



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

CUSTOMER ASSISTANCE

PETER TRIESTMAN,	)	ORDER ADOPTING
Petitioner	)	INITIAL DECISION
	)	
V.	)	
	)	
PUBLIC SERVICE ELECTRIC AND GAS COMPANY	)	BPU DKT. NO. EC12030239U
Respondent	)	OAL DKT. NO. PUC 03126-13
	)	(ON REMAND PUC 05419-2012N)

**Parties of Record:**

**Peter Triestman**, Petitioner, appearing *pro se*  
**Alexander C. Stern, Esq.**, on behalf of Respondent, Public Service Electric and Gas Company

BY THE BOARD:

By Petition for Formal Hearing filed with the Board of Public Utilities (Board) on March 8, 2012, Peter Triestman (Petitioner) alleged that he experienced a diversion of service and that Public Service Electric and Gas Company (PSE&G) overbilled him for electric and gas usage during the period between June 6, 2009 and February 8, 2012. PSE&G is a public utility in the State of New Jersey, subject to the jurisdiction of the Board. The Petition was transmitted to the Office of Administrative Law (OAL) on April 23, 2012 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was held on July 27, 2012, before Administrative Law (ALJ) Judge Kimberly A. Moss. After reviewing the record, the Board adopted the Initial Decision, in part, and remanded, in part. The remanded matter was transmitted to the OAL and filed on March 5, 2013, and a telephone conference was held on March 26, 2013. ALJ Moss conducted hearings on June 24, 2013 and September 10, 2013 on the remanded issues. On October 7, 2013, the ALJ issued her initial decision, dismissing the petition. (October 7, 2013 Initial Decision Page 13).

Having reviewed the record, the Board now **ADOPTS** the Initial Decision rendered on October 7, 2013.

## **BACKGROUND AND PROCEDURAL HISTORY**

### **Petition**

In his Petition dated March 8, 2012, Petitioner alleges that he experienced a diversion of service and that PSE&G overbilled him for electric and gas usage during the period between June 6, 2009 and February 8, 2012. (Petition ¶ 1). According to the Petitioner's estimate, PSE&G billed him \$33,566.95 where he should have been billed \$6,600. (Petition ¶¶ 1, 6). On February 1, 2011, the Petitioner alleges that he paid PSE&G \$2,000 and that PSE&G applied this \$2,000 as a deposit rather than a credit toward his usage. (Petition ¶ 8).

The Petitioner claims that PSE&G's meter continued to record electric usage even after he shut off electricity from his apartment's main panel. (Petition ¶ 3). He also claims that PSE&G continued to bill him for gas usage after he shut off the gas from the main valve in his apartment and shut off all gas appliances and gas heaters. (Petition ¶ 4). According to the Petitioner, PSE&G's agents investigated electric usage in the hallways on all the floors in his building but failed to investigate gas usage on non-hallway portions of other floors. (Petition ¶ 5).

In addition, the Petitioner claims that PSE&G improperly refused to classify his account as "residential" during the period between November 2009 and January 2011 – only to later reclassify his account as "residential" in February 2011. (Petition ¶ 9). Finally, the Petitioner demands that PSE&G credit the bill's excess to his account, that PSE&G credit his \$2,000 payment toward his usage rather than a deposit, that the Board review his bills and determine their accuracy before and after the reclassification of his apartment, and that the Board permit him to propound discovery on PSE&G. (Petition ¶¶ 7–10).

### **Answer**

In its Answer dated April 13, 2012, PSE&G denies all of the Petitioner's allegations. (Answer ¶ 1). PSE&G alleges the Petitioner owed PSE&G \$33,063.43 as of April 11, 2012. (Answer ¶ 3).

According to PSE&G, it conducted a field investigation on February 4, 2011 which revealed the Petitioner was utilizing a 4,000-square foot open loft area for both commercial and residential purposes. (Answer ¶ 7). PSE&G claims it investigated whether it could classify the Petitioner's account as "residential" and whether it would benefit the Petitioner to do so. (Answer ¶ 8).

PSE&G raises various affirmative defenses including the Petitioner's failure to state a claim; PSE&G's conformity with its tariffs, New Jersey statutes, and regulations of the Board of Public Utilities; and the accuracy of PSE&G's billing. (Answer ¶¶ 1–4). PSE&G demands an order denying Petitioner's requested relief and dismissing the Petition. (Answer ¶ 4).

