

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Halsted Partners,

-vs-

Peoples Gas Light and Coke Company,

Complaint as to billing/charges in
Chicago, Illinois.

Docket No. 10-0702

**REPLY IN OPPOSITION TO COMPLAINANT'S
RESPONSE TO MOTION TO DISMISS**

I. INTRODUCTION

Complainant Halsted Partners complains that during and after the year 2000, Peoples Gas Light and Coke Company (“Peoples Gas”) “inaccurately measure[d] Complainant’s actual gas usage” at an apartment building located at 4356 N. Kenmore Avenue, Chicago, Illinois (the “Building”) and as a result of its allegedly inaccurate measurements, Peoples Gas continually overcharged Complainant for gas services.¹ Based on the “continuing violation doctrine,” Complainant requests that the Commission order Peoples Gas to refund approximately eight years of alleged overcharges. *See* Fn. 1. The Commission should reject Complainant’s request.

Section 9-252.1 of the Public Utilities Act (“Act”) states, any complaint based on “an error . . . in measuring the quantity or volume of the service provided . . . must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect

¹ In its Complaint, Complainant suggests that the time period of alleged overcharges is 1996 to the present. *See* Complaint at ¶¶3 and 10. However, in Response to Peoples Gas’ Motion to Dismiss (“Response”), Complainant admits that on December 4, 2008, Peoples Gas installed new meters at the Building and that on and after December 4, 2008, Peoples Gas accurately measured the gas Complainant consumed, *i.e.*, Complainant incurred no overcharges after December 4, 2008. *See* Affidavit of David C. LeSueur (“Affidavit”), a copy of which is attached as Exhibit A to Response, at ¶11. Complainant further admits it is not requesting relief for alleged overcharges prior to the year 2000. *See* Ex. A to Response - Affidavit - at ¶6. Thus, the actual time period for which Complainant seeks relief runs from sometime in 2000 to December 4, 2008.

billing.” 220 ILCS 5/9-252.1. Complainant first had knowledge of Peoples Gas’ allegedly inaccurate gas measurements and errant billings thereon in the year 2000, and Complainant admittedly complained to Peoples Gas about the problem “on numerous occasions” prior to December 4, 2008, *i.e.*, the date after which Complainant acknowledges Peoples Gas’ gas measurements were accurate. *See* Fn. 1. Nonetheless, Complainant did not file suit until December 7, 2010.

Because Complainant failed to file suit within two years of the date on which it first had knowledge of Peoples Gas’ allegedly inaccurate gas measurements and incorrect bills, its Complaint is time barred, and Complainant is not entitled to any of the relief it seeks. The judicially created “continuing violation doctrine” does not and cannot extend the statutory date by which Complainant was required to file suit.

Further, due to the untimeliness of the Complaint, and the fact that Complainant’s delay in filing suit was unreasonable and unjustified, the “continuing violation doctrine” does not even arguably justify an award of relief in excess of the two-year period provided for in Section 9-252.1 of the Act.

II. ARGUMENT

A. The Complaint is Time Barred, and Complainant is Not Entitled to Relief

According to Complainant, Peoples Gas’ argument that the Complaint should be dismissed as time barred solely “refer[s] to billings on or after December 7, 2008.” *See* Response at ¶1. Complainant grossly mischaracterizes Peoples Gas’ argument.

In its Memorandum in Support of Motion to Dismiss (“Supporting Memorandum”), Peoples Gas stated:

Section 9-252.1 [of the Act] requires that a complaint “be filed with the Commission no more than 2 years after the date the customer first has

knowledge of the incorrect billing.” [Citations omitted.] Complainant failed to satisfy this requirement.

See Supporting Memorandum at pps. 3-4.

Peoples Gas then demonstrated that although Complainant admittedly first had knowledge of Peoples Gas’ allegedly inaccurate gas measurements and bills reflecting the same long before December 7, 2008, Complainant did not file its Complaint until December 7, 2010.

See Supporting Memorandum at pps. 4-5.

Based on the foregoing, Peoples Gas concluded:

Complainant filed its Complaint more than two years after it “first ha[d] knowledge of the incorrect billing”. Accordingly, the Complaint is untimely and should be dismissed with prejudice.

See Supporting Memorandum at p. 5; *cf. Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166 at ¶29, 353 Ill. Dec. 299 (Ill. Sup. Ct., June 26, 2011) (stating, “[t]he underlying theory of liability limitations is that, because a public utility is strictly regulated, its liability should be defined and limited so that it may be able to provide service at reasonable rates”).

