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ILLINOIS COMMERCE COMMISSION

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CHIEF CLERK'S OFFICE

IN THE MATTER OF:)
)
PATRICIA O'DONNELL)
)
V.)
)
PEOPLES GAS LIGHT & COKE)
COMPANY)

No. 03-0246

RESPONDENT'S CLOSING BRIEF

THE PEOPLES GAS LIGHT AND COKE COMPANY (hereinafter "Respondent"), by and through its attorney Erin L. Ziaja, files its Closing Brief at the request of the Hearing Examiner and pursuant to 83 Ill. Adm. Code §§ 200.800, 840 and in support thereof states as follows:

INTRODUCTION

This case involves a complaint filed by the owner and landlord of an apartment building located at 5729 W. Addison in Chicago. On April 16, 2003, Complainant filed a formal complaint relating to a bill she received in October 2002 for gas usage occurring in the First Floor Apartment (the "Apartment") of Complainant's building. The gas that had been supplied to the Apartment was a result of tampering. Having no evidence that anyone lived in the Apartment during the period in which the tampering and associated usage occurred, Respondent billed Complainant, as the building owner, for the gas usage. Respondent contends that Complainant was the beneficiary of the gas service.

Complaint alleges that she did not cause the tampering and, thus should not be held responsible for the gas charges. She claims she was in California during the period in question, and therefore, could not have benefited from the service. She also alleges that Respondent should have notified her earlier of the tampering. Complainant claims that for the period in dispute, the Apartment was rented to Mr. James Cerny and his father, Raymond

Cerny. She alleges that Mr. Cerny was responsible for providing his own utilities. Therefore, Complainant seeks to “terminate the attempts to collect the past due amounts” for the Apartment. (ICC Compl. 03-0246).

PROCEDURAL HISTORY

On April 16, 2003, Complainant filed a formal complaint with the Illinois Commerce Commission (“ICC”) challenging a bill that she received in October 2002. The bill reflected the previously unbilled gas usage associated with the Apartment for a period of February 5, 2000 through April 15, 2002. (Compl. Ex. 3) An evidentiary hearing was held on July 13, 2004. Mr. Brian Schmoldt testified on behalf of Peoples Gas. Mr. Schmoldt is a special service representative with Peoples Gas and a keeper of Peoples Gas’ records. (Tr. 165) Mr. Schmoldt has been with Respondent for eleven years. (Tr. 165) Mr. Schmoldt testified that he investigated Complainant’s complaint and was familiar with the facts of this case. (Tr. 166) Complainant appeared pro se and produced no witnesses.

STATEMENT OF FACTS

The property in question is a three-unit residential apartment building located in Chicago’s northwest side. (Tr. 126-127). The property contains three units, one of which is a basement apartment. *Id.* Each unit has its own gas meter. (Tr. 119). The meters are located in the basement of the apartment building. The previously unbilled service reflects usage associated solely with the first floor unit.

Complainant was the owner and manager of the building.¹ While there were short periods of time that Complainant lived in the building, over the past ten years, Complainant

¹ Although the building was sold subsequent to the filing of the ICC Complaint, for the relevant period of February 2000 through October 2001, Complainant was the property owner.

resided primarily in California.² (Tr. 153-154, Compl. Ex. 2) Thus, the apartment building was used as an income property. However, some units were occupied by Complainant's family members: Namely, Plaintiff's son, Daniel Suerth, who has lived in each apartment unit at one point of time or another. (Compl. Ex. 1).

Complainant maintains that all relevant times, the units were occupied by tenants and that there were no extended periods of vacancy for any unit. Id. However, Complainant kept no records of who lived in the building or what period of time the units were occupied. (Tr. 161-163). In fact, Complainant does not even know the full names of many of her tenants. (Tr. 127-131). She was also unable to recall the exact dates tenants resided in her building. (Tr. 128, Tr. 163). Complainant claims she does not provide her tenants with a lease.

The issue presented in this Complaint begins when Mr. Eric Nieto, the person living in the Apartment from November 1999 through February 2000³ moved out and terminated his gas service. Although Complainant cannot pinpoint when Mr. Nieto left the building, Respondent's records indicate that gas service was terminated to the Apartment on February 4, 2000. (Tr. 174, Resp. Ex. 1) On that day, gas service was manually shut off by Respondent's employee, and a lock was secured to the gas meter, rendering it inoperable. (Tr. 175, Resp. Ex. 2) A reading was also taken on February 4, 2000 and reflected a final reading of 8078. (Tr. 173). A final bill reflecting that reading was sent to Mr. Nieto. Id.