### **July 27, 2012 Hearing**

At the first evidentiary hearing<sup>1</sup> on July 27, 2012, the Petitioner testified about the alleged diversion of his gas and electric service, the improper classification of his apartment, and PSE&G's subsequent errors in revised bills.

Mr. Sequeira, a field service technician for PSE&G, testified that Petitioner's electric meter stopped after he shut off all breakers. (T69-10 to 14). But in his report (dated December 8, 2011) Mr. Sequeira acknowledged that one of the Petitioner's breakers was wired to the lights in the stairwells on all four floors of the building. (Exhibit P-3 to Initial Decision). It was also made clear at the hearing that if a diversion is discovered in a commercial building, it is left to the tenants and landlord to resolve the dispute, as opposed to a residential building, where PSE&G revises the bills and bills the landlord for diverted service. (1T 82-13 to 14; 1T 86-14 to 19). However, according to Mr. Edward Sullivan, a PSE&G employee of 46 years, tenants do sometimes pay for common areas and that PSE&G does not concern itself with the lease agreements between landlords and their tenants. (T49-2 to 9). But, during cross examination, Mr. Sullivan stated PSE&G should have followed up when it realized the Petitioner's breaker was connected to the lights in the stairwell. (T57-22 to 23).

To support his allegation of diversion of gas service, Petitioner stated that PSE&G continued to bill him for gas usage even after he shut off his gas appliances, including his heating system. (1T 21-T32). Further, he testified that the pipes in his apartment froze, while the pipes on the third floor remained running. (1T 17-14 to 17; 1T 18-8 to 9). In response to this allegation, Mr. Sequeira pointed to the December 2011 test, where he noted that Petitioner's gas meter spun when he turned on the heat and stopped when he shut it off. (1T 69-18 to 20). He concluded there was no diversion of gas service. (1T 69-23 to 24).

To support the improper classification of his apartment as commercial, Petitioner testified that his family lived in the space and does not operate a business there. (1T 8-19 to 22; 1T 9-1T 10). Mr. Sequeira testified that he visited Petitioner's apartment in February of 2011 to determine whether it was commercial or residential, but Petitioner refused to let him enter the apartment. (1T 65-4 to 8). However, Mr. Sequeira concluded that Petitioner operated a show business because he could see stage designs in the apartment and the building owner told him the Petitioner had a show business. (1T 74-1T 75). Despite these findings, PSE&G changed Petitioner's commercial gas meter to a residential meter in February of 2011, and changed the commercial electric meter to a residential meter in December 2011. (1T 76-3 to 7; 1T 77-12 to 21). According to Mr. Sullivan, Petitioner actually benefited from the commercial rate. (1T 50-16 to 23).

### **August 20, 2012 Initial Decision**

In her first Initial Decision, ALJ Moss noted her findings of fact as: Petitioner's meter was wired to the lights of the stairwell of all four floors and Petitioner never agreed to pay for lights outside of his premises. (August 20, 2012 Initial Decision Page 5). Therefore, the ALJ concluded Petitioner experienced a diversion of electric service. (August 20, 2012 Initial Decision Page 8).

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<sup>1</sup> The hearing transcripts will be designated: 1T (July 27, 2012); 2T (June 24, 2013); and 3T (September 10, 2013).

However, unlike ALJ Moss's decision regarding electric service, the Initial Decision did not make any findings of fact or conclusions to resolve this dispute about diverted gas service.

The ALJ also concluded that Petitioner was incorrectly billed for gas usage at a commercial rate from July 2009 until February 2011 and incorrectly billed for electric usage at a commercial rate from July 2009 until December 2011. (August 20, 2012 Initial Decision Page 8).

The Initial Decision ordered PSE&G to:

1. Determine the amount attributable to Petitioner's diversion of service and to contact the Petitioner's landlord to correct the diversion;
2. Re-bill the Petitioner for gas usage from July 2009 to February 2011 at the residential rate in effect during those months; and
3. Re-bill the Petitioner for electric usage from July 2009 to December 2011 at the residential rate in effect during those months.

[August 20, 2012 Initial Decision Pages 8-9].

