on post-judgment penalties for SBG/Simon Garden Realty, Co. and at least, $ 65,957.73 for Colonial Garden Realty Co., respectively. In the alternative , Complainant requests a credit placed on their accounts and service agreements in accordance with the amounts requested for refund.

Wherefore, for the reasons set forth above, Complainants respectfully request that the Commission grant the prayer for relief as set forth in the Complaint and find in favor for Complainants, sustain their complaint, order PGW to refund monies collected erroneously from Complainants as a result of their unjust and unreasonable billing and collection practices, order PGW to cease and desist and reform their payment posting reordering scheme and implement a more just and reasonable accounting practice that charges and collects interest finance charges at the legal rate authorized under the Tariff, the Public Utility Code and Pennsylvania law, which is 18% simple interest per annum for pre-judgment interest and 6% simple interest per annum for post-judgment interest.

Respectfully Submitted By,

Donna S. Ross, Esq., For Complainants

Complainants Conclusions of Law

I. The Statute of Limitations Should Be Tolled Under the Continuing Violation Doctrine and Discovery Rule

1. The Commission has jurisdiction over the subject matter and the parties in this proceeding. Complainants claims are not time barred and should be tolled beyond the requirements of 66 Pa.C.S. §3314 and refunded overcharges under §1312 pursuant to the equitable principles invoked by the Continuing Violations Doctrine, the Discovery Rule and Estoppel.

2. The party seeking a rule or order from the Commission has the burden of proof in that proceeding 66 Pa.C.S. § 332(a).

3. PGW's continuous 30 year pattern, practice and conduct has violated Title 66, Ch. §1303, §1304, §1309; §1502 of the Pennsylvania Public Utility Code, the Commissions Regulations, promulgated at 52 Pa.Code §§56.1, 56.15, 56.22, 56.23, 56.24, 56.99, 56.140, 56.141, 56.151, 56.152, 62.74 and 62.75(c)(10); and well-settled Pennsylvania law codified at 42 Pa.C.S §8101, and Pa.R.C.P Rule 3023.

4. PGW's pattern and practice reordering payments posted and processed out of time is unjust and unreasonable.

5. PGW's pattern and practice reordering payments posted results in compounding the legal interest rate to which PGW is legally entitle to collect, indirectly raises the rate authorized by the Tariff and violates 66 Pa.C.S.§1303. **Waterman v. Jurupa Community Services,** 53 Cal.App.4th 1550, 1556, 62 Cal.Rptr.2d 264, 1996 Cal. App. LEXIS 1228. (The court holding that manner in which water company applied payments and computed penalties, late fees and charges to customer water strictly prohibited this type of payment posting finding that it resulted in penalties not afforded under the statute and compounded interest charges paid by the customer.

5. PGW did not disclose the payment reordering process to patrons and maintains a continuing pattern and practice of concealing, omitting and failing disclose substantially material facts, which harmed Complainants, and despite Complainants diligence to discover such material facts to prevent further injury, Defendants misconduct precluded them from discovering their initial injury within the limitations period. **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

6. Respondent's misconduct occurred outside of the limitations period, and Respondents' predicate acts have continued within the limitations period and constitute a pattern and practice that continues to cause harm Complainants by failing to disclose and by maintaining a payment reordering process that results in charging and collecting late fees and penalties on pre-judgment and post judgment interest at the compounded rate of 18%, with an APR of 19.562% in excess of the approved tariff, Title 66, Ch. 13 and 15 of the Public Utility Code and regulations and Pennsylvania law.

7. PGW's malfeasance is a demonstrable pattern and practice of violative conduct that Respondent has not ceased, harmed Complainants prior to the limitations period and continues to harm Complainants, constituting a violation that warrants invoking the equitable remedy under the continuing violations doctrine.

8. PGW's pattern and practice was in existence long before Complainants had an account with PGW.

9. Under the continuing violations doctrine accepted in this jurisdiction, the aggregate claims theory advanced by the court in **West v. Philadelphia Electric Company,** 45 F.3d 744, 1995 U.S. App. LEXIS 1070 decision is applicable.

10. PGW's scienter in misrepresenting Complainants' billing, collection actions, statement of accounts, manipulating Complainant's good will by purporting to reassure them PGW was investigating their claims, intentionally or passively concealed, omitted and failed to disclose material information that prevented Complainants from bringing their claims earlier, warrants PGW being estopped from raising limitations defenses. **Merck & Co., Inc. v Reynolds**, 559 U.S. 633; 2010 U.S. LEXIS 3671, **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

11. The Commission must balance PGW's misrepresentations, concealment, substantial omissions of material facts with Complainants diligent efforts to uncover their injuries sooner and estop PGW from raising the statute of limitations as a bar to Complainants claims. **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450., **Nesbitt v. Erie Coach Company**, 416 Pa. 89, 92, 96 (1964), **West v. Philadelphia Electric Company,** 45 F.3d 744, 1995 U.S. App. LEXIS 1070, **Merck & Co., Inc. v Reynolds**, 559 U.S. 633; 2010 U.S. LEXIS 3671, **Mary Esther Battle v.PECO Energy Co.**, C-00003804 (Order entered July 16, 2001). **In Re Providian Financial Corporation Securities Litigation**, 152 F. Supp.2d 814, 2001 U.S. Dist. LEXIS 9084. **National Railroad Passenger Corp. v.**

Morgan, 536 U.S. 101, 122 S.Ct. 2061, 2002 U.S. LEXIS 4214, (the plaintiff was able to bring claims outside of the statute of limitations period, provided that an act contributing to the claim occurred within the filing period, the entire time period of the hostile environment may be considered by a court for purposes of determining liability).

12. Complainants have shown they are entitled to relief by substantial evidence supporting the conclusion relief should be granted pursuant to the equitable tolling principles of the Continuing Violations Doctrine, Discovery Rule and Estoppel.

II. A Lien is a Judgment. A judgment creates an immediate lien against real property. A judgment shall bear the interest rate of 6% per annum.

13. Pursuant to **Pa.R.C. P. Rule 3001**, a judgment is defined as a judgment or order requiring the payment of money or adjudicating the right to possession in an action of replevin.

14. **Pa.R.C.P. Rule 3023. Judgment. Lien. Duration.** (a)Except as provided by subdivision (b), a judgment when entered in the judgment index shall create a lien on real property located in the county, title to which at the time of entry is recorded in the name of the person against whom the judgment is entered.

15. Pertaining to interest on judgments, the statute reads, **42 Pa.C.S.§8101, Interest on judgments.** Except as otherwise provided by another *statute*, a judgment for the specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award.***41 P.C.S. §201*** establishes that the legal interest rate in Pennsylvania is 6%.

16. In the Pennsylvania Supreme Court case **In Re Upset Sale, Tax Cl. Bureau of Berks,** 505 Pa. 327, 334 (Pa. 1984), *479 A.2d 940,*1984 Pa. LEXIS 292, the court reasoned "judgment liens are a product of centuries of statutes which authorize a judgment creditor to seize and sell the land of debtors at a judicial sale to satisfy their debts out of the proceeds of the sale. . . .when the judgment is entered of record, the judgment also operates as a lien upon all real property of the debtor in that county, 42 Pa. Pa.C.S.A Sections 4303(a)(b, 1732(b) and 2737(3)". "The judgment lien thus constitutes a liquidated claim...." ***Id.*** at 355.

17. All lawfully imposed or assessed municipal claims are liens on the property by operation of law. Section 3 of the Municipal Liens Act, 53 P.S. § 7106; **N. Coventry Twp. v. Tripodi,** 64 A.3d 1128,1132

(Pa. Cmwlth. 2013). The Municipal Liens Act provides for a specific, detailed and exclusive procedure that must be followed to challenge or collect on a municipal lien placed in cities of first class, such as the City.

18. When a lien is docketed in the judgment index of the county in which the real or personal property exists, the doctrine of merger is initiated and the statutory construct controls, i.e. as articulated in **Equitable Gas v. Wade, 812 A.2d 715 (Pa. Super. 2002)**. As the court reasoned in **Equitable Gas v. Wade**, "[a]ppellant, [Equitable] was certainly entitled to charge 18% per year pursuant to the tariff until ...it obtained a final judgment in the Court of Common Pleas. At that point, the doctrine of merger applies...Appellant's choice to take recourse with the court system required it to be governed by the rules governing actions at law, including statutory provisions governing post-judgment interest. "

19. 52 Pa.Code § 56.22 regarding the accrual of late payment charges is crystal clear and is further supported by caselaw. The note clearly states that the ***statute, 42 Pa.C.S. § 8101***, controls over the regulatory pre-judgment interest rate, and cites a case directly on point which reinforces the proposition that the statutory post-judgment interest rate is the legal rate after judgment. **Equitable Gas v. Wade, 812 A.2d 715 (Pa. Super. 2002).**

20. Inasmuch as PGW's admits to and does not defend its accounting methodologies and practices charging compounded interest of 18% per annum on lien judgments instead of the statutory post judgment rate of 6% per annum. **In Re: Michael L. Jones v. Wells Fargo**, 2012 Bankr. LEXIS 1450.

21. PGW maintains a process to reorder payment postings that results in increased revenue and over-collections of pre-judgment and post judgment late fees and finance charges which violates Title 66, Ch. 1303, 1304, 1309; 1502 of the Pennsylvania Public Utility Code, the Commissions Regulations, promulgated at 52 Pa.Code §§56.1, 56.15, 56.22, 56.23, 56.24, 56.99, 56.140, 56.141, 56.151, 56.152, 62.74 and 62.75(c)(10); and well-settled Pennsylvania law codified at 42 Pa.C.S §8101 .

22. PGW's payment re-ordering scheme creates a discriminatory rate and service class solely attributable to property owners which violates 66 Pa.C.S.§1502.

23. The Commission has the authority to reform and revise contracts entered into by a regulated public utility, when it is in the public interest pursuant to 66 Pa.C.S.§508. PGW's pricing decisions regarding choosing not to assess finance charges of 6%per annum (or .5% per month) on Complainants account balances reduced to lien judgments in favor of maintaining the higher compounded interest

finance charge of 18% per annum or 1.5% compounded monthly also violates, §1303, §1304 and the 'fixed rate' doctrine codified at 66 Pa.C.S. §1309 and §1502 and should be reformed in the public interest.

24. The Commission has the authority to reform and revise contracts entered into by a regulated public utility, when it is in the public interest pursuant to 66 Pa.C.S.§508 and should reform PGW's pricing decisions regarding maintaining its practice of reordering payments and the process that results in charging and collecting late fees and penalties on pre-judgment and post judgment interest at the compounded rate of 18%, with an APR of 19.562% in excess of the approved tariff, Title 66, Ch. 13 and 15 of the Public Utility Code and contravenes Commission regulations and Pennsylvania law.