The fact that the Complaint is time barred by Section 9-252.1 of the Act means the Complaint should be dismissed *in its entirety*, not just with respect to “billings on or after December 7, 2008.” *See* Supporting Memorandum at pps. 3-5; *see also* Fn. 1; *Malibu Condominium Assoc. v. Commonwealth Edison Co.*, Docket No. 08-0401 (June 24, 2009), a copy of which is attached as Exhibit B to Supporting Memorandum, at 22 (stating, “complainants have the responsibility to pursue their claims in a full and timely manner”).² Thus, Complainant is not entitled to any relief.

² Despite its initial contention, Complainant otherwise seems to recognize the foregoing. Elsewhere in its Response, Complainant states, Peoples Gas’ “argument is that the complaint was not filed within two years of Complainant ‘gaining knowledge of the alleged inaccuracies in its gas bills’, and the Complainant [sic] in its entirety is time-barred.” *See* Response at ¶3.

B. Complainant Admittedly First Had Knowledge of Peoples Gas' Allegedly Inaccurate Gas Measurements Long Before December 4, 2008

1. "Actual knowledge" is not required to trigger Section 9-252.1's statute of limitation.

Per Section 9-252.1 of the Act, a complaint about a utility bill based on "an error . . . in measuring the quantity or volume of the service provided . . . must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing." 220 ILCS 5/9-252.1.

Complainant and People Gas agree, the Commission defined the phrase "first has knowledge of the incorrect billing" in *King's Walk Condominium Assoc. v. Commonwealth Edison Co.*, Docket No. 08-0264 (July 27, 2011), a copy of which is attached as Exhibit C to Supporting Memorandum. See Supporting Memorandum at p. 4; Response at ¶10. However, the parties disagree about the meaning of the *King's Walk Condominium Assoc.*'s definition of this phrase. Accordingly, further consideration of *King's Walk Condominium Assoc.* is necessary.

In *King's Walk Condominium Assoc.*, the Commission explained that the phrase "first has knowledge of the incorrect billing" is "similar to language in other limitations periods that require the bringing of an action within a specified period of time from the date, upon which, the injured party had enough information to place it on notice that it was injured and that the injury may have been caused by the respondent/defendant." See Ex. C to Supporting Memorandum - *King's Walk Condominium Assoc.* - at 11. The Commission then found that in the case before it, Section 9-252.1's statute of limitations was therefore triggered on "[t]he date, upon which, King's Walk had notice of, or, should have known of, what was contained in [the respondent's] bills" See Ex. C to Supporting Memorandum - *King's Walk Condominium Assoc.* - at 11.

Complainant argued that the Commission’s finding improperly imputed the phrase “should have known” into Section 9-252.1’s statute of limitations. The Commission rejected complainant’s argument, explaining that its finding simply determined what the phrase “first has knowledge of the incorrect billing” means. *See* Ex. C to Supporting Memorandum - *King’s Walk Condominium Assoc.* - at 11. The Commission further explained:

if there is no requirement that the limitations period here commences when the complainant had enough information to place that complainant on notice that he or she was injured, then, Section 9-252.1 of the Act, which is a limitations period, would provide no limitations at all. This is true because such a reading of the statute would allow a Complainant to “wear blinders,” in that, he or she could simply not read these bills for decades, and still file a meritorious complaint with this Commission. Such a construction would defeat the very purpose of a limitations period.

See Ex. C to Supporting Memorandum - *King’s Walk Condominium Assoc.* - at 11. Thus, as held in *King’s Walk Condominium Assoc.*, constructive knowledge is sufficient to trigger Section 9-252.1’s statute of limitations.

In view of the foregoing, Complainant’s claim that the phrase “first has knowledge of the incorrect billing” means a date in January 2010 when it allegedly first had actual knowledge of its injury such that it could calculate the alleged overcharges, is clearly erroneous. *See* Response at ¶11(emphasis added) (Complainant claims it “could not have obtained ‘enough information to place it on notice that it was “injured’ from an examination of the billing before January 2010,” because although “it was suspicious that the gas usage billed for the building varied wildly from month to month with little if any correlation to ambient temperature, without a baseline established by consecutive actual meter readings [during the year 2009], Complainant could not *know* that it had been ‘injured’ (that is, overbilled)”). Accordingly, the Commission should reject Complainant’s claim regarding the date it first had knowledge.