### **Compliance Letter**

PSE&G filed a compliance letter on August 28, 2012, informing the Board that it re-billed the Petitioner pursuant to the August 20, 2012 Order and contacted Petitioner's landlord regarding the diversion. (August 28, 2012 Letter ¶ 1). Based on the re-billing Petitioner owed an additional \$180.92 for gas usage and had a credit of \$5.97 for electric usage. Ibid. As for the usage regarding the hallway lights, PSE&G credited Petitioner's account for \$1,628.47. It was determined that Petitioner, after all the adjustments to his account, owed PSE&G a remaining balance of \$33,361.80. (August 28, 2012 Letter ¶ 2). Petitioner's landlord informed PSE&G that Petitioner was the only tenant benefiting from the hallway lights and his lease is a commercial lease. Ibid.

### **December 19, 2012 Board Order**

In its December 19, 2012 Order, the Board adopted the ALJ's decision in part, and remanded in part, following a review of the record and the exceptions and reply to exceptions filed. Specifically it found that the Initial Decision's conclusions about Petitioner's diversion of service regarding the hallway lights, his right to a revised electric bill, and his request for residential rates were reasonable and fully supported by the record. (December 19, 2012 Board Order Page 9).

However, the Board remanded the matter to the OAL, directing the OAL to:

1. determine if compliance with requirements as set forth in N.J.A.C. 14:3-7.8 regarding the diversion of gas service was satisfied;
2. provide findings of fact and conclusions of law on whether there is further diversion of electric service based on Petitioner's

allegations that there are other electrical appliances in use that supply service outside of his unit which he is paying for and based on his allegation that PSE&G did not properly investigate the diversion of electric service; and

3. provide findings of fact to support the conclusion that there was a diversion of gas service.

[December 19, 2012 Board Order Page 9]

### **Hearing on Remand**

In response to the Board's remanded issues, ALJ Moss held an evidentiary hearing on June 24, 2013 and on September 10, 2013. Mr. Sullivan testified that he oversaw Mr. Sequeira's investigation of Petitioner's complaint. (2T 76-3 to 12). He also explained the steps that were taken while testing for a diversion in Petitioner's unit and the steps that were taken after the Board issued its December 19, 2012 Order, particularly the several attempts to contact the landlord, Mr. Jose Gomes. (2T 77-17 to 2T 78-22 to 23). Mr. Sullivan testified that he still does not believe a diversion of service existed. (2T 79-23). Further, when asked if PSE&G was dealing with a residential or commercial premise in the present matter, Mr. Sullivan testified it was not residential because the landlord described the building as a commercial building and because the landlord indicated that Petitioner did not have a lease with the landlord. (2T 90-11 to 15, 2T 131-5 to 12). Also, Mr. Sullivan stated that even if the unit was considered residential, there can be no diversion under the law because Petitioner is the primary beneficiary of any alleged diversion. (2T 93-21 to 2T 94-3). Mr. Sullivan explained that Petitioner is not a "tenant-customer" under N.J.A.C. 14:3-7.8 because Petitioner does not rent a dwelling unit in a multi-family building or owns it as a condominium. (2T 108-18 to 23).

The ALJ continued her evidentiary hearing on September 10, 2013. PSE&G presented Mr. Gomes who testified that he is the principal of Tall Oak Builders and that Tall Oak Builders owns 115 Monroe Street, where Petitioner occupies the fourth floor of that building. (3T 6-23 to 3T 7-10). Mr. Gomes further stated that when Petitioner was looking to rent the 5,000 square-foot area, a lease was never signed, that he and Petitioner discussed the area's use as commercial, and that the fourth floor did not have a kitchen before Petitioner occupied it. (3T 7-13 to 3T 8-5). Mr. Gomes testified that he and Petitioner agreed that Petitioner is responsible for utilities. (3T 8-6 to 11).

When asked about the diversion of service regarding the hallway lights, Mr. Gomes noted that Petitioner is the only tenant presently in the building and that Petitioner is the primary beneficiary of the hallway light bulbs. (3T 10-5 to 14). Additionally, Mr. Gomes was not aware of any diversion of service at 115 Monroe Street. (3T 9-18 to 23).

Mr. Gomes described the occupied space at 115 Monroe Street. Specifically, he stated that a councilman occupies the 500 square foot space on the first floor, the second floor is used for cell phone company equipment storage, the third floor is vacant, Petitioner occupies the fourth floor, and three cell phone companies (Nextel, Verizon, and Metro PCS) pay for cell tower space on the roof. (3T 13-3 to 3T 15-9).