25. The Commission's rulings to strictly hold public utilities accountable to ratepayers where their conduct has resulted in unauthorized rate increases or violations to its Tariff, the courts have ruled in favor of the Commission's authority to revise terms found to be "unjust, unreasonable, inequitable, or otherwise contrary or adverse to public interest. **PPL Electric Utilities Corporation v. Pennsylvania Public Utility Commission,** 912 A.2d 386; 2006 Pa.Commw., LEXIS 665); *See also,* **Kentucky West Virgina Gas v. Pennsylvania Public Utility Commission**, 837 F.2d 600; 1988 U.S. App. LEXIS 463; 92 P.U.R.4th 542; and **LP Water and Sewer Co. v. Pennsylvania Public Utility Commission**, 722 A. 2d 733; 1998 Pa. Commw. LEXIS 912.

Proposed Order

IT IS HEREBY ORDERED:

1. Complainants' Complaint is Sustained.
2. Respondent shall cease and desist from maintaining a billing and collections policy that exceeds collection of prejudgment interest in excess of 18% simple interest.
3. Respondent shall cease and desist from maintaining a billing and collections policy that exceeds the collection of post judgment interest for lien judgments filed and docketed with the Court of Common Pleas in excess of 6% simple interest.
4. Respondent shall refund monies collected from Complainants' in excess of the Tariff in accordance with the sums calculated by the Commission.
5. Respondent shall be limited to collection of post judgment interest in accordance with 42 Pa.C.S. 8101, and the legal interest rate of 6% simple interest per annum pursuant to 41 Pa.C.S. § 202
6. Respondent shall reform its payment posting reordering process to conform with 52 Pa.Code § 62.74 and § 56.15
7. Respondent shall provide customer disclosures explaining in detail the utility's payment posting order, pursuant to 52 Pa.Code § 56.15, § 62.74, and § 62.75 (c)(10)

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PENNSYLVANIA PUBLICUTILITY COMMISSION

In the Matters of:

Re: Complainants Main Briefs In the Matters of: SBG Management Services, Inc./Colonial Garden Realty, LP v. Philadelphia Gas Works, Docket No. C-2012-2304183; SBG Management Services, Inc./ Simon Gardens Realty, LP v. Philadelphia Gas Works, Docket No. C-2012-2304324; SBG Management Services, Inc./Fairmount Realty, v. Philadelphia Gas Works, Docket No. C-2012-2304215 ; SBG Management Services, Inc./Elrae Garden Realty, LP v. Philadelphia Gas Works, Docket No. C-2012-2304167 ; SBG Management Services, Inc./Marshall Square Realty, LP v. Philadelphia Gas Works, Docket No. C-2012-2304303; SBG Management Services, Inc./Fern Rock Realty v. Philadelphia Gas Works, Docket No. C-2012-2308465;SBG Management Services, Inc./Marchwood Realty v. Philadelphia Gas Works, Docket No. C-2012-2308454; SBG Management Services, Inc./Oak Lane Realty Co., LP v. Philadelphia Gas Works, Docket No. C-2012-2308462

Certificate of Service

I hereby certify that as of today's date, I have served the foregoing instrument in the above referenced matters, upon the parties set forth below, via First Class, U.S. mail/overnight delivery and/or by hand delivery to all parties as listed below, in accordance with the requirements of 52 Pa.Code Section 1.54 and the PA Public Utility Commission Orders.

The Honorable ALJ Eranda Vero
Pennsylvania Public Utility Commission, Suite 4063,
801 Market Street, Philadelphia, PA 19107

For Pennsylvania Public Utility Commission
Via U.S. Mail First Class/overnight mail

Mr. Laureto Farinas, Esquire
Philadelphia Gas Works
800 W. Montgomery Avenue, 4th Floor
Philadelphia, PA 19122

For Respondent PGW
Via U.S. Mail First Class/overnight mail

Mr. Phil Pulley and Ms. Kathy Treadwell
SBG Management Services, Inc.
P.O. Box 459, Abington, PA 19001

For Complainants
Via Hand Delivery

The Honorable Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
mail
400 North ST, 2nd Fl, Harrisburg, PA 17105-3265

For Pennsylvania Public Utility Commission
Via U.S. Mail First Class/overnight

Date: 4/24/2015

By: _____

DONNA S. ROSS, ESQUIRE
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APPENDIX

CASELAW

1. WATERMAN v. JURUPA COMMUNITY SERVICES, 1996 Cal.App.LEXIS 1228

2. IN RE: Michael L. Jones v. Wells Fargo, 2012 Bankr. LEXIS 1450

*53 Cal. App. 4th 1550, *; 62 Cal. Rptr. 2d 264, **;*
*1996 Cal. App. LEXIS 1228, ***; 97 Cal. Daily Op. Service 2526*

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WATERMAN CONVALESCENT HOSPITAL, INC., Plaintiff and Appellant, v. JURUPA COMMUNITY SERVICES DISTRICT, Defendant and Respondent.

No. E016924.

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

53 Cal. App. 4th 1550; 62 Cal. Rptr. 2d 264; 1996 Cal. App. LEXIS 1228; 97 Cal. Daily Op. Service 2526; 97 Daily Journal DAR 4415

November 26, 1996, Decided

SUBSEQUENT HISTORY: [*1]** The Publication Status of this Document has been Changed by the Supreme Court from Unpublished to Published April 2, 1997.

PRIOR HISTORY: APPEAL from the Superior Court of Riverside County. Super.Ct.No. 256840. James D. Ward, Judge.

DISPOSITION: The judgment is reversed. On remand, the trial court is directed to reconsider Waterman's motion for summary judgment in the light of the discussion in this opinion.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant hospital, a customer of appellee water district, challenged an order of the Superior Court of Riverside County (California), which granted summary judgment in favor of appellee in a action by appellant that challenged certain late fees and penalties assessed by appellee. Appellant contended the late fees and penalties were not authorized by Cal. Gov't Code § 61621.

OVERVIEW: Appellant hospital, a customer of appellee water district, challenged summary judgment in favor of appellee in an action to challenge certain late fees and penalties assessed by appellee. Appellant contended that the method of computing penalties, late fees, and charges violated Cal. Gov't Code § 61621, which provided that if the charges and basic penalty remain unpaid an additional one-half of 1 percent penalty could be applied. Appellee had applied an additional 10 percent late charge on the unpaid balance for months in which the only unpaid balance was a late penalty fee. Appellee argued that the statute did not set forth the manner in which payments were to be applied to an account, and thus it did not violate the statute. While agreeing with appellee that the statute did not specify the manner in which payments were applied to an account, the appellate court reversed summary judgment in favor of appellee because the progression of 10 percent basic penalties was not authorized. The court agreed with appellant that the statute was clear and

unambiguous, and that the basic penalty was for nonpayment within the time specified, not for having a monthly account balance.

OUTCOME: The court reversed summary judgment in favor of appellee water district because only one basic penalty was allowable for each late payment. The court held that upon nonpayment of the penalty, only an additional penalty of one-half of 1 percent per month was allowed. The court remanded for the lower court to decide whether to grant appellant's summary judgment motion because issues remained as to damages and the scope of relief sought.

CORE TERMS: percent penalty, monthly, late payments, nonpayment, unpaid, delinquent payments, ordinance, summary judgment, compounding, forfeitures, authorize, customer, billing, water district, late fees, delinquent, late charge, account balances, outstanding, percent per, collection, calculated, charging, water service, monthly payment, late payment penalty, fully paid, imposing penalties, strictly construed, scrupulously

LEXISNEXIS® HEADNOTES

Hide

Governments > Public Improvements > General Overview

HN1 See Cal. Gov't Code § 61621. *Shepardize:* Restrict By Headnote

Governments > Public Improvements > General Overview

HN2 If a customer fails to make payments within the specified time, including the basic penalty for late payment, the additional payment of one-half of 1 percent per month for nonpayment of the charges and basic penalty may be charged. More Like This Headnote | *Shepardize:* Restrict By Headnote

Governments > Legislation > Interpretation

HN3 Penalties and forfeitures are not favored by the courts, and statutes imposing penalties or creating forfeitures must be strictly construed. More Like This Headnote | *Shepardize:* Restrict By Headnote

HEADNOTES / SYLLABUS

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SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

A customer of a water district filed an action alleging that the district's method of computing penalties, late fees, and charges violated Gov. Code, § 61621 (collection of charges by district). The trial court granted summary judgment for the district. (Superior Court of Riverside County, No. 256840, James D. Ward, Judge.)

The Court of Appeal reversed, directing the trial court, on remand, to reconsider plaintiff's motion for summary judgment in light of the appellate opinion. The court held that the trial court erred in granting summary judgment for the district. The district was charging a 10 percent penalty on prior 10 percent penalties by applying the current monthly payment to any earlier outstanding bill; if the

current bill thereby became not fully paid, a new 10 percent penalty was applied to the outstanding balance of the current bill. However, § 61621 authorizes a basic penalty of not more than 10 percent for late payments (nonpayment within the time specified for payment), not a penalty for partially unpaid monthly account balances. Instead, the statute provides that, if the charges and basic penalty remain unpaid, an additional one-half of 1 percent penalty may be applied. The statute is clear and unambiguous, and the district's interpretation rendered the additional penalty provision meaningless. Penalties and forfeitures are not favored by courts, and statutes imposing penalties or creating forfeitures must be strictly construed. In addition, the district's own ordinance provided for a 10 percent penalty for delinquent payments, not delinquent account balances. Plaintiff paid all monthly charges currently, except for the initial late payment that led to the penalty. All the other 10 percent penalties were attributable to this fact. (Opinion by Hollenhorst, J., with Ramirez, P. J., and McKinster, J., concurring.)

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

CA(1)± **(1) Waters § 182—Public Utilities Selling Water—Actions, Remedies, and Proceedings —Water District's Penalties and Late Fees—Unauthorized Compounding of Penalties on Prior Penalties.** — --In an action by a customer of defendant water district, alleging that the district's method of computing penalties, late fees, and charges violated Gov. Code, § 61621 (collection of charges by district), the trial court erred in granting summary judgment for the district. The district was charging a 10 percent penalty on prior 10 percent penalties by applying the current monthly payment to any earlier outstanding bill; if the current bill thereby became not fully paid, a new 10 percent penalty was applied to the outstanding balance of the current bill. However, § 61621 authorizes a basic penalty of not more than 10 percent for late payments (nonpayment within the time specified for payment), not a penalty for partially unpaid monthly account balances. Instead, the statute provides that, if the charges and basic penalty remain unpaid, an additional one-half of 1 percent penalty may be applied. The statute is clear and unambiguous, and the district's interpretation rendered the additional penalty provision meaningless. Penalties and forfeitures are not favored by courts, and statutes imposing penalties or creating forfeitures must be strictly construed. In addition, the district's own ordinance provided for a 10 percent penalty for delinquent payments, not delinquent account balances. Plaintiff paid all monthly charges currently, except for the initial late payment that led to the penalty. All the other 10 percent penalties were attributable to this fact.

[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 754 et seq.]

COUNSEL: Christine J. Wilson ▾ and Elizabeth Plott Tyler ▾ for Plaintiff and Appellant.

Best, Best & Krieger, Gene Tanaka ▾✓ and Susan E. Dumouchel ▾ for Defendant and Respondent.

JUDGES: Opinion by Hollenhorst, J., with Ramirez, P. J., and McKinster, J., concurring.