2. Complainant admittedly first had knowledge of Peoples Gas' allegedly errant billings in the year 2000.

Complainant first had knowledge of Peoples Gas' allegedly incorrect billing on the date Complainant "had notice of, or, should have known of" the bills reflecting Peoples Gas' purportedly inaccurate gas measurements. *See* 220 ILCS 9-252.1; Ex. C to Supporting Memorandum - *King's Walk Condominium Assoc.* - at 11. Here, that date is not in dispute.

Complainant admits that "for many years," it believed Peoples Gas was inaccurately measuring its gas consumption. *See* Complaint at ¶5 and at ¶14 (claiming to have made numerous "complaints that the meters [at the Building] are inaccurate"); Ex. A to Response - Affidavit - at ¶¶6 and 9. Complainant based its belief on what Complainant describes as substantial variations in Peoples Gas' bills during and after the year 2000. *See* Ex. A to Response - Affidavit - at ¶9 (Complainant asserts, Peoples Gas' 2000 through 2008 bills demonstrate "enormous variations in the quantity of gas billed for the Building, both for month to month, as well as annually [and] between the two meters in the Building"); Complaint at ¶5 (alleging, "the gas usage billed by [Peoples Gas] on the bills was inaccurate, as it varied wildly from month to month, with no apparent correlation to ambient temperature or season, and was an impossibly high amount given the number and capacity of gas-using fixtures and appliances on the Premises, and the fact that Complainant installed (in 2008) a solar hot water heating system to supplement or supplant the gas-fired hot water heater on the Premises").

Complainant further admits that "on numerous occasions" prior to December 4, 2008, the substantial variability in Peoples Gas' bills prompted it to complain that Peoples Gas was billing it for more gas than it actually used. *See* Complaint at ¶¶5 and 14; *see also* Fn. 1.

Complainant is bound by its judicial admissions that: (i) it long believed Peoples Gas was inaccurately measuring its gas consumption; (ii) it had notice of Peoples Gas' allegedly

inaccurate gas measurements based on the purportedly “enormous variations” in the monthly bills it received from Peoples Gas during and after the year 2000; and (iii) prior to December 2008, it repeatedly complained about the problem to People Gas. *See e.g., State Sec. Ins. Co. v. Linton*, 67 Ill. App. 3d 480, 484 (1st Dist. 1978) (explaining, “once a statement of fact has been admitted in the pleadings, it constitutes a judicial admission, it is binding on the party making it, and it makes it unnecessary for the opposing party to introduce evidence in support thereof because it has the effect of withdrawing the fact from issue”); *See* Ex. A to Response - Affidavit - at ¶6; Ex. C to Supporting Memorandum - *King’s Walk Condominium Assoc.* - at 9-10 (explaining that errors evidenced by billing statements are discovered when bills are received); Ex. B to Supporting Memorandum - *Malibu Condominium Assoc.* - at 19 (explaining that where bills provide notice of facts that would prompt a reasonable customer to inquire further, there is no reason for the customer to delay in the processing and resolution of a billing dispute”).

Hence, it is beyond dispute that Complainant had knowledge sufficient to trigger Section 9-252.1’s statute of limitation long before December 4, 2008, *i.e.*, the date after which Complainant admit Peoples Gas accurately measured its gas consumption. *See* Fn. 1. Therefore, Complainant had to file suit *before* December 4, 2010. *See* 220 ILCS 5/9-252.1; Ex. B to Supporting Memorandum - *Malibu Condominium Assoc.* - at 22 (stating, “complainants have the responsibility to pursue their claims in a full and timely manner”). Due to Complainant’s failure to file its Complaint until December 7, 2010, its Complaint is time barred, and Complainant is not entitled to any relief. *See* 220 ILCS 5/9-252.1.

Complainant’s claim that Peoples Gas must establish the specific date on which Complainant first had “knowledge of the incorrect billing” lacks merit. The fact that Complainant admittedly had knowledge of Peoples Gas’ allegedly inaccurate gas measurements

and related billings *prior* to December 4, 2008 is more than sufficient basis on which to dismiss Complainant's December 7, 2010 Complaint as untimely. *See Consolidated Communications Consultant Serv. v. Illinois Bell Tel. Co.*, Docket No. 99-0429 (June 14, 2001), a copy of which is attached as Exhibit B to Response, at 11 (analyzing the timeliness of a Section 9-252.1 complaint based on the general timeframe, *i.e.*, late 1998, in which complainant gained knowledge of deficiencies in its phone system).