Because Respondent never received a request to turn service back on for the first floor unit, Respondent assumed that the Apartment remained vacant. (Tr. 177). However, in

² It is undisputed that Complainant lived in California during the period of February 2000 through February 2002.

³ Complainant testimony as to the exact dates when people lived in the apartment building can only be described as sketchy. Complainant was unable to testify as to when exactly Mr. Nieto lived in the building. Therefore, these dates are based on Respondent's business records that reflect when service was initiated and terminated in Mr. Nieto's name.

September 10, 2001, a meter reader noticed activity registering on the Apartment's meter and took a reading. (Tr. 180). At that time, the meter read 9928. (Tr. 180, Resp. Ex. 4) Additionally, the reader noticed the lock had been removed from the meter. Id. When Respondent received the meter reader's report, indicating gas usage was occurring in the Apartment, it sent another meter reader out to confirm the activity. (Tr. 200-207) Respondent then began monitoring gas usage by taking actual meter readings while it conducted an investigation to determine who should be billed for the unlawfully obtained gas. (Tr. 180-182) Because of the approaching moratorium, which prohibits Respondent from turning off gas service during certain periods of time, and the need to investigate this matter further, Respondent did not immediately cut off service to the first floor unit. (Tr. 207).

The investigation showed that there was not currently a customer of record. (Tr. 178). In an effort to discover the proper party to bill for service, Respondent issued a bill to "Unknown Occupant" and addressed it to the Apartment. (Tr. 182-201). In these types of circumstances, it is Respondent's policy to initially issue a bill to the unknown tenant in the hope that the tenant will contact Respondent to establish an account for gas service, thereby avoiding the need to implicate the landlord and/or property owner. Id. Unfortunately, Respondent did not get any response from its "unknown occupant" billing. (Tr. 183). Therefore, Respondent terminated service to the Apartment on April 15, 2002, after the expiration of the moratorium. (Tr. 183, 205). Respondent removed the meter from the building on that same date. (Tr. 184, Resp. Ex. 5). The meter was then tested on July 3, 2002. Id. The results of the test showed that the meter was operating accurately. Id. Respondent registered the final reading at 0779. (Tr. 185, Resp. Ex. 6). Being unable to determine who was currently residing in the unit, Respondent issued a bill to Complainant, as the property owner, for the total gas charges incurred. (Tr. 186, Resp. Ex. 7).

Upon receipt of the bill, Complainant contacted Respondent and said that a tenant by the name of James Cerny lived in the Apartment from February 2000 through April 2002. (Tr. 129-130). She stated that she had no lease with Mr. Cerny. (Tr. 161). In fact, during the hearing she produced no evidence tending show that any tenant lived in the Apartment during the disputed period. Specifically, she stated she has no cancelled rent checks, rent receipts, rental application, credit checks, and although, she stated she evicted Mr. Cerny for failure to pay rent, she has no copy of any paperwork associated with the eviction proceedings. Id. Complainant also claims to have no knowledge of Mr. Cerny's whereabouts. Therefore, she did not produce him as a witness to the hearing. Although Complainant's son, Daniel Suerth, would have known whether Mr. Cerny lived in the building during the time period in question, because he lived in the building during the relevant time period, Complainant did not produce him as a witness either.

Complainant refused to pay any portion of the bill and filed a complaint with the ICC. (Tr. 150). During the course of the proceedings, Respondent voluntarily subpoenaed Commonwealth Edison's customer records to see if they had any record of Mr. Cerny living in the Apartment. (Tr. 195-196). Commonwealth Edison had no record of service being provided to James Cerny. (Tr. 196). However, it did have records indicating that an account was opened in the name of Raymond Cerny.⁴ Id. However, these records show that Raymond Cerny's occupancy in the first floor apartment began on October 29, 2001. (Tr. 195) Commonwealth Edison had no record of *anyone* living in the apartment between February 5, 2000 and October 28, 2001. (Tr. 195).

⁴ Complainant alleges that Raymond Cerny was her James Cerny's father, who lived with his son in the first floor apartment.