OPINION BY: HOLLENHORST

OPINION

[*1551] [264] HOLLENHORST, J.**

Plaintiff, a customer of defendant water district, filed this action to challenge certain late fees and penalties assessed by the **[*1552]** district. Plaintiff contended that the method of computation of

penalties, late fees, and charges violates Government Code section 61621. The trial court disagreed and granted summary judgment for the water district.

UNDISPUTED FACTS

The Jurupa Community Services District (District) provided water and sewer services for a fee to plaintiff **[***2]** Waterman Convalescent Hospital, Inc., doing business as Mt. Rubidoux Convalescent Center (Waterman). Billing was on a monthly basis.

Waterman's April 24, 1991, bill for water and sewer services was $ 877.54. Payment was due May 20, 1991. A dispute arose as to whether this payment was made on time, but late payment was conceded for purposes of the summary judgment motion.

[265]** Contending the payment was late, the District issued its May 22 bill consisting of $ 1,015.18 for current services and $ 87.75 for a late penalty. The $ 87.75 represented a 10 percent late charge on the $ 877.54 April bill. Waterman paid the $ 1,015.18 on June 6, 1991, which the District applied to the May 22 bill, leaving $ 87.75 unpaid.

The next bill was dated June 26, 1991, and consisted of $ 1,222.46 for current services and another 10 percent late charge on the $ 87.75, or $ 8.78. Thus, each month Waterman paid the current charges and was charged an additional 10 percent late charge on the unpaid balance. This continued until April 1994, when the total due reached $ 1,684.45. At that point, the District threatened to cut off services and Waterman paid the bill under protest and brought this action to recover **[***3]** the amount paid.

DISCUSSION

CA(1)**(1)** Waterman contends that the District's billing policy violates Government Code section 61621 and the District's Ordinance No. 81 because the District is charging a 10 percent penalty on prior 10 percent penalties.

The District contends that it applies any monthly payment to the earlier outstanding bill and, if the current bill thereby becomes not fully paid, a new 10 percent penalty is applied to the outstanding balance of the current bill. It argues that neither the statute nor the ordinance sets forth the *manner* in which payments are to be applied to an account, and thus it does not violate the statute or the ordinance.

HN1Government Code section 61621, in relevant part, provides: "A district may provide for the collection of charges. Remedies for their collection and **[*1553]** enforcement are cumulative and may be pursued alternatively or consecutively as the local agency determines. [P] A district may provide for a basic penalty of not more than 10 percent for nonpayment of the charges within the time and in the manner prescribed by it, and in addition may provide for a penalty of not exceeding one-half of 1 percent per month for nonpayment **[***4]** of the charges and basic penalty. It may provide for collection of the penalties herein provided for." [1]

FOOTNOTES

1 The parties do not focus their arguments on the District's Ordinance No. 81. It provides, in relevant part, "All bills for water service shall be due and payable immediately upon receipt. There shall be added to any bill for water service for which payment is not received by 5 p.m. on the 26th day following the billing date a basic penalty in an amount equal to ten percent (10). . . . [P] If a delinquent water bill is not paid in full, including penalties, by the 40th day following the billing date, the General Manager shall turn-off and discontinue water service to the consumer . . . . [P] All delinquent bills which are not paid by the 60th day following the billing date shall be subject to a delinquency penalty of one-half of one percent (.005) per month which shall apply from the billing date until the bill is paid in full."

Waterman interprets the statute as authorizing (1) monthly charges **[***5]** for services provided; (2) a 10 percent penalty for nonpayment of charges and (3) an additional penalty of one-half of 1 percent for nonpayment of charges and basic penalty. It argues that there was only one untimely payment, and only one 10 percent basic penalty was authorized. When it continued to pay current monthly charges, only the one basic penalty of $ 87.75 remained unpaid, and it argues that only a 1/2 percent penalty could be applied for that nonpayment. In other words, Waterman argues that, once the basic 10 percent late payment penalty is applied, the only further penalty which may be added is the 1/2 percent penalty. Waterman therefore contends that the District was unlawfully charging penalties on top of penalties. It calculates the maximum penalty which could have been charged (in the applicable time period here) for the one late payment of $ 87.75 as $ 102.42.

The District denies that it was compounding penalties, i.e., that it was charging penalties on top of penalties. It maintains that "the Legislature clearly left the manner in which the fees are collected, and the manner in which payments are applied, to the discretion of the District. There is nothing in the **[***6]** statute or the ordinance which prevents the District from applying a payment to a customer's late fee first, and then the balance to a customer's monthly bill, in order to collect a late payment penalty." In other words, **[**266]** "the District would apply Waterman's monthly payment to the unpaid portion of Waterman's previous month's bill, leaving an unpaid balance on Waterman's current monthly bill, against which a 10 penalty was assessed."

The difficulty with the District's argument is that the statute authorizes a basic penalty for late *payments* (nonpayment within the time specified for **[*1554]** payment), but not a basic penalty for partially unpaid *monthly account balances*. Instead, the statute provides that, if the charges and basic penalty remain unpaid, an additional one-half of 1 percent penalty may be applied. While we find the statute to be clear and unambiguous, the District's interpretation renders the additional penalty provision meaningless.

Waterman cites *Schuhart v. Pinguelo* (1991) 230 Cal. App. 3d 1599 [282 Cal. Rptr. 144] in support of its position. In that case, the trial court interpreted a statute relating to water district improvement bonds. The statute **[***7]** provided for a 1 percent penalty for late payment and the appellate court held that the trial court erred in applying a 2 percent penalty provided in a subsequent statute.

The appellate court also considered a secondary issue which is cited here. The trial court had interpreted the statute and a penalty clause in the bond to allow compounding of the monthly penalty. The trial court accepted the plaintiff's argument that "after the first penalty is calculated, this initial penalty merges with the initial delinquent payment to become the new delinquency upon which the next month's penalty is to be calculated." (*Schuhart v. Pinguelo*, *supra*, 230 Cal. App. 3d 1599, 1607.) The appellate court found this interpretation to be erroneous. It said: "The statute scrupulously maintains a distinction between penalties and delinquent payments of principal and interest, directing the continued imposition of penalties until 'such delinquent payment and all penalties thereon are fully paid,' and directing the treasurer to collect 'such penalties with and as a part of the delinquent payment.' " (*Id.*, at p. 1608.)

Although the court expressed its belief that the Legislature did not intend **[***8]** to impose a 1 percent penalty on the amount of delinquent principal and/or interest each month, it found the language arguably ambiguous. It therefore considered legislative intent and found that absurd consequences would result from plaintiff's interpretation. After examining the legislative materials, it found no intent to allow compounded penalties. The court also noted that plaintiff had "failed to cite a single statute or case that authorizes compounding of penalties. Penalties and forfeitures are not favored by the courts, and statutes imposing penalties or creating forfeitures must be strictly construed." (*Schuhart v. Pinguelo*, *supra*, 230 Cal. App. 3d 1599, 1610.)

We agree with Waterman that the statute here is clear and unambiguous, and that it does not authorize the penalties imposed here. The statute authorizes a "basic penalty of not more than 10 percent" for late payments. It also authorizes an additional penalty "not exceeding one-half of 1 percent **[*1555]** per month for nonpayment of the charges and basic penalty." (Gov. Code, § 61621.) Here, there was

only one late payment, and the basic penalty amounting to $ 87.75 was charged. Upon nonpayment of this **[***9]** amount, the district could charge an additional penalty of one-half of 1 percent per month.

Instead, the District charged a 10 percent penalty on the $ 87.75 late charge and thus added $ 8.78 to Waterman's bill. The following month, it added the two 10 percent penalties to total $ 96.53 and then charged another 10 percent, or $ 9.65, to the bill. We find this progression of 10 percent basic penalties is not authorized by the statute. The District thus admitted "that [it] applied a charge of ten percent (10) per month each and every month to Plaintiff's account for water services between May 1991 and March 1994." This practice is the problem. As noted above, the basic penalty is for nonpayment within the time specified, *not* for having a monthly account balance.

While we agree with the District that the statute does not specify the manner in which payments are applied to an account, and that the application of payments to the oldest balances first is not barred by the **[**267]** statute, the fact remains that only the penalties specified by the statute are authorized. (Cf. Fin. Code, § 4001; *Hitz v. First Interstate Bank* (1995) 38 Cal. App. 4th 274 [44 Cal. Rptr. 2d 890] [late **[***10]** fees on consumer credit card accounts]; *Beasley v. Wells Fargo Bank* (1991) 235 Cal. App. 3d 1383 [1 Cal. Rptr. 2d 446] [same].)

The District argues that Waterman's interpretation of the statute would create an absurdity because the District would be effectively prevented from ever collecting a late payment penalty where a customer is making partial payments. We disagree. HN2 If a customer fails to make payments within the specified time, including the basic penalty for late payment, the additional payment of "one-half of 1 percent per month for nonpayment of the charges and basic penalty" (Gov. Code, § 61621) may be charged. In addition, the District has the other very effective remedies of cutting off service or putting a lien on the property. (Gov. Code, § 61621; *Perez v. City of San Bruno* (1980) 27 Cal. 3d 875, 886-888 [168 Cal. Rptr. 114, 616 P.2d 1287].) While the District appears to feel that the additional penalty of one-half of 1 percent is inadequate, its remedy is in amendment of the statute.

In addition, we note that the District did not follow the provisions of its own Ordinance No. 81. That ordinance provides for a 10 percent penalty for delinquent payments. **[***11]** (See fn. 1, *ante*.) It then provides that, if the bill is not paid in full by the 40th day, the water shall be turned off. If the bill is not **[*1556]** paid by the 60th day, the additional penalty of one-half of 1 percent applies. (*Ibid*.) The Ordinance also refers to delinquent *payments*, not delinquent account balances. It thus supports Waterman's interpretation that only one basic penalty is allowable for each late payment.

Finally, as noted above, the plaintiff in *Schuhart* argued "that after the first penalty is calculated, this initial penalty merges with the initial delinquent payment to become the new delinquency upon which the next month's penalty is to be calculated." (*Schuhart v. Pinguelo*, *supra*, 230 Cal. App. 3d 1599, 1607.) This argument, which was rejected in *Schuhart*, is the same method as was used here: the current payment is applied to the earlier deficit balance, thus creating a cumulative payment balance in the current month which is subject to a new penalty. The *Schuhart* court found no statutory basis for such an interpretation, pointing out that "[t]he statute scrupulously maintains a distinction between penalties and delinquent **[***12]** payments of principal and interest . . . ." (*Id*., at p. 1608.) The same is true here, as the statute here clearly distinguishes between charges for services, the basic penalty, and the additional penalty.

The District attempts to fit within *Schuhart* by arguing that "the facts show that the District scrupulously maintained a distinction between penalties and monthly charges." Yet the facts show that the District's accounting practice had the opposite effect: The application of a monthly payment to the preceding month's unpaid penalty generated an unpaid cumulative balance in the current month which then provided the basis for another 10 percent penalty. Thus, the District's accountant advised Waterman in 1994 that "[t]he current outstanding balance on the account is $ 1,684.45 which is an accumulation of late charges dating back to the original late charge of $ 87.75 placed on the April 1991 bill."