C. There is No Legal Basis That Even Potentially Justifies Awarding Complainant Relief in Excess of the Two-Year Period in Section 9-252.1

1. Complainant cannot rely on the “continuing violation doctrine” because its Complaint is untimely.

Complainant boldly asserts, “[t]here is simply no legal basis” to support People Gas’s contention that Complainant cannot recover relief for more than two years prior to the date of its Complaint. *See* Response at ¶4. Complainant’s assertion is frivolous. The clear authority is Section 9-252.1 of the Act. *See* 220 ILCS 5/9-252.1; *see also* Ex. C to Supporting Memorandum - *King’s Walk Condominium Assoc.* - at 11 (finding that because Complainant “filed its formal Complaint with the Commission on April 11, 2008, many of its claims would nevertheless be time-barred pursuant to Section 9-252.1. Two years before April 11, 2008 would be April 11, 2006” and “allegations in the Complaint contesting the propriety of electric rates that occurred before April 11, 2006, must be dismissed for lack of jurisdiction”).

Further, Complainant fails to cite any authority supporting its claim that Section 9-252.1’s two-year limit on relief is not applicable to its Complaint. *See* generally Response. Notably, *Consolidated Communications* does not constitute such authority.

Consolidated Communications was based on a utility’s failure to provide one feature of a telephone service (*i.e.*, a dialing feature relating to incoming intercom calls on a Centrex

telephone system) for which service the utility improperly charged the complainant for several years. *See* Ex. B to Response - *Consolidated Communications* - at 2-3. The parties disputed whether the complaint before the Commission was governed by Section 9-252 or Section 9-252.1 of the Act. *See* Ex. B to Response - *Consolidated Communications* - at 8. Accordingly, the Commission evaluated the timeliness of the complaint under both statutory provisions.

After concluding, “Section 9-252.1 applies here,” the Commission stated it “*must next determine whether [complainant] acquired knowledge of the dialing deficiencies within the two-year period preceding the filing of the Complaint in August, 1999.*” *See* Ex. B to Response - *Consolidated Communications* - at 11 (emphasis added). Then, the Commission found:

[complainant] hired Consolidated in 1998 . . . after which Consolidated tested purportedly deficient Centrex lines included on a list provided by [complainant]. . . . A claim dated November 12, 1998 was then sent to [the utility]. . . . In February, 1999, [the utility] confirmed the inbound defect

The Commission finds that [complainant] acquired knowledge of the dialing deficiencies after the professional testing by Consolidated verified some of the employee concerns Until that time, [complainant] would not necessarily know whether its employees or its telecommunications system needed remediation. As discussed above, it is our experience that persons untrained in telecommunications functions, like the employee’s in [complainant’s] geographically scattered facilities . . . do not necessarily recognize or understand systemic problems affecting the equipment they utilize. Mr. Pollina links our experience to the instant case when he states . . . that some employees simply did not understand the nature of Centrex Therefore, we do not believe [complainant] acquired knowledge, for statute of limitations purposes, until Consolidated investigated [complainant’s] telecommunications system and determined that there were deficiencies in its Centrex.

Ex. B to Response - *Consolidated Communications* - at 11.

Because complainant had no way of knowing it was injured simply by reviewing its bills and because complainant first acquired knowledge of the dialing deficiencies in its telephone system in late 1998, the Commission deemed complainant’s August 1999 complaint timely filed

under Section 9-252.1 of the Act. *See* Ex. B to Response - *Consolidated Communications* - at 11. Notably, the Commission did not even mention the “continuing violation doctrine” in its analysis of the complaint’s timeliness under Section 9-252.1.³

Even more significantly, although the Commission did rely on the “continuing violation doctrine” to fashion complainant’s relief under Section 9-252.1, it did so only after finding that complainant timely filed its complaint. *See* Ex. B to Response - *Consolidated Communications* - at 11 and 13.

As demonstrated above, Complainant in this case did not timely file its Complaint. *Supra* at pps. 4-8. Further, even if the timeliness of Complainant’s filing were evaluated pursuant to the “continuing violation doctrine,” Complainant’s Complaint would still be untimely.