PSE&G then called Mr. Sequeira to testify about his February 2011 investigation of Petitioner's complaint. Specifically, he stated that the electrical diversion check consisted only of a breaker and meter test, and the gas diversion check consisted of a heater and meter test. (3T 38-8 to 3T 40-2). Further, Mr. Sequeira testified that he did not find any diversion at all, for electric or gas and he continues to believe there is no diversion of electric or gas because when he shut off both the electric and the gas meters, the meters stopped running. (3T 46-23 to 41-2). Mr. Sequeira also testified that PSE&G does not perform diversion of service investigations on commercial premises. (3T 43-24 to 3T 44-4). However, he admitted to conducting a diversion investigation at Petitioner's unit because there was an obligation once PSE&G changed Petitioner's meters to residential. (3T 44-10 to 16).

Mr. Sequeira testified that he was not able to fully conduct an investigation of Petitioner's premises to determine whether it was residential or commercial. (3T 47-13 to 19). Specifically, he explained that Petitioner would not let him in so he was only able to peek through the door. (3T 47-19 to 24). He noticed open float lamps and stage sets, an area that could have been a kitchen, a ceiling heater, a commercial heater, and a water heater in the basement for Petitioner's unit. (3T 48-2 to 3T 50-13).

Mr. Sequeira testified that he had the bookkeeping department change Petitioner's rate to residential because Petitioner showed him racks of clothes by the front door and told him he was living there so he took his word for it that it was residential. (3T 51-10 to 13). Mr. Sequeira also acknowledged his report, recorded on February 1, 2011, where he observed a range, gas range, refrigerator, microwave oven, dishwasher, central hearing and water heating electric. (3T 51-15 to 21). Mr. Sequeira also admitted that after the Board issued its December 19, 2012 Board Order, no additional investigations took place. (3T 55-23 to 25).

### **October 7, 2013 Initial Decision**

On October 7, 2013, ALJ Moss issued an Initial Decision. The ALJ found that Mr. Gomes rented the fourth floor unit at 113-115 Monroe Street<sup>2</sup> to Petitioner as a commercial unit and that all the other tenants in the same building are commercial tenants. (October 7, 2013 Initial Decision Page 8). Specifically, the ALJ found that three cell phone companies share a room on the second floor for their equipment, and have antennas on the roof and that the third floor has been vacant for several years. Ibid. The ALJ also found that Petitioner does not rent a dwelling unit in a multi-family building, nor does he own a condominium at 115 Monroe Street. Ibid.

The ALJ further found that Petitioner first contacted PSE&G in May of 2009, requesting to be billed at a residential rate and alleging there was a diversion of service. (October 7, 2013 Initial Decision Page 8). On February 1, 2011, Mr. Sequeira requested PSE&G change Petitioner's account to residential. Ibid. The ALJ determined that the diversion of service investigation took place on December 8, 2011, more than two months after Petitioner's request, but during that investigation, Petitioner allowed Mr. Sequeira only limited access to the unit. Finally, ALJ Moss found that PSE&G does not conduct diversion-of-service investigations on commercial premises. (October 7, 2013 Initial Decision Pages 8-9).

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<sup>2</sup> On June 24, 2013, Petitioner testified there are two entrances to the building in question. One is labeled 115, which is Petitioner's entrance and to all floors except the first floor. There is an entrance labeled 113 which is for the first floor. (2T 46-17 to 21). From herein, 115 Monroe Street will be used to reference the building in question.

ALJ Moss concluded that Petitioner was not a "tenant-customer" in accordance with N.J.A.C. 14:3-7.8(a), which is the diversion-of-service rule. Because a "tenant-customer" is a "residential customer of record at the time of the complaint who rents a dwelling unit in a multi-family building or owns a condominium" and the facts show that Petitioner did not rent in a multi-family building, the ALJ determined Petitioner was not eligible for a diversion-of-service investigation pursuant to N.J.A.C. 14:3-7.8(a). (October 7, 2013 Initial Decision Page 10). Additionally, the ALJ concluded that PSE&G did not conduct the diversion investigation in accordance with N.J.A.C. 14:3-7.8(d) because the investigation was not done within two months of the Petitioner's complaint. However, the ALJ determined that Petitioner failed to show by a preponderance of the evidence, via his own diversion investigation, that there was any type diversion beyond the hallway light bulbs. (October 7, 2013 Initial Decision Page 12). Accordingly, the ALJ dismissed the Petition because Petitioner is not a "tenant-customer" within N.J.A.C. 14:3-7.8(a).