If the monthly charges and penalties are viewed separately, as they should be, it must be admitted that Waterman paid all monthly charges currently, except for the one late payment that led to the $ 87.75 penalty. All the other 10 percent penalties were attributable to this **[***13]** fact. We therefore agree

with Waterman that the District was compounding 10 percent penalties upon 10 percent penalties and that such compounding is not authorized by the statute. "HN3↑Penalties and forfeitures are not favored by the courts, and statutes imposing penalties or creating forfeitures must be strictly construed." (*Schuhart v. Pinguelo*, *supra*, 230 Cal. App. 3d 1599, 1610; cf. *Smiley v. Citibank* (1995) 11 Cal. 4th 138, 161-162 [44 Cal. Rptr. 2d 441, 900 P.2d 690] [late payment fees justified as a matter of public policy]; *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1978) 21 Cal. 3d 365 [146 Cal. **[**268]** Rptr. 371, 578 **[*1557]** P.2d 1375, 18 A.L.R.4th 1050] [compound interest charged on stockbroker's margin accounts as usury].)

The trial court therefore erred in granting the District's motion for summary judgment. While the issue is a matter of law, we do not decide whether Waterman's summary judgment motion should have been granted in its entirety, as issues remain as to damages and the scope of relief sought by Waterman's summary judgment motion.

DISPOSITION

The judgment is reversed. On remand, the trial court is directed to reconsider **[***14]** Waterman's motion for summary judgment in the light of the discussion in this opinion.

Ramirez, P. J., and McKinster, J., concurred.

*2012 Bankr. LEXIS 1450, **

IN RE: MICHAEL L. JONES DEBTOR; MICHAEL L. JONES, PLAINTIFF VERSUS WELLS FARGO HOME MORTGAGE, INC., DEFENDANT

CASE NO. 03-16518, SECTION A, CHAPTER 13, ADVERSARY NO. 06-1093

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2012 Bankr. LEXIS 1450

April 5, 2012, Decided

SUBSEQUENT HISTORY: Affirmed by Jones v. Wells Fargo Home Mortg. Inc., 2013 U.S. Dist. LEXIS 37810 (E.D. La., Mar. 18, 2013)

PRIOR HISTORY: Wells Fargo Bank, N.A. v. Jones (In re Jones), 439 Fed. Appx. 330, 2011 U.S. App. LEXIS 17867 (5th Cir. La., 2011)

CASE SUMMARY

PROCEDURAL POSTURE: Defendant mortgage creditor was found to have wilfully violated the automatic bankruptcy stay by misapplying plaintiff bankruptcy debtor's payments, and the sanction requiring the creditor to implement remedial practices in lieu of punitive damages was found to be beyond the bankruptcy court's jurisdiction. Upon remand from the U.S. District Court for the Eastern District of Louisiana, the bankruptcy court considered punitive damages.

OVERVIEW: The creditor violated the stay by misapplying postpetition payments made by the debtor and the bankruptcy trustee to undisclosed postpetition fees and costs not authorized by the bankruptcy court, without notice to the debtor or the trustee, and in contravention of the debtor's confirmed plan of reorganization and the court's confirmation order, and the creditor routinely engaged in the same practices in numerous other bankruptcy cases. The bankruptcy court held that substantial punitive damages were warranted against the creditor for its egregious misconduct. The creditor violated the stay intentionally through affirmative acts of misconduct, engaged in particularly vexing litigation concerning its conduct which caused the debtor substantial delay and expense, and steadfastly refused to voluntarily correct any errors except through litigation. Further, the creditor possessed significant resources and was not deterred by previous sanctions in this and other cases, and a substantial punitive damage award was warranted to deter the creditor's misconduct and motivate the creditor to rectify its practices.

OUTCOME: Punitive damages were awarded against the creditor.

CORE TERMS: punitive damages, postpetition, punitive, automatic stay, accounting, mortgage loan,

amortization, compensatory, incorrect, mortgage, attorney's fees, monetary, notice, deter, default, damage awards, proof of claim, actual damages, willful, nos, judicial notice, confirmation, overpayment, borrower, compensatory damages, reckless disregard, egregious, undisclosed, calculation, confirmed

LEXISNEXIS® HEADNOTES ⊟Hide

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Coverage > Estate Property

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Contempt

Bankruptcy Law > Estate Property > Content

Bankruptcy Law > Practice & Proceedings > Jurisdiction > Core Proceedings

HN1 A bankruptcy court has jurisdiction over all property of a bankruptcy estate wherever located. 28 U.S.C.S. §§ 157(a), 1334(e); 11 U.S.C.S. § 541. Upon filing of the case, all actions to collect, enforce, or possess property of the estate are automatically enjoined. 11 U.S.C.S. § 362. Proceedings to prosecute violations of the automatic stay are core proceedings. A proceeding to enforce the automatic stay by means of civil contempt is a core proceeding within the meaning of 28 U.S.C.S. § 157 and within the scope of the bankruptcy court's powers. 11 U.S.C.S. § 105(a). A contempt order is purely civil if the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation. More Like This Headnote | *Shepardize:* Restrict By Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages

HN2 11 U.S.C.S. § 362(k) allows for the award of actual damages, including costs and attorneys' fees, as a result of a violation of the automatic bankruptcy stay, and punitive damages in appropriate circumstances. Punitive damages are warranted when the conduct in question is willful and egregious, or when the defendant acted with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he was doing so. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

HN3 Punitive damage awards must address both reasonableness and adequate guidance concerns to satisfy the Fourteenth Amendment's due process clause. A two-part test helps courts determine whether the requirements are met: (1) whether the circumstances of the case indicate that the award is reasonable; and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the factfinder. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

HN4 A court examines three factors in determining the propriety of a punitive damage award: (1) the degree of reprehensibility; (2) the ratio between the punitive damages and the actual harm; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable cases. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

HN5 Infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. More Like This Headnote

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages

HN6 See 11 U.S.C.S. § 362(k)(1).

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages

HN7 Punitive damages may be recovered when a creditor acts with actual knowledge of a violation of the automatic bankruptcy stay or with reckless disregard of the protected right. Where an arrogant defiance of federal law is demonstrated, punitive damages are appropriate. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

HN8 Exemplary damages must bear a reasonable relationship to compensatory damages. The proper inquiry whether there is a reasonable relationship between the punitive damages award and the harm likely to result from a defendant's conduct as well as the harm that actually has occurred. There is no mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. Instead, punitive damages must address both reasonableness and adequate guidance concerns to satisfy the Fourteenth Amendment's due process clause. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

HN9 When necessary to deter reprehensible conduct, courts often award punitive damages in an amount multiple times greater than actual damages. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

HN10 Fairness requires that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty. In determining an appropriate punitive damage amount, substantial deference must be given to legislative judgments concerning appropriate sanctions for the conduct at issue. More Like This Headnote

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For Wells Fargo Home Mortgage, Inc., Defendant (06-01093): Anthony Rollo, LEAD ATTORNEY, McGlinchey, Stafford, Cellini and Lang, Baton Rouge, LA; Daniel Plunkett, Heather A. LaSalle, LEAD ATTORNEYS, McGlinchey Stafford, PLLC, New Orleans, LA; Eric J Simonson, Rudy J. Cerone, LEAD ATTORNEYS, New Orleans, LA.

For U. S. Trustee Region V, U.S. Trustee (06-01093): Mary S. Langston, Office of the U.S. Trustee, New Orleans, LA.

JUDGES: Hon. Elizabeth W. Magner, U.S. Bankruptcy Judge.

OPINION BY: Elizabeth W. Magner

OPINION

MEMORANDUM OPINION

This matter is on remand from the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit")[1] and the United States **[*2]** District Court for the Eastern District of Louisiana ("District Court").[2] The mandate required reconsideration of monetary sanctions in light of *In re Stewart*.[3] The parties were afforded time to file additional briefs, after which the matter was taken under advisement.[4] Wells Fargo Bank, N.A. ("Wells Fargo") also filed an *Ex Parte* Motion to Take Judicial Notice[5] which will be addressed in this Opinion.

FOOTNOTES

1 5th Cir. case no. 10-31005; *Wells Fargo Bank, N.A. v. Jones (In re Jones)*, 439 Fed.Appx. 330 (5th Cir. 2011).

2 USDC, EDLA, 391 B.R. 577.

3 *Wells Fargo Bank, N.A. v. Stewart (In re Stewart)*, 647 F.3d 553 (5th Cir. 2011).

4 Docket no. 455. The parties indicated that the Court should use the briefs they previously filed in connection with the Motion for Sanctions rather than submitting entirely new briefs. Docket nos. 78, 96. The parties were allowed to supplement these initial briefs.

5 Docket no. 459.

I. Jurisdiction

*HN1*The bankruptcy court has jurisdiction over all property of the estate wherever located.[6] Upon filing of the case, all actions to collect, enforce, or possess property of the estate are automatically enjoined.[7] Proceedings to prosecute violations of the automatic stay are core proceedings.[8] **[*3]** A proceeding to enforce the automatic stay by means of civil contempt is a "core proceeding" within the meaning of 28 U.S.C. § 157 and within the scope of the bankruptcy court's powers.[9] A contempt order is purely civil "[i]f the purpose of the sanction is to coerce the contemnor into compliance with a court order, or to compensate another party for the contemnor's violation."[10] The Court finds that it has jurisdiction over this proceeding for civil contempt.

FOOTNOTES

6 28 U.S.C. §§ 157(a) and 1334(e) and 11 U.S.C. § 541.

7 11 U.S.C. § 362.

8 *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir. 1986); *Milbank v. McGee (In re LATCL&F, Inc.)*, 2001 U.S. Dist. LEXIS 12478, 2001 WL 984912, *3 (N.D.Tex. 2001).

9 11 U.S.C. § 105(a); *Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609 (5th Cir. 1997); *In re*

Johnson, 575 F.3d 1079, 1083 (10th Cir. 2009); *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108-109 (2nd Cir. 2006); *In re Nat. Century Financial Enterprises, Inc.*, 423 F.3d 567, 573-574 (6th Cir. 2005).

10 *Lamar Financial Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990).

II. Procedural Background

This adversary proceeding was filed by Michael L. Jones, debtor, ("Jones" or "Debtor") in an effort to recoup **[*4]** overpayments made to Wells Fargo on his home mortgage loan. The complaint requested return of the overpayments, reimbursement of actual damages, and punitive damages for violation of the automatic stay. At trial, the parties severed Debtor's request for compensatory and punitive damages from the merits of Debtor's claim for return of overpayments. On April 13, 2007, the Court entered an Opinion[11] and Partial Judgment[12] awarding Jones $24,441.65, plus legal interest for amounts overcharged by Wells Fargo. In addition, the Opinion found Wells Fargo to be in violation of the automatic stay because it applied postpetition payments made by Jones and his trustee to undisclosed postpetition fees and costs not authorized by the Court, noticed to Debtor or his trustee, and in contravention of Debtor's confirmed plan of reorganization and the Confirmation Order.[13] Wells Fargo's conduct was found to be willful and egregious.[14]

FOOTNOTES

11 Docket no. 69; *In re Jones*, 366 B.R. 584 (Bankr.E.D.La. 2007).

12 Docket no. 68.

13 Docket no. 69.

14 *Id.*

A second hearing on sanctions, damages, and punitive relief was held on May 29, 2007.[15] At the hearing, Wells Fargo offered to implement several remedial measures designed **[*5]** to correct systemic problems with its accounting of home mortgage loans ("Accounting Procedures").[16] The new Accounting Procedures were negotiated between the Court and Wells Fargo's representative. They were embodied in a subsequent Supplemental Memorandum Opinion,[17] Amended Judgment,[18] and Administrative Order 2008-1. The Amended Judgment also awarded Jones $67,202.45 in compensatory sanctions for attorney's fees and costs.[19]

FOOTNOTES

15 Jones also filed a Motion for Sanctions, Including Punitive Damages. Docket no. 77.

16 Tr.T. 5/29/01, 48:18-23; 63:2-21; 83:4-10; 92:24-93:4. Docket no. 126.

17 Docket no. 153; *Jones v. Wells Fargo Home Mortgage, Inc., (In re Jones)*, 2007 Bankr. LEXIS 2984, 2007 WL 2480494 (Bankr.E.D.La. 2007).