Based on these records, Respondent voluntarily reduced Complainant's bill by an amount equivalent to the gas charges incurred between October 29, 2001 and April 15, 2002.⁵ (Tr. 196). Accordingly, while Complainant never amended her complaint, the new period in dispute is February 5, 2000 through October 28, 2001. (Tr. 124). Thus, the final bill, in the amount of \$1914.86, reflects the cost of gas used during that time period. (Joint Ex. 1). Complainant does not question the accuracy of the final bill or the reasonableness of the charges. Rather, she agrees that \$1914.86 is an accurate reflection of the cost of gas supplied to the Apartment, however, she continues to maintain that she should not have to be the one to pay it. (Tr. 221).

ARGUMENT

The Complainant has failed to establish that Respondent violated any provision of the Public Utilities Act or Illinois Administrative Code. The Commission is given the authority to hear complaints regarding "any act or things done or omitted to be done in violation, or claimed violation, of any provision of [the Public Utilities Act, [220 ILCS 5/1-101, et seq., the "PUA"] or any order or rule of the Commission." 220 ILCS 5/10-108. The burden of proof is on the Complainant to establish the violation. *City of Chicago v. Illinois Commerce Commission*, 13 Ill.2d 607, 150 N.E.2d 776 (1958), *see also* 83 Ill. Admin. Code 200.570 (2004) (requires the Complainant to open and close proceedings, indicating that the Complainant has the burden of proof, just as the plaintiff has the burden of proof in the trial courts). Here, the Complainant failed to meet her burden. Specifically, Complainant produced no witnesses or probative documentary evidence. Although hard to believe, Complainant claims that she does not have a single, solitary piece of evidence showing that

⁵ Respondent has been unable to locate James or Raymond Cerny and, therefore, is unable to collect any portion of the monies owed attributable to this waived period of time.

James or Raymond Cerny lived in the property during the time period in question.

Complainant does not have a lease for either James Cerny or Raymond Cerny. (Tr. 161) She does not have a copy of a rental application or a reference or credit check that she ran prior to renting the apartment. (Tr. 161) She does not have copies of rent receipts. *Id.* When asked whether she has a copy of a single cancelled check provided by the alleged tenants, she said “they paid me in cash.” (Tr. 162). Finally, even though Complainant said that she had the Cernys evicted from the premises, she does not have any documents associated with the eviction. (Tr. 163) In fact, “the *only* paperwork [Complainant has] as far as who lived in the building” is junk mail that she collected in the hallway a year after the disputed period. (Tr. 144 line 14-15). Respondent, on the other hand, has sufficiently established “by a preponderance of the evidence, that the customer’s meter had been tampered with, that the customer benefited from the tampering, and that the utility’s rebilling is reasonable.”⁶ 83 Ill. Admin. Code 280.100 (c) (2004) Respondent will address each of these elements in turn.

1. Did Tampering Occur at the Premises?

At the outset it is important to reiterate that the issue presented in Complainant’s complaint is strictly whether, she, as the property owner, is responsible for payment of the gas supplied to the first floor apartment during the period of February 5, 2000 through October 29, 2001. That tampering occurred at the property is undisputed. However, Respondent is cognizant that the burden lies with it to show by a preponderance of the evidence that

⁶ Although a public utility is typically limited to a one year period in which to render a bill for services to a residential customer, when tampering is involved, the utility is not constrained to this period and can instead bill for the entire period encompassing unbilled services. Specifically, “when there has been tampering with . . . meters . . . and the customer has enjoyed the benefit of such tampering, the utility is not restricted to the [time limits] on unbilled service. . . . The customer shall be responsible for all service usage, and the utility may bill the customer for all service usage during the period the tampering occurred.” 83 Ill. Admin. Code 280.100(c)(2) (2004).

tampering occurred. (Tr. 118). Respondent more than sufficiently satisfied its burden through the evidence presented.