### **Exceptions**

No exceptions were filed following the October 7, 2013 Initial Decision.

## **DISCUSSION AND FINDINGS**

### **A. Standard of review**

N.J.A.C. 1:1-18.6(c) and N.J.S.A. 52:14B-10 both provide that an agency may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are "arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record."

### **B. Credibility**

The ALJ made several credibility determinations that were pertinent to her factual and legal conclusions. Here, the ALJ had the opportunity to observe the demeanor of Petitioner and found the Petitioner not to be credible. (October 7, 2013 Initial Decision Pages 7-8). The ALJ indicated that Petitioner kept interrupting the other witnesses and did not provide a foundation as to why the steps he took in his diversion investigation would prove more reliable than one conducted by PSE&G. Ibid. The record supports the ALJ's reasoning, as Petitioner interrupted witnesses several times during the September 10, 2013 hearing, did not provide any foundation for his alleged diversion, did not give Mr. Sequeira full access to his unit during the diversion investigation, and did not sign a lease to the premises. (3T 48-24 to 3T 49-9; 3T 59-9 to 11; and 3T 72-24 to 3T 73-4, October 7, 2013 Initial Decision at pages 7-8). Upon review of the record, the Board **FINDS** that the ALJ's determination regarding the credibility of Petitioner was not arbitrary, capricious or unreasonable.

The ALJ also had the opportunity to observe the demeanor of Messrs. Sullivan, Gomes, and Sequeira and found all three of them credible. (October 7, 2013 Initial Decision Page 7). Specifically, the ALJ indicated that Mr. Sullivan outlined the steps PSE&G took in the diversion investigation and the steps PSE&G took after the Board's December 19 Order was issued. Additionally, the ALJ indicated that Mr. Gomes explained the rental agreement and the composition of the building where Petitioner rents, and that Mr. Sequeira admitted that he requested PSE&G change Petitioner's billing from commercial to residential, partly because

Petitioner simply stated he was a residential tenant. Ibid. The record fully supports the ALJ's reasoning.

With regards to Mr. Sullivan, he described the field service reports submitted by Mr. Sequeira and how his tests of the electric breakers and gas meters demonstrated no diversion of service and also described PSE&G's attempts to contact Mr. Gomes. (2T 77-17 to 2T 78-22 to 23). Further, Mr. Sullivan is a PSE&G employee of 46 years, and is well aware of the requirement that one must rent in a multi-family dwelling or own his or her unit as a condominium to be considered a "tenant-customer" under N.J.A.C. 14:3-7.8. (2T 73-13; 2T 108-18 to 23; October 7, 2013 Initial Decision Page 4).

Regarding Mr. Gomes, he testified that a councilman occupies the 500 square foot space on the first floor, the second floor is used for cell phone company equipment storage, the third floor is vacant, Petitioner occupies the fourth floor, and three cell phone companies - Nextel, Verizon, and Metro PCS - pay for cell tower space on the roof. (3T 13-3 to 3T15-9).

Finally, the ALJ's determination regarding Mr. Sequeira is supported by the record because Mr. Sequeira admitted that he requested a change in Petitioner's billing, based on Petitioner's statement that he has a residential unit. (3T 51-10 to 13).

Upon review of the record, the Board **FINDS** that the ALJ's determination regarding the credibility of Messrs. Sullivan, Gomes, and Sequeira is supported by sufficient, competent, and credible evidence in the record.

### **C. Petitioner's status as a "tenant-customer"**

Based on the credible testimony, the ALJ determined that Petitioner was not a "tenant-customer" under N.J.A.C. 14:3-7.8(a), thereby not entitling him to a diversion of service investigation. (October 7, 2013 Initial Decision Page 10).

Because the ALJ's finding of fact is supported by substantial evidence in the record, the Board **FINDS** that Petitioner is not a "tenant-customer" under N.J.A.C. 14:3-7.8(a) as a matter of law. N.J.A.C. 14:3-7.8 contains the Board's Diversion of Service rule. The most relevant section is N.J.A.C. 14:3-7.8(a), which defines a "tenant-customer" as "a residential customer of record at the time of the complaint who rents a dwelling unit in a multi-family building or owns a condominium."

The remaining provisions of N.J.A.C. 14:3-7.8 afford diversion protections only to "tenant-customers." Commercial tenants are not mentioned anywhere in the rule. N.J.A.C. 14:3-7.8 provides in part:

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

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



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

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

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

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

[N.J.A.C. 14:3-7.8.]