18 Docket no. 154.

19 *Id.*

Following its agreement, Wells Fargo reversed its legal position and appealed the Amended Judgment to the District Court.

On appeal, the District Court affirmed the findings of this Court and increased the compensatory civil award to $170,824.96. However, because Wells Fargo withdrew its consent to the nonmonetary relief ordered, the issue of punitive damages was remanded for further findings and consideration.[20] Wells Fargo appealed the District Court remand, but the Fifth **[*6]** Circuit dismissed the appeal for lack of jurisdiction.[21]

FOOTNOTES

20 USDC, EDLA case no. 07-3599; docket nos. 76, 77; *Wells Fargo Bank, N.A. v. Jones*, 391 B.R. 577 (E.D.La. 2008).

21 5th Cir. case no. 08-30735.

For the reasons set forth in the Opinion dated October 1, 2009, this Court imposed the original sanctions ordered, the Accounting Procedures, *in lieu* of punitive damages ("Partial Judgment on Remand").[22] Based on the findings of the District Court, this Court also entertained Jones' request for an increase in compensatory sanctions. Wells Fargo opposed the request, but settled the matter for an undisclosed stipulated amount.[23] Jones appealed the denial of punitive damages.[24]

FOOTNOTES

22 Docket nos. 390, 392; *Jones v. Wells Fargo Home Mortgage, Inc., (In re Jones)*, 418 B.R. 687 (Bankr.E.D.La. 2009).

23 Docket no. 417.

24 Docket no. 424.

On August 24, 2010, the District Court affirmed the Partial Judgment on Remand.[25] Again, Jones appealed the denial of punitive relief to the Fifth Circuit.

FOOTNOTES

25 USDC, EDLA case no. 07-3599, docket no. 139; *Jones v. Wells Fargo Bank N.A.*, 2010 U.S. Dist. LEXIS 98127, 2010 WL 3398849 (E.D.La. 2010). *See also* USDC, EDLA case no. 09-7635, docket no. 11.

On August 23, 2007, more than four (4) months after this **[*7]** Court entered its initial opinion in this case, Ms. Dorothy Stewart filed an Objection to the Proof of Claim of Wells Fargo in her bankruptcy case pending in this district. The Objection alleged in part that the amount claimed by Wells Fargo in its proof of claim was incorrect because prepetition payments had been improperly applied.[26]

FOOTNOTES

26 USBC, EDLA case no. 07-11113, docket no. 24.

The Memorandum Opinion issued in the *Dorothy Stewart* case found that Wells Fargo misapplied her payments in a fashion identical to *Jones*.[27] As with the *Jones* decision, Wells Fargo's actions resulted in an incorrect amortization of Ms. Stewart's debt and the imposition of unauthorized or unwarranted fees

and costs. Because Wells Fargo's failure was a breach of its obligations under the Partial Judgment on Remand, it was ordered to audit every borrower with a case pending in this district for compliance with the Accounting Procedures ("*Stewart* Judgment").[28]

FOOTNOTES

27 *Id.* at docket no. 61; *In re Stewart*, 391 B.R. 327 (Bankr.E.D.La. 2008).

28 *Id.* at docket no. 62.

The *Stewart* Judgment was affirmed by the District Court after Wells Fargo appealed.[29] Wells Fargo then appealed the *Stewart* Judgment to the Fifth Circuit.

FOOTNOTES

29 *In re Stewart*, 2009 U.S. Dist. LEXIS 53441, 2009 WL 2448054 (E.D.La. 2009).

The **[*8]** Fifth Circuit affirmed the findings and compensatory award contained in the *Stewart* Judgment.[30] However, the Fifth Circuit also found that the order requiring audits of debtor accounts was beyond this Court's jurisdiction. As a result, this portion of the relief was vacated. The *Stewart* appeal preceded hearing on the *Jones*' appeal. In light of *Stewart*, the Fifth Circuit remanded the Partial Judgment on Remand for consideration of alternative, punitive monetary sanctions.[31]

FOOTNOTES

30 *In re Stewart*, 647 F.3d 553 (5th Cir. 2011).

31 *Id.*

III. Facts

The facts of this case are well documented in previous Opinions. Those facts are incorporated by reference.[32] Only facts immediately relevant to remand will be restated. Wells Fargo willfully violated the automatic stay imposed by 11 U.S.C. § 362 when it:

> [C]harged Debtor's account with unreasonable fees and costs; failed to notify Debtor that any of these postpetition charges were being added to his account; failed to seek Court approval for same; and paid itself out of estate funds delivered to it for payment of other debt.[33]

FOOTNOTES

32 Docket nos. 69, 153, 390; USDC, EDLA, 391 B.R. 577, docket no. 76; USDC, EDLA case no. 09-7635, docket no. 11.

33 *Jones*, 366 B.R. at 600.

Jones **[*9]** has already been awarded $24,441.65 for amounts overcharged on his loan; legal interest from March 30, 2006, until paid in full; and $170,824.96 in actual attorney's fees and costs. In addition,

the to the amounts included in judgments rendered to date, Jones also incurred additional legal fees of $118,251.93 and $3,596.95 in costs. The additional fees and costs are supported by Jones' Application for Award Of Fees And Costs Related To Remand filed in the record of this case.[34]

FOOTNOTES

34 Docket no. 396.

IV. Motion to Take Judicial Notice

Both the Partial Judgment on Remand and Administrative Order 2008-1 contemplated an internal review by Wells Fargo of all loan files to ensure the proper application of payments on home mortgage loans. Wells Fargo did not comply as evidenced by the *Stewart* decision. Instead, Wells Fargo continued to seek payment on prepetition monetary defaults calculated through the improper amortization of home mortgage loans.

As a result, in *Stewart*, this Court ordered Wells Fargo "to audit all proofs of claim [] filed in this District in any case pending on or filed after April 13, 2007, and to provide a complete loan history on every account."[35] Wells Fargo was ordered to **[*10]** amend the proofs of claim to comport with the loan histories. Wells Fargo appealed *Stewart* arguing that the Court was without authority to enforce the Accounting Procedures. Wells Fargo did not argue to the Fifth Circuit that the relief it challenged had already been performed. Quite simply if it had, its appeal would have been rendered moot.

FOOTNOTES

35 *In re Stewart*, 391 B.R. 327, 357 (Bankr.E.D.La. 2008).

Wells Fargo now requests this Court take judicial notice of its compliance with Administrative Order 2008-1 as a mitigating factor in any assessment of punitive damages. To evaluate this claim, the problems found in this case and the remedies embodied in Administrative Order 2008-1 must be examined in detail.

In this case, Wells Fargo testified that every home mortgage loan was administered by its proprietary computer software. The evidence established:

1. Wells Fargo applied payments first to fees and costs assessed on mortgage loans, then to outstanding principal, accrued interest, and escrowed costs. This application method was directly contrary to the terms of Jones' note and mortgage, as well as, Wells Fargo's standard form mortgages and notes. Those forms required the application of payments **[*11]** first to outstanding principal, accrued interest, and escrowed charges, then fees and costs. The improper application method resulted in an incorrect amortization of loans when fees or costs were assessed. The improper amortization resulted in the assessment of additional interest, default fees and costs against the loan. The evidence established the utilization of this application method for every mortgage loan in Wells Fargo's portfolio.

2. Wells Fargo applied payments received from a bankruptcy debtor or trustee to the oldest charges outstanding on the mortgage loan rather than as directed by confirmed plans and confirmation orders. This resulted in the incorrect amortization of mortgage loans postpetition. Again, the improper amortization resulted in additional interest, default fees and costs to the loan. The evidence established the utilization of this application method for every mortgage loan administered by Wells Fargo in bankruptcy.

3. When postpetition fees or costs were assessed on a loan in bankruptcy, Wells Fargo applied payments received from the bankruptcy debtor to those fees and charges without disclosing the assessments or requesting authority. The payments were property **[*12]** of the estate, they were

applied contrary to the terms of plans and confirmation orders, and in violation of the automatic stay. This practice resulted in the incorrect amortization of mortgage loans postpetition. Again, the improper amortization resulted in the addition of increased interest, default fees and costs to the loan balance. The evidence established the utilization of this application method for every Wells Fargo mortgage loan in bankruptcy.

Wells Fargo's practices led to the following conclusions:

1. Applications contrary to the contract terms of Wells Fargo's standard form notes and mortgages resulted in an incorrect amortization of the loan. As a result, monetary defaults claimed by Wells Fargo on the petition date were incorrect.

2. Misapplication of payments received postpetition resulted in incorrect amortization of Wells Fargo loans and threatened a debtor's fresh start, as well as, discharge.

3. Application of postpetition payments to new, undisclosed postpetition fees or costs also threatened a debtor's fresh start and discharge.

The Partial Judgment on Remand and Accounting Procedures were crafted to remedy the above problems. They were designed to protect debtors **[*13]** from incorrectly calculated proofs of claim, to verify that loans were properly amortized prepetition in accordance with the terms of notes and mortgages, and to ensure that postpetition amortizations were in compliance with the terms of confirmed plans and orders. Because the evidence established that the problems exposed with the *Jones*' loan were systemic, Administrative Order 2008-1 and the Partial Judgment on Remand required corrective action on existing loans in bankruptcy for past errors, as well as, ongoing future performance.

There is nothing in the record supporting Wells Fargo's assertion that it has corrected its past errors. There is nothing in the record to assure future compliance with the terms of notes, mortgages, confirmed plans or confirmation orders. Therefore, Wells Fargo's request for judicial notice of compliance is denied.

Wells Fargo has also requested judicial notice of the fact that after the completion of the first remand to this Court, it abandoned any challenge to the compensatory portions of the judgments in favor of Jones. This request has been granted. The overpayments on the loan and costs associated with recovery are limited to costs and legal fees incurred **[*14]** through the initial remand. Specifically, they are based on awards rendered prior to that remand and include additional fees and costs incurred by Jones through the remand, as set forth in the Application.