Respondent has shown that on February 4, 2000, pursuant to Mr. Nieto's request, Respondent manually shut off the gas to the first floor. (Tr. 173). On that same day, Respondent affixed a lock to the meter rendering the meter inoperable. (Tr. 175). During the disputed period, Respondent never received a request to turn service back on and thus, the lock was never removed by Respondent. Yet on September 2001, a meter reader noticed that the lock was missing and that gas usage was being registered for the first floor apartment. (Tr. 180-181) The meter was subsequently removed and tested for accuracy. (Tr. 184) The results of the tests show that the meter was fully operational. *Id.* Thus, the registering of gas was directly related to usage, which could not have occurred had the lock not been removed by an unauthorized third-party. Complainant offers no evidence to dispute these facts. Thus, based on the undisputed evidence, it is clear that someone tampered with the meter by breaking and removing the lock.

2. Did the Tampering at the Premises Benefit the Complainant?

Complainant's entire argument is that because she lived in California during the time period that the tampering occurred, she could not possibly have caused the tampering or used the gas herself, and, therefore, she should not be responsible for payment. Respondent does not dispute that Complainant was living in California at the time the tampering occurred. However, the regulations do not require that the Complainant be responsible for the tampering. Instead, Rule 280.100(c)(2) of the Illinois Administrative Code affords liability if Complainant benefited from the tampering irrespective of any responsibility she may bear for it.

It is well-established that the owner of a property can be a beneficiary of gas usage even though they did not receive the gas directly. See Diehl v. The Peoples Gas Light and Coke Co., 01-0453, 2003 WL 1995626 (Mar. 26, 2003) attached at Brief Ex. 1. Property owners benefit anytime heat is provided to their building. Id. In this instance, Complainant benefited because there was substantial gas consumption at her building that she received without paying for it. This gas kept the building heated for over a year and a half, protected the pipes from freezing, and created a more comfortable environment for tenants and potential tenants who may have viewed the apartment. Further, there is not a single piece of evidence that corroborates Complainant's story that Mr. Cerny lived in the Apartment during the period in question. The only "evidence" Complainant produced to "show the people that lived [in the building]" was "just junk that [she] picked up in the hallway." The mail did not support that Mr. Cerny lived in the Apartment during the period in question. In fact, several of the addressees never even lived in the Apartment and none of the mail reflected the disputed time period. (Tr. 139-144). The one piece of mail she brought with Raymond Cerny's name on it was dated June 21, 2002 which is not only outside the time period in dispute, but actually reflects a date that Respondent's records show Michael Streff living in the apartment. Id. Recognizing the complete lack of probative value of this material, the Judge refused to allow this material to be admitted into evidence. There is simply no evidence showing that the gas used benefited anyone other than the building at large. Accordingly, Complainant, as the building owner, should be held financially responsible for the gas provided to the building.⁷

⁷ Assuming someone lived in the Apartment during the period in question, because the Complainant failed to keep any records of who the tenants were and what the terms of the rental agreement were, there is no way of knowing if the tenant was to be responsible for paying the utilities. Given the complete lack of evidence, it is entirely conceivable that Complainant rented the apartment with utilities to be provided by the landlord. It is also possible that Complainant's son, Daniel Seurth, moved back into the Apartment during its vacancy, as he had done on previous occasions. Given Complainant's complete failure to keep any records of who lived in the building or produce any witness, it is impossible to say who, if anyone, was in the Apartment during the disputed period.

3. Was the Gas Charge Reasonable?

The reasonableness of the gas charge is undisputed. (Tr. 221-222) Complainant agrees with Respondent that \$1914.86 accurately reflects the cost of gas supplied to Complainant's property. *Id.* The final bill issued to Complainant is based on both estimated usage determined on a pro rata basis each month and actual readings. (Tr. 191-192) When the gas service was turned off to the first floor apartment, the meter read 8078. (Tr. 181) After the tampering was discovered and gas was shut off to the Apartment, the final reading was 0779. (Tr. 185) Thus, 2700 units of gas were provided to Complainant's property as a result of tampering.

The total charge for this gas was actually \$2,802.07. (Complt. Ex. 3, Resp. Ex. 7). However, during the course of its investigation, Respondent subpoenaed records from Commonwealth Edison. (Tr. 195-196). These records showed that Raymond Cerny was living in the first floor apartment beginning on October 29, 2001. *Id.* Based on these records, Respondent voluntarily agreed to hold Complainant harmless for any gas usage that occurred after October 29, 2001. (Tr. 196). Respondent's actions resulted in nearly a \$1000 credit being issued to Complainant and a reduction in her bill from \$2802.07 to \$1914.86. (Joint Ex. 1). Respondent has been unable to collect any portion of this waived amount from Raymond or James Cerny. (Tr. 196).