The rulemaking history of N.J.A.C. 14:3-7.8 also shows the rule's applicability to "tenant-customers" only. N.J.A.C. 14:3-7.8 diversion of service, formally known as N.J.A.C. 14:3-7.16, began as a proposal in May of 1983. See 15 N.J.R. 787. In its proposal, the definition of "tenant-customer" as found in N.J.A.C. 14:3-7.6 was defined as "a residential customer of record whose meter is located off his or her rented own premises." 15 N.J.R. 788. Before its adoption in November of 1983, the Board considered several comments on the proposal and stated in its summary of comments that "commercial tenants are not covered by the rule." 15 N.J.R. 1950. Thereafter, the Board amended the definition of "tenant-customer" to mean a "residential customer of record at the time of the complaint who rents a dwelling unit in a multi-family building or owns a condominium." 15 N.J.R. 1952. Because the Board amended the definition of "tenant-customer," the Board's intent was to clear any ambiguity in the applicability of N.J.A.C. 14:3-7.8, by specifically stating that "commercial tenants are not covered by the rule." 15 N.J.R. 1952.

Given the diversion of service rule's strict applicability to "tenant-customers", the substantial evidence in the record supporting the ALJ's credibility determinations and legal and factual conclusions that Petitioner is not a "tenant-customer," the Board **FINDS** that N.J.A.C. 14:3-7.8 does not apply to Petitioner because he is not a "tenant-customer" as defined under N.J.A.C. 14:3-7.8. Accordingly, the Board **FINDS** that PSE&G should bill Petitioner at a commercial rate going forward because the record fully supports that Petitioner is a commercial tenant.

#### D. Diversion of Service

Notwithstanding Petitioner's ineligibility for a diversion-of-service investigation under N.J.A.C. 14:3-7.8, the ALJ concluded that PSE&G did not conduct the diversion investigation in accordance with N.J.A.C. 14:3-7.8(d)(4) because it was not done within two months of Petitioner's complaint. (October 7, 2013 Initial Decision Page 12). However, the ALJ concluded that Petitioner failed to show, by a preponderance of the credible evidence that there was a gas or electric diversion other than the hallway lights. Ibid. Because the ALJ's conclusion regarding Petitioner's failure to meet his burden of proof is fully supported by substantial evidence in the record, the Board **FINDS** there was no further diversion of service other than the hallway lights. In addition, as noted by the ALJ and above, the petitioner was not entitled to a diversion investigation because he is not a tenant-customer in accordance with N.J.A.C. 14:3-7.8(a). (October 7, 2013 Initial Decision at page 12).

#### E. Modifying the December 19, 2012 Board Order

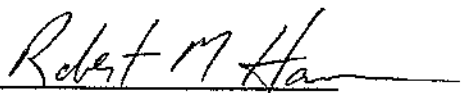
In its December 19, 2012 Order, the Board found that Petitioner experienced a diversion of electric service stemming from the eight hallway lights in the stairwell of the building. (December 19, 2012 Board Order Page 8). As a result, the Board ordered PSE&G to credit Petitioner for the diversion. Ibid. Additionally, the Board ordered PSE&G to retroactively apply residential rates to Petitioner's bills. Id. at 9.

In light of the newly presented evidence and for the reasons noted earlier, the Board modifies its earlier ruling that Petitioner should be billed at a residential rate. Moreover, the Board modifies its earlier ruling that there was a diversion of electric service in Petitioner's unit. Because the Board **FINDS** that Petitioner is a commercial tenant, the Board **HEREBY ORDERS** PSE&G to bill Petitioner on the commercial tariff going forward. The Board will not disturb any credits given to Petitioner resulting from its December 19, 2012 Board Order declaring there was a diversion.

Upon careful review and consideration of the entire record, the Board **HEREBY FINDS** that the factual determinations and legal conclusions of ALJ Moss in the October 7, 2013 Initial Decision are reasonable and based upon sufficient, competent, and credible evidence. Thus, the Board **HEREBY ADOPTS** the Initial Decision and **HEREBY ORDERS** the Petition to be **DISMISSED**. The Board **HEREBY FURTHER ORDERS** PSE&G to bill Petitioner on the commercial tariff going forward.