V. Law and Analysis

This Court previously found that Wells Fargo willfully violated the automatic stay imposed by 11 U.S.C. § 362.[36] That ruling is not at issue. The only issue before the Court is the appropriate relief available. In light of the Fifth Circuit's ruling in *Stewart*, the application of the Accounting Procedures to all debtors in the district would be an improper exercise of authority beyond the bounds of this case. Because this relief was ordered *in lieu* of punitive sanctions, the mandate on remand directs that monetary relief be considered.

FOOTNOTES

[36] Docket nos. 153, 154; *In re Jones*, 2007 Bankr. LEXIS 2984, 2007 WL 2480494 (Bankr.E.D.La. 2007).

HN2 Section 362(k) allows for the award of actual damages, including costs and attorneys' fees, as a result of a stay violation, and punitive damages "in appropriate circumstances." Punitive damages are warranted when the conduct in question is willful and egregious,[37] or when the defendant acted "with actual knowledge that he was violating the federally protected **[*15]** right or with reckless disregard of

whether he was doing so."[38] There is no question that Wells Fargo's conduct was willful. As previously decided, Wells Fargo clearly knew of Debtor's pending bankruptcy and was represented by bankruptcy counsel in this case. Wells Fargo is a sophisticated lender with thousands of claims in bankruptcy cases pending throughout the country and is familiar with the provisions of the Bankruptcy Code, particularly those regarding the automatic stay.

FOOTNOTES

37 *In re Ketelsen*, 880 F.2d 990, 993 (8th Cir. 1989).

38 *In re Sanchez*, 372 B.R. 289, 315 (Bankr. S.D.Tex. 2007) (citations omitted).

Wells Fargo assessed postpetition charges on this loan while in bankruptcy. However, it was not the assessment of the charges, but the conduct which followed that this Court found sanctionable. Despite assessing postpetition charges, Wells Fargo withheld this fact from its borrower and diverted payments made by the trustee and Debtor to satisfy claims not authorized by the plan or Court.
Wells Fargo admitted that these actions were part of its normal course of conduct, practiced in perhaps thousands of cases. As a result of the evidence presented, the Court also found
Wells Fargo's **[*16]** actions to be egregious. There is also no question that Wells Fargo exhibited reckless disregard for the stay it violated.

The imposition of punitive awards are designed to discourage future misconduct and benefit society at large.[39] Sanctions are "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."[40]

FOOTNOTES

39 *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267, 101 S.Ct. 2748, 2759, 69 L. Ed. 2d 616 (1981) ("[punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); Restatement (Second) of Torts § 908 (1979) (the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence).

40 *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L. Ed. 2d 747 (1976).

The Supreme Court, in *Pacific Mutual Life Ins. Co. v. Haslip*, ruled that HN3 punitive damage awards must address both reasonableness and adequate guidance concerns **[*17]** to satisfy the Fourteenth Amendment's due process clause.[41] The Fifth Circuit developed a two part test to help courts determine whether the requirements set forth under *Haslip* are met: "(1) whether the circumstances of the case indicate that the award is reasonable; and (2) whether the procedure used in assessing and reviewing the award imposes a sufficiently definite and meaningful constraint on the discretion of the factfinder."[42]

FOOTNOTES

41 *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 17, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

42 *Eichenseer v. Reserve Life Ins. Co..*, 934 F.2d 1377, 1381 (5th Cir. 1991).

In *BMW of North America, Inc. v. Gore*, HN4 the Supreme Court examined three (3) factors in

determining the propriety of a punitive damage award:

1) "the degree of reprehensibility;"

2) the ratio between the punitive damages and the actual harm; and

3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[43]

FOOTNOTES

43 *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S.Ct. 1589, 1598-1599, 134 L. Ed. 2d 809 (1996).

A. Degree of Reprehensibility

HN5 "[I]nfliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target **[*18]** is financially vulnerable, can warrant a substantial penalty."[44] Wells Fargo did not adjust Jones' loan as current on the petition date and instead continued to carry the past due amounts contained in its proof of claim in Jones' loan balance. It also misapplied funds regardless of source or intended application, to pre and postpetition charges, interest and non-interest bearing debt in contravention of the note, mortgage, plan and confirmation order. Wells Fargo assessed and paid itself postpetition fees and charges without approval from the Court or notice to Jones.

FOOTNOTES

44 *Id.* at 1599.

The net effect of Wells Fargo's actions was an overcharge in excess of $24,000.00. When Jones questioned the amounts owed, Wells Fargo refused to explain its calculations or provide an amortization schedule. When Jones sued Wells Fargo, it again failed to properly account for its calculations. After judgment was awarded, Wells Fargo fought the compensatory portion of the award despite never challenging the calculations of the overpayment. In fact, Wells Fargo's initial legal position both before this Court[45] and in its first appeal[46] denied any responsibility to refund payments demanded in error! The cost **[*19]** to Jones was hundreds of thousands of dollars in legal fees and five (5) years of litigation.

FOOTNOTES

45 Docket no. 50, pp. 11-17.

46 Docket no. 97, p. 2.

While every litigant has a right to pursue appeal, Wells Fargo's style of litigation was particularly vexing. After agreeing at trial to the initial injunctive relief in order to escape a punitive damage award, Wells Fargo changed its position and appealed. This resulted in:

1. A total of seven (7) days spent in the original trial, status conferences, and hearings before this Court;

2. Eighteen (18) post-trial, pre-remand motions or responsive pleadings filed by Wells Fargo, requiring nine (9) memoranda and nine (9) objections or responsive pleadings;

3. Eight (8) appeals or notices of appeal to the District Court by Wells Fargo, with fifteen (15) assignments of error and fifty-seven (57) sub-assignments of error, requiring 261 pages in briefing, and resulting in a delay of 493 days from the date the Amended Judgment was entered to the date the Fifth Circuit dismissed Wells Fargo's appeal for lack of jurisdiction;[47] and

4. Twenty-two (22) issues raised by Wells Fargo for remand, requiring 161 pages of briefing from the parties in the District Court **[*20]** and 269 additional days since the Fifth Circuit dismissed Wells Fargo's appeal.

FOOTNOTES

47 *See Jones*, 391 B.R. at 582.

The above was only the first round of litigation contained in this case. After the District Court remanded based on Wells Fargo's change of heart, Wells Fargo appealed the decision to remand. When that was denied, it took the legal position that the remand did not afford this Court the right to impose punitive damages *in lieu* of the Accounting Procedures it had both proposed and consented to undertake. That position if valid, would have allowed Wells Fargo to propose alternative relief to escape punitive damages; when the offer was accepted, challenge the relief it proposed; and avoid any punitive award, a position as untenable as it was illogical.

Following this Court's ruling on remand, Wells Fargo appealed to the District Court once again, unsuccessfully. Yet another appeal to the Fifth Circuit was abandoned, but the same issues were then challenged by litigating and appealing the *Stewart* case.[48]

FOOTNOTES

48 Wells Fargo was also sanctioned in two other cases for similar behavior since the Partial Judgment was entered on April 13, 2007. *See In re Stewart*, 391 B.R. 327 (Bankr. E.D.La. 2008); **[*21]** *In re Fitch*, 390 B.R. 834 (Bankr. E.D.La. 2008).

Wells Fargo has taken the position that every debtor in the district should be made to challenge, by separate suit, the proofs of claim or motions for relief from the automatic stay it files. It has steadfastly refused to audit its pleadings or proofs of claim for errors and has refused to voluntarily correct any errors that come to light except through threat of litigation. Although its own representatives have admitted that it routinely misapplied payments on loans and improperly charged fees, they have refused to correct past errors. They stubbornly insist on limiting any change in their conduct prospectively, even as they seek to collect on loans in other cases for amounts owed in error.

Wells Fargo's conduct is clandestine. Rather than provide Jones with a complete history of his debt on an ongoing basis, Wells Fargo simply stopped communicating with Jones once it deemed him in default. At that point in time, fees and costs were assessed against his account and satisfied with postpetition payments intended for other debt without notice. Only through litigation was this practice discovered. Wells Fargo admitted to the same practices **[*22]** for all other loans in bankruptcy or default. As a result, it is unlikely that most debtors will be able to discern problems with their accounts without extensive discovery.

Unfortunately, the threat of future litigation is a poor motivator for honesty in practice. Because litigation with Wells Fargo has already cost this and other plaintiffs considerable time and expense, the Court can only assume that others who challenge Wells Fargo's claims will meet a similar fate.

Over eighty (80%) of the chapter 13 debtors in this district have incomes of less than $40,000.00 per year. The burden of extensive discovery and delay is particularly overwhelming.

In this Court's experience, it takes four (4) to six (6) months for Wells Fargo to produce a simple accounting of a loan's history and over four (4) court hearings. Most debtors simply do not have the personal resources to demand the production of a simple accounting for their loans, much less verify its accuracy, through a litigation process.

Wells Fargo has taken advantage of borrowers who rely on it to accurately apply payments and calculate the amounts owed. But perhaps more disturbing is Wells Fargo's refusal to voluntarily correct its **[*23]** errors. It prefers to rely on the ignorance of borrowers or their inability to fund a challenge to its demands, rather than voluntarily relinquish gains obtained through improper accounting methods. Wells Fargo's conduct was a breach of its contractual obligations to its borrowers. More importantly, when exposed, it revealed its true corporate character by denying any obligation to correct its past transgressions and mounting a legal assault ensure it never had to. Society requires that those in business conduct themselves with honestly and fair dealing. Thus, there is a strong societal interest in deterring such future conduct through the imposition of punitive relief.

Both parties agree that a legal remedy to address stay violations exists under section 362(k)(1), which provides that HN6"an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[49] Wells Fargo argues that the Court has already imposed an adequate legal remedy because Debtor has been reimbursed for his actual damages, *i.e.* his attorney fees. "HN7 Punitive damages may be **[*24]** recovered when the creditor acts with actual knowledge of the violation or with reckless disregard of the protected right."[50] It has also been held that "where an arrogant defiance of federal law is demonstrated, punitive damages are appropriate."[51] Either standard justifies the assessment of punitive damages in this case.[52] Due to the prevalence and seriousness of Wells Fargo's actions, punitive damages are warranted.

FOOTNOTES

49 *See also In re Fisher*, 144 B.R. 237, n.1 (Bankr. D.RI 1992) (noting that the compensatory and punitive damages provided for a willful stay violation under section 362 is a legal remedy).

50 *In re Dynamic Tours & Transportation, Inc.*, 359 B.R. 336, 343 (Bankr. M.D.Fla. 2006) (citation omitted).

51 *Id.* at 344.

52 Further, the District Court found that "[t]he Bankruptcy Court clearly had the authority to impose punitive damages against Wells Fargo pursuant to Section 362 because the Bankruptcy Court determined that Wells Fargo's conduct was egregious."

B. Ratio Between Punitive Damages and Actual Harm

HN8"[E]xemplary damages must bear a 'reasonable relationship' to compensatory damages."[53] "[T]he proper inquiry 'whether there is a reasonable relationship between the punitive damages **[*25]** award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred.'"[54] The Supreme Court has stated that it "cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[55] Instead, punitive damages must address both "*reasonableness*" and "*adequate guidance*" concerns to

satisfy the Fourteenth Amendment's due process clause.[56]

FOOTNOTES

53 *Id.* at 1601.