Complainant argues that Respondent should have advised her earlier than October 2002 of the tampering. She argues, in essence, that Respondent had a duty to mitigate its damages, thereby reducing Complainant's liability. However, the Commission's rules do not impose any such requirement on Respondent. Because of the difficulty in discovering tampering, the rules are quite clear that Respondent is not limited by a time constraint in which it must bill Complainant. 83 Ill. Admin. Code 280.100(c)(2) (2004).

Further, and most importantly, *Respondent is already holding Complainant harmless for the cost of gas used after October 29, 2001.* Thus, Complainant is only being billed for the time period before Respondent was aware of the tampering and the brief amount of time it took to conduct the initial investigation to determine that tampering was in fact occurring. That Complainant was not notified until October 2002 of the tampering is completely irrelevant to the proceedings. Complainant is not being held responsible for the gas activity that occurred between October 29, 2001 and April 15, 2002. Respondent could not have mitigated its damages from February 5, 2000 to September 10, 2001 because it was unaware tampering had occurred and that gas was being supplied to the Apartment. Thus, Complainant has no basis to complain that she should have been told sooner. Simply put, Complainant is being asked to pay for the same amount of gas that she would have if Respondent notified her immediately after the discovery of the tampering because Respondent isn't trying to collect for a period when it definitively knew of the gas usage. It is attempting to collect for the gas used prior to the discovery of tampering. Under these circumstances, Respondent's billing Complainant for the period when the gas was being used to heat Complainant's property can only be described as completely reasonable.

CONCLUSION

Complainant failed to establish that Respondent violated any provision of the Public Utilities Act or any of the Commission's rules. In fact, Complainant offered no evidence that tends to show that she was not the beneficiary of the gas supplied to her property. Respondent, on the other hand, more than sufficiently established that (1) tampering occurred at the property; (2) as the owner of the building, Complainant benefited from the gas usage and (3) the bill that was sent to Complainant was reasonable. Specifically, the evidence shows that Respondent shut off service to the Apartment and placed a lock on the meter

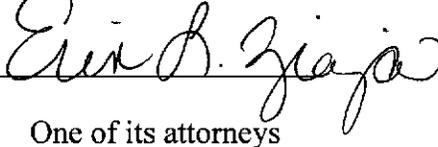
rendering it inoperable; that an unknown third-party broke the lock and turned on service to the Apartment; that Complainant's property received free heat for over two years; that after discovering the tampering Respondent took actual readings every month until it was able to remove the meter and terminate gas service; and that Respondent voluntarily waived almost \$1000 in charges for the period that Commonwealth Edison's records show Raymond Cerny lived in the unit. In the complete absence of any contrary evidence, Complainant's complaint must be denied.

Wherefore, Respondent, Peoples Gas Light and Coke Company respectfully requests that the Administrative Law Judge issue a Proposed Order denying Complainant, Patricia O'Donnell's complaint relating to the First Floor Account of 5729 West Addison.

Dated: August 13, 2004

Respectfully submitted,

THE PEOPLES GAS LIGHT
AND COKE COMPANY

By: 

One of its attorneys

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ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF:)	
)	
PATRICIA O'DONNELL)	
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V.)	No. 03-0246
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PEOPLES GAS LIGHT & COKE)	
COMPANY)	

NOTICE OF FILING

To: Patricia O' Donnell	Administrative Law Judge John Riley
	Illinois Commerce Commission
949 N. Damen Avenue	160 North LaSalle Street, Suite C-800
Chicago, Illinois 60622	Chicago, Illinois 60601-3104

PLEASE TAKE NOTICE that on this date Respondent in the above captioned case sent by U. S. Mail for filing with the Illinois Commerce Commission, 527 East Capitol Avenue, P. O. Box 19280, Springfield, Illinois 62701, the Respondent's Closing Brief.

Dated: 8/13/04

THE PEOPLE GAS LIGHT
AND COKE COMPANY

By: Erin Ziaja
Erin Ziaja, One of its attorneys

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this Respondent's Closing Brief on Complainant and the Administrative Law Judge by causing a copy to be placed in the U. S. Mail, properly address and postage prepaid on August 13, 2004.

Respectfully Submitted,

Erin Ziaja
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