DATED: 12/18/13

BOARD OF PUBLIC UTILITIES  
BY:


  
ROBERT M. HANNA  
PRESIDENT

  
JEANNE M. FOX  
COMMISSIONER

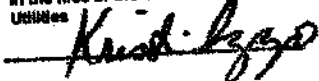
  
JOSEPH L. FIORDALISO  
COMMISSIONER

  
DIANNE SOLOMON  
COMMISSIONER

  
MARY-ANNA HOLDEN  
COMMISSIONER

ATTEST:   
KRISTI IZZO  
SECRETARY

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



PETER TRIESTMAN

V.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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

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**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. PUC 03126-13  
AGENCY DKT. NO. GC12030239U  
(ON REMAND PUC 05419-12)

**PETER TREISTMAN,**

Petitioner,

v.

**PUBLIC SERVICE ELECTRIC  
AND GAS COMPANY,**

Respondent.

OCT 7 2013

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**Peter Treistman, pro se**

**Alexander Stern, Esq., for respondent**

Record Closed: September 10, 2013

Decided: October 7, 2013

BEFORE KIMBERLY A. MOSS, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioner, Peter Treistman (Treistman), disputes bills by respondent, Public Service Electric and Gas (PSE&G). He alleges that there was a diversion of service. Treistman's petition was filed with the Board of Public Utilities (Board) on March 12, 2012. The matter was transmitted to the Office of Administrative Law (OAL) and filed

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

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

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

### **FACTUAL DISCUSSION AND FINDINGS**

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

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

## Testimony

### Peter Treistman

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

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

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

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

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

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

Edward Sullivan

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

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



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

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

Jose Gomes

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

Joseph Cauda

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

Peter Sequeira

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **LEGAL ANALYSIS AND CONCLUSIONS**

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

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

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

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

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

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

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

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

3. The application shall state that, if the tenant-customer has made one or more previous diversion complaints in the previous 12-month period, which failed to uncover a diversion of utility service, the utility may bill the customer for the cost of the second and subsequent investigations;
4. The utility shall investigate the alleged diversion within two months of the receipt of the investigation request. Each diversion investigation shall include a meter test conducted in accordance with N.J.A.C. 14:3-4.4;
5. The utility shall have the right of reasonable access pursuant to N.J.A.C. 14:3-3.6. For purposes of utility access, the alleged diversion is presumed to constitute a hazardous condition until the utility investigates;
6. If, as a result of such investigation, the utility determines that the service from the pipes and/or wires serving the tenant-customer has been diverted, the utility shall notify the landlord or his or her agent and instruct him or her to correct the diversion within 30 days through rewiring or repiping. However, this provision shall in no way prohibit a utility from disconnecting service if the utility determines that an unsafe condition exists;
7. If a diversion is found, the utility shall attempt to determine the identity of the beneficiary;
8. A tenant-customer seeking relief shall be responsible for furnishing to the utility the identity and address of the landlord or agent, and of the beneficiary, if known;
9. Additionally, the tenant-customer shall provide any other information, which may assist the utility in its investigation;
10. The utility shall furnish to the tenant-customer, the tenant-customer's landlord, and to the beneficiary (if different from the landlord) within 14 days of the investigation, a written report on the findings of the investigation. This report shall include information on the estimated cost of diverted service based upon prior use, degree day analysis, load study and/or cooling degree hours, whichever is appropriate;

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

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

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

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

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



**ORDER**

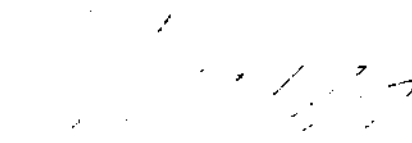
Based on the foregoing, it is hereby **ORDERED** that the petition is **DISMISSED**.

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

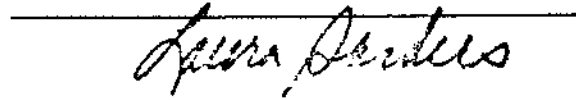
This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five days and unless such time limit is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

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

10-7-13  
DATE

  
\_\_\_\_\_  
KIMBERLY A. MOSS, ALJ

Date Received at Agency:

  
\_\_\_\_\_

Date Mailed to Parties:  
ljb

OCT - 8 2013

\_\_\_\_\_  
DIRECTOR AND  
CHIEF ADMINISTRATIVE LAW JUDGE

**WITNESSES**

For Petitioner:

For Respondent:

Ed Sullivan  
Peter Sequeira  
Jose Gomes  
Joseph Cauda

**EXHIBITS**

For Petitioner:

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

For Respondent:

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