54 *Id.* at 1602 (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453, 113 S.Ct. 2711, 2717-2718, 125 L. Ed. 2d 366 (1993) (emphasis in original)). In TXO, the Supreme Court compared the punitive damage award and the damages that would have ensued had the offending party succeeded.

55 *Haslip*, 111 S.Ct. at 1043.

56 *Id.*

In *Eichenseer v. Reserve Life Insurance Co.*,[57] the Fifth Circuit awarded $1,000.00 in compensatory damages and $500,000.00 in punitive damages for wrongful denial of an insurance claim. Specifically, the Fifth Circuit found that the insurance company acted with "reckless disregard ... for the rights of the insured," and that "[i]ts actions were far more offensive than mere incompetent record keeping or clerical **[*26]** error."[58] The Fifth Circuit also considered that this was not the first instance which a court assessed punitive damages against the insurance company, and if the previous award did not deter sanctionable conduct, a larger award was necessary.[59]

FOOTNOTES

57 *Eichenseer*, 934 F.2d at 1381.

58 *Id.* at 1382-1383.

59 *Id.* at 1384.

Norwest Mortgage, Inc., n/k/a Wells Fargo, was assessed $2,000,000 in exemplary damages in *Slick v. Norwest Mortgage, Inc.*[60] for charging postpetition attorneys fees to debtors' accounts without disclosing the fees to anyone.[61] Four years after the ruling in *Slick*, Jones found that Wells Fargo continued to charge undisclosed postpetition fees despite that multi-million dollar damage assessment. Following *Jones*, Wells Fargo was involved in at least two (2) additional challenges to the calculation of its claims *in this Court*. In both cases the evidence revealed that Wells Fargo continued to improperly amortize loans by employing the same practices prohibited by *Jones*.[62] In short, Wells Fargo has shown no inclination to change its conduct.

FOOTNOTES

60 *Slick v. Norwest Mortgage, Inc.*, 2002 Bankr.Lexis 772 (Bankr.S.D.Ala. 2002).

61 *Id.* at *32.

62 *In re Stewart*, 391 B.R. 327 (Bankr. E.D.La. 2008); *In re Fitch*, 390 B.R. 834 (Bankr. E.D.La. 2008).

HN9 When **[*27]** necessary to deter reprehensible conduct, courts often award punitive damages in an amount multiple times greater than actual damages. In *Haslip*, the Supreme Court upheld as reasonable punitive damages that were more than four (4) times the amount of compensatory damages

and two hundred (200) times the amount of out-of-pocket expenses when the trial court found that the conduct was serious and deterrence was important.[63] The Supreme Court found, "While the monetary comparisons are wide and, indeed, may be close to the line, the award [] did not lack objective criteria."[64]

FOOTNOTES

63 *Haslip*, 111 S.Ct. at 1046.

64 *Id.*

The Supreme Court found it proper for the underlying court to examine as a factor in determining the amount of punitive damages, the "financial position" of the defendant.[65] Wells Fargo is the second largest loan servicer in the United States. With over 7.7 million loans under its administration at the time this matter went to trial, it possesses significant resources. Previous sanctions in *Slick, Stewart, Fitch* and even this case have not deterred Wells Fargo. As recognized in *Eichenseer*, if previous awards do not deter sanctionable conduct, larger awards may be necessary.

FOOTNOTES

65 *Id.* at 1045.

C. [*28] Comparison of Punitive Damages and Civil or Criminal Penalties

HN10 Fairness requires that a person receive "fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty."[66] In determining the appropriate punitive damage amount, "substantial deference" must be given to "legislative judgments concerning appropriate sanctions for the conduct at issue."[67] Other courts have recognized that this comparison may be difficult in bankruptcy cases:

> Obviously, this latter guidepost poses something of a problem as there is not a complex statutory scheme designed to respond to violations of the automatic stay other than the Bankruptcy Code itself. Significantly, § 362(h)[68] specifically provides for the award of punitive damages. Thus, creditors must be presumed to be on notice that if they violate the automatic stay they will be liable for punitive damages.[69]

FOOTNOTES

66 *BMW*, 116 S.Ct. at 1598.

67 *Id.* at 1603.

68 This provision is now section 362(k).

69 *In re Johnson*, 2007 Bankr. LEXIS 2678, 2007 WL 2274715, *15 (Bankr.N.D.Ala. 2007) (quoting *In re Ocasio*, 272 B.R. 815, 826 (1st Cir.BAP 2002).

As previously set forth, Wells Fargo is a sophisticated lender and a regular participant in bankruptcy **[*29]** proceedings throughout the country. It is represented by able counsel and it well versed in the Bankruptcy Code and the provisions of the automatic stay. Wells Fargo was on notice by the language

of section 362(k) that it could be subject to punitive damages, and it was on notice through jurisprudence that those damages could be severe.

VI. Conclusion

Wells Fargo's actions were not only highly reprehensible, but its subsequent reaction on their exposure has been less than satisfactory. There is a strong societal interest in preventing such future conduct through a punitive award. The total monetary judgment to date is $24,441.65, plus legal interest, $166,873.00 in legal fees and $3,951.96 in costs. Other fees and costs incurred by Jones through the first remand were also incurred and are not included in the foregoing amounts. Because the Court cannot reveal the sealed amount stipulated to by the parties when they settled Jones' Application for Award of Fees and Costs Related to Remand ("Application"),[70] the Court will use Jones' Application itself as evidence of fees and costs actually incurred up to the date of the Application. The Application and supporting documentation establish **[*30]** that an additional $118,251.93 in attorneys' fees and $3,596.95 in costs was also incurred by Jones.[71] The amounts previously awarded plus the additional amounts incurred establish that the cost to litigate the compensatory portion of this award was $292,673.84. After considering the compensatory damages of $24,441.65 awarded in this case, along with the litigation costs of $292,673.84; awards against Wells Fargo in other cases for the same behavior which did not deter its conduct; and the previous judgments in this case none of which deterred its actions; the Court finds that a punitive damage award of $3,171,154.00 is warranted to deter Wells Fargo from similar conduct in the future. This Court hopes that the relief granted will finally motivate Wells Fargo to rectify its practices and comply with the terms of court orders, plans and the automatic stay.

FOOTNOTES

70 Docket no. 396.

71 Evidence of the fees and costs incurred is attached to the Application.

New Orleans, Louisiana, April 5, 2012.

/s/ Elizabeth W. Magner

Hon. Elizabeth W. Magner

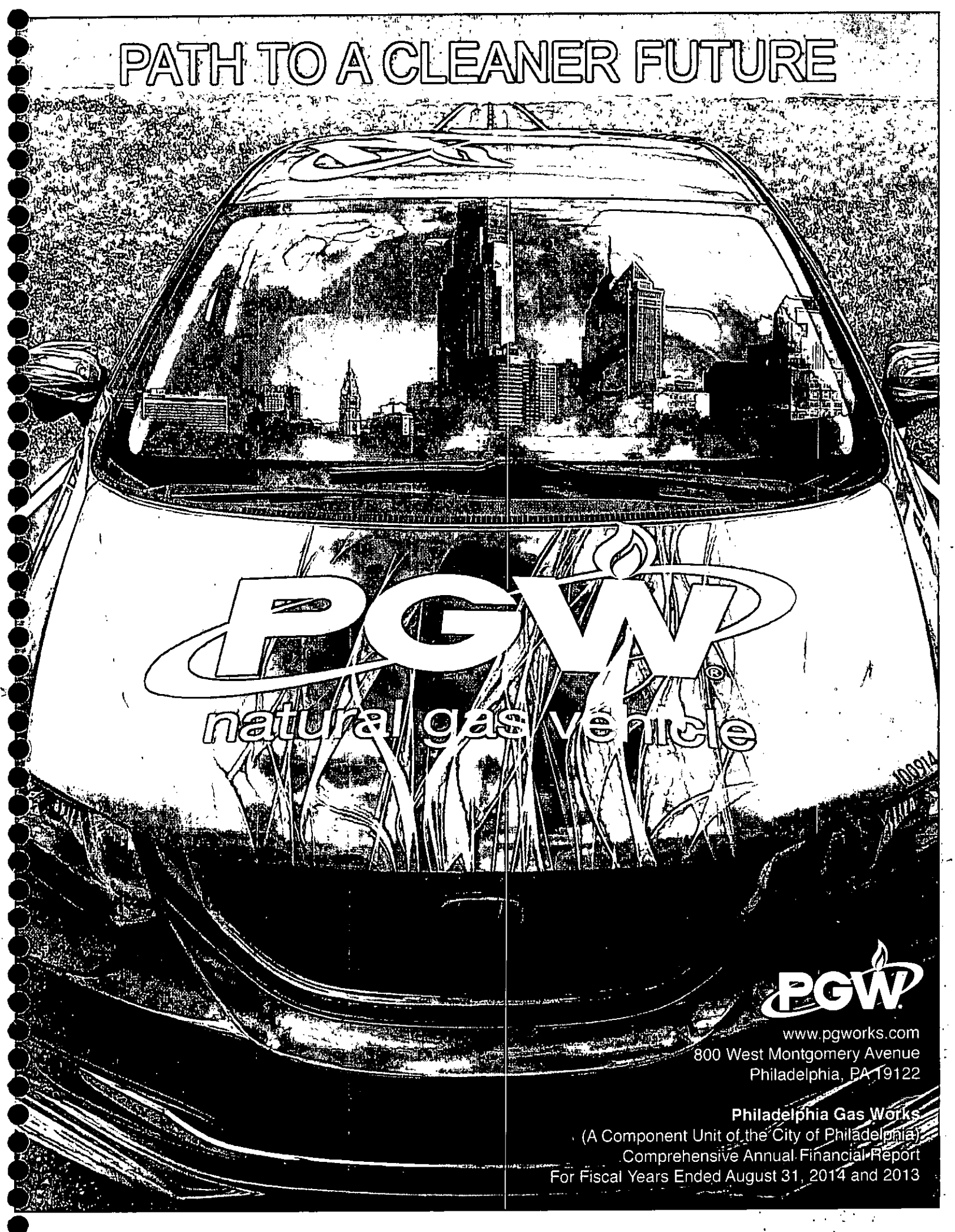
U.S. Bankruptcy Judge

OTHER REFERENCES

PGW 2014 COMPREHENSIVE ANNUAL REPORT

(a) Operating Revenues Balance Sheet & (h) Revenue Recognition

PATH TO A CLEANER FUTURE



PGW

www.pgworks.com
800 West Montgomery Avenue
Philadelphia, PA 19122

Philadelphia Gas Works
(A Component Unit of the City of Philadelphia)
Comprehensive Annual Financial Report
For Fiscal Years Ended August 31, 2014 and 2013

PHILADELPHIA GAS WORKS
Joseph F. Golden, Jr. • Executive Vice President and Acting Chief Financial Officer
800 West Montgomery Avenue • Philadelphia, PA 19122
Phone: 215-684-6464 • Fax: 215-684-6564
Email: JGolden@pgworks.com

The Chairman and Members of the Philadelphia Facilities Management Corporation Philadelphia, Pennsylvania:

The Comprehensive Annual Financial Report (CAFR) of the Philadelphia Gas Works (PGW or the Company) for the years ended August 31, 2014 and 2013 is hereby submitted. The financial statements were prepared in accordance with Generally Accepted Accounting Principles in the United States of America (U.S. GAAP). Responsibility for both the accuracy of the data and the completeness and fairness of the presentation, including all disclosures, rests with PGW management.

The financial statements were audited by KPMG, a firm of licensed certified public accountants. The annual audit was conducted in accordance with auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that KPMG plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, no such opinion was expressed. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. The audit provides a reasonable basis for KPMG's opinion.

In KPMG's opinion, the financial statements present fairly, in all material respects, the financial position of PGW as of August 31, 2014 and 2013, and the changes in its financial position and its cash flows for the years then ended, in conformity with U.S. GAAP. Accordingly, an unmodified opinion was rendered. This independent auditor's report is presented as the first component of the financial section of this report.

Management has provided a narrative to accompany the basic financial statements. This narrative is known as Management's Discussion and Analysis (MD&A). This letter of transmittal is designed to complement the MD&A and should be read in conjunction with it.

PROFILE OF PHILADELPHIA GAS WORKS

PGW began providing gas service to the City of Philadelphia (the City) in 1836, when the City's first gas lights were turned on along Second Street, between Vine and South Streets. In 1841, PGW came under City ownership. In 1897, the City contracted for PGW to be managed by UGI Corporation (then United Gas Improvement Company). Effective January 1, 1973 the City contracted with Philadelphia Facilities Management Corporation to operate and manage PGW.

KPMG LLP
1601 Market Street
Philadelphia, PA 19103-2499

Independent Auditors' Report

The Controller of the City of Philadelphia and
Chairman and Members of the Philadelphia
Facilities Management Corporation
Philadelphia, Pennsylvania:

We have audited the accompanying financial statements of Philadelphia Gas Works (the Company), a component unit of the City of Philadelphia, Pennsylvania, as of and for the years ended August 31, 2014 and 2013, and the related notes to the financial statements, which collectively comprise the Company's basic financial statements as listed in the table of contents.

Management's Responsibility for the Financial Statements

Management is responsible for the preparation and fair presentation of these financial statements in accordance with U.S. generally accepted accounting principles; this includes the design, implementation, and maintenance of internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error.

Auditors' Responsibility

Our responsibility is to express an opinion on these financial statements based on our audits. We conducted our audits in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditors' judgment, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control. Accordingly, we express no such opinion. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of significant accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Philadelphia Gas Works as of August 31, 2014 and 2013, and the changes in its financial position, and its cash flows for the years then ended, in accordance with U.S. generally accepted accounting principles.

Other Matters

Required Supplementary Information

U.S. generally accepted accounting principles require that the management's discussion and analysis on pages 3-14 and the schedules of pension funding progress and other postemployment benefits funding progress on pages 57 and 58 be presented to supplement the basic financial statements. Such information, although not a part of the basic financial statements, is required by the Governmental Accounting Standards Board who considers it to be an essential part of financial reporting for placing the basic financial statements in an appropriate operational, economic, or historical context. We have applied certain limited procedures to the required supplementary information in accordance with auditing standards generally accepted in the United States of America, which consisted of inquiries of management about the methods of preparing the information and comparing the information for consistency with management's responses to our inquiries, the basic financial statements, and other knowledge we obtained during our audits of the basic financial statements. We do not express an opinion or provide any assurance on the information because the limited procedures do not provide us with sufficient evidence to express an opinion or provide any assurance.

Other Information

The introductory and statistical sections have not been subjected to the auditing procedures applied in the audits of the basic financial statements, and accordingly, we do not express an opinion or provide any assurance on them.

KPMG LLP

Philadelphia, Pennsylvania
December 23, 2014, except for note 15, as to which the date is February 23, 2015

PHILADELPHIA GAS WORKS
(A Component Unit of the City of Philadelphia)

Statements of Revenues and Expenses and Changes in Net Position

Years ended August 31, 2014 and 2013

(Thousands of U.S. dollars)

	2014	2013
Operating revenues:		
Gas revenues:		
Non-heating	$ 39,610	35,262
Gas transport service	41,217	37,078
Heating	655,311	602,814
Total gas revenues	736,138	675,154
Appliance and other revenues	8,317	8,333
Other operating revenues	14,681	9,984
Total operating revenues	759,136	693,471
Operating expenses:		
Natural gas	304,051	255,501
Gas processing	19,637	17,592
Field services	37,577	34,926
Distribution	36,929	30,259
Collection and account management	11,273	11,297
Provision for uncollectible accounts	38,848	39,971
Customer services	11,187	11,102
Marketing	7,783	6,789
Administrative and general	85,872	78,206
Pensions	24,521	23,614
Other postemployment benefits	11,228	16,492
Taxes	7,687	7,220
Total operating expenses before depreciation	596,593	532,969
Depreciation	47,428	45,912
Less depreciation expense included in operating expenses above	5,771	4,870
Net depreciation	41,657	41,042
Total operating expenses	638,250	574,011
Operating income	120,886	119,460
Interest and other income	3,597	1,147
Income before interest expense	124,483	120,607
Interest expense:		
Long-term debt	48,261	49,655
Other	9,380	10,740
Allowance for funds used during construction	(506)	(430)
Total interest expense	57,135	59,965
Distribution to the City of Philadelphia	(18,000)	(18,000)
Excess of revenues over expenses	49,348	42,642
Net position, beginning of year	358,587	315,945
Net position, end of year	$ 407,935	358,587

See accompanying notes to basic financial statements.

* Cost of removal of approximately $2.7 million was charged to expense as incurred in FY 2014 and is not included in accumulated depreciation.

	August 31, 2013			
	Beginning balance	Additions and transfers	Retirements and transfers	Ending balance
Land	$ 5,595	—	—	5,595
Distribution and collection systems	1,435,353	67,419	(21,554)	1,481,218
Buildings and equipment	453,181	14,438	(2,886)	464,733
Total utility plant, at historical cost	1,894,129	81,857	(24,440)	1,951,546
Under construction	53,851	72,416	(81,858)	44,409
Less accumulated *depreciation for:*				
Distribution and collection systems	(691,151)	(31,018)*	20,548	(701,621)
Buildings and equipment	(131,179)	(12,019)*	3,851	(139,347)
Utility plant, net	$ 1,125,650	111,236	(81,899)	1,154,987

* Cost of removal of approximately $2.9 million was charged to expense as incurred in FY 2013 and is not included in accumulated depreciation.

(h) Revenue Recognition

The Company is primarily a natural gas distribution company. Operating revenues include revenues from the sale of natural gas to residential, commercial, and industrial heating and non-heating customers. The Company also provides natural gas transportation service. Appliance and other revenues primarily consist of revenue from the Company's parts and labor repair program. Revenue from this program is recognized on a monthly basis for the life of the individual parts and labor plans. Additional revenue is generated from collection fees, reconnection charges, and bulk Liquefied Natural Gas (LNG) sales contracts. Other operating revenues primarily consist of finance charges assessed on delinquent accounts.

In early 2012, Act 11 was enacted by the Pennsylvania Legislature, which permitted public utilities to file a request with the PUC for the implementation of a Distribution System Improvement Charge (DSIC). A DSIC permits natural gas distribution companies to recover the costs related to main and service replacement not already recovered in base rates. This legislation provides utility companies with a supplemental recovery mechanism for costs related to incremental/accelerated distribution system repair, improvement, and replacement. Act 11 permits gas utilities to recover 5.0% of their non-gas revenues via the recovery mechanism and permits greater percentage increases if the PUC so permits. The Company started billing customers a DSIC surcharge as of July 1, 2013. In FY 2014, the Company billed customers $19.4 million for the DSIC surcharge. In FY 2013, the Company billed

(Continued)

MUR3

FedEx. Express Package US Airbill — 8079 2822 1626 — 0215

1 From Please print and press hard. Date 4/21/2015 Sender's FedEx Account Number 2393-0508-3
Sender's Name Donna S. Ross Phone 215 938-6665
Company SBQ MANAGEMENT
Address 1095 RYDAL RD
City RYDAL State PA ZIP 19046-1711

2 Your Internal Billing Reference

3 To Recipient's Name The Hon. Rosemary Chiavetta, Sec.
Company PA PUC
Address 400 North ST, 2nd Fl
Address Commonwealth Keystone Bldg
City Harrisburg State PA ZIP 17105-3265
HOLD Weekday / HOLD Saturday
0119148457

4 Express Package Service — Packages up to 150 lbs.
FedEx First Overnight; FedEx Priority Overnight; FedEx Standard Overnight (X); FedEx 2Day A.M.; FedEx 2Day; FedEx Express Saver

5 Packaging: FedEx Envelope*; FedEx Pak*; FedEx Box; FedEx Tube; Other

6 Special Handling and Delivery Signature Options
SATURDAY Delivery
No Signature Required; Direct Signature; Indirect Signature
Does this shipment contain dangerous goods? No; Yes; Dry Ice; Cargo Aircraft Only

7 Payment Bill to: Sender; Recipient; Third Party; Credit Card; Cash/Check
Total Packages; Total Weight; Total Declared Value*

611

Get travel times. Schedule pickups. Create labels. Go to fedex.com

FedEx. Express Package US Airbill — 8079 2822 0696 — 0215

1 From Please print and press hard. Date 4/23/2015 Sender's FedEx Account Number 2393-0508-3
Sender's Name Donna S. Ross Phone 215 938-6665
Company SBQ MANAGEMENT
Address 1095 RYDAL RD
City RYDAL State PA ZIP 19046-1711

2 Your Internal Billing Reference

3 To Recipient's Name ALI ERANDAVERO Phone
Company PA PUC
Address 801 Market ST, Suite 4063
Address Suite 4063
City Philadelphia State PA ZIP 19107
HOLD Weekday / HOLD Saturday
0119148457

4 Express Package Service — Packages up to 150 lbs.
FedEx First Overnight; FedEx Priority Overnight; FedEx Standard Overnight (X); FedEx 2Day A.M.; FedEx 2Day; FedEx Express Saver

5 Packaging: FedEx Envelope* (X); FedEx Pak*; FedEx Box; FedEx Tube; Other

6 Special Handling and Delivery Signature Options
SATURDAY Delivery
No Signature Required; Direct Signature; Indirect Signature
Does this shipment contain dangerous goods? No (X); Yes; Dry Ice; Cargo Aircraft Only

7 Payment Bill to: Sender (X); Recipient; Third Party; Credit Card; Cash/Check
Total Packages; Total Weight; Total Declared Value*

611

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MUR3

FedEx. Express Package US Airbill — 8079 2822 0700 — 0215

1 From Please print and press hard. Date 4/24/2015 Sender's FedEx Account Number 2393-0508-3
Sender's Name Donna S. Ross Phone 215 938-6665
Company SBQ MANAGEMENT
Address 1095 RYDAL RD
City RYDAL State PA ZIP 19046-1711

2 Your Internal Billing Reference

3 To Recipient's Name Mr. Laureto Tarinas Phone
Company PGW
Address 800 W. Montgomery Ave
Address 4th Fl
City Philadelphia State PA ZIP 19107
HOLD Weekday / HOLD Saturday
0119148457

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