Under the “continuing violation doctrine,” the statute of limitations begins to run on “the date of the last in a series of related wrongs.” Ex. B to Response - *Consolidated Communications* - at 12. Complainant admits that the last date on which Peoples Gas allegedly measured its gas consumption inaccurately was a date prior to December 4, 2008, after which date Complainant admits Peoples Gas’s gas measurements were accurate. *See* Fn. 1. Therefore, even under the “continuing violation doctrine,” Complainant would have had to file suit *prior* to December 4, 2010, which Complainant failed to do. *Supra* at p. 7.

³ The Commission found it appropriate to rely on the “continuing violation doctrine” when analyzing the complaint’s timeliness under Section 9-252 of the Act, because Section 9-252’s two-year statute of limitations is not triggered by an injured party’s “first knowledge” of incorrect billing. *See* Ex. B to Response - *Consolidated Communications* - at 11-12. Section 9-252’s two-year statute of limitations is triggered by the date the “produce, commodity or service as to which complaint is made was furnished or performed.” 220 ILCS 5/9-252. Accordingly, after finding that the utility had engaged in a continuing violation that complainant could not readily discover, the Commission stated that if the complaint were governed by Section 9-252, the statute of limitations applicable to complainant’s claim would not begin to run until February or March of 1999, *i.e.*, the date of the utility’s last wrongful act, rather than the earlier date on which complainant first obtained knowledge of its injury for purposes of Section 9-252.1. *See* Ex. B to Response - *Consolidated Communications* - at 11-12.

Because there is no theory under which Complainant can be found to have timely filed its Complaint, *Consolidated Communications* is inapplicable and fails to support Complainant's claim for relief in excess of two years prior to the date it filed its Complaint.

2. Complainant's reliance on Section 500.240 is misplaced.

If a complaint is not timely filed, a complainant is not entitled to any relief. *Supra* at pps. 1-3; *see also* Ex. C to Supporting Memorandum - *King's Walk Condominium Assoc.* - at 11. Therefore, because the Complaint in this case is time barred, the question of relief is moot. *Supra* at pps. 4-8. Because Section 500.240 of the Illinois Administrative Code, 83 Ill. Admin. Code 500.240, has no bearing on the timeframe in which a complaint must be filed, Section 500.240 does not impact this conclusion in any way. *See* 83 Ill. Admin. Code 500.240. Accordingly, Section 500.240 is not even arguably relevant, and Complainant's reliance on Section 500.240 as purported authority permitting the Commission to grant it relief for more than two years is entirely misplaced.

Complainant's reliance on Section 500.240 is also misplaced because, by its express terms, Section 500.240 is only applicable to cases in which a "test of a customer meter made by a utility, or by the Commission when removed from service, shall show such meter to have an average error of more than four percent" 83 Ill. Admin. Code 500.240. This case does not involve a meter test. *See generally* Complaint.

Further, Section 500.240 and Section 9-252.1's two-year limitation on relief are not inconsistent. In cases where Section 500.240 is applicable, it only authorizes relief for six months, unless "it can be shown that the inaccuracy [of a meter] has existed for a longer period than six months" 83 Ill. Admin. Code 500.240. However, where such showing is made, Section 500.240 cannot modify Section 9-252.1's two-year limitation on relief.

3. The legislature expressly limited the relief available under Section 9-252.1 to the two-year period preceding a complaint.

As a creation of the Illinois legislature, the Commission “derives its power and authority solely from the statute creating it, and it may not, by its own acts, extend its jurisdiction.” *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 60 (1st Dist. 2010), *aff’d* 353 Ill. Dec. 299 (June 26, 2011); Ex. B to Supporting Memorandum - *Malibu Condominium Assoc.* - at 21 (explaining, the Commission “can only assume jurisdiction in the manner prescribed by the Act”). Stated otherwise, the Commission’s subject matter jurisdiction to hear a case *and to provide relief* extends only as far as the statute from which the Commission derives its authority. *See* Ex. B to Supporting Memorandum - *Malibu Condominium Assoc.* - at 21. Hence, the Commission cannot rely on judicially created doctrines like the “continuing violation doctrine” to expand its jurisdiction to grant relief on a Section 9-252.1 complaint for more than two years prior to the date a complainant “first has knowledge of the incorrect billing.” As explained in *Malibu Condominium Assoc.*

[t]here is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports. [Citation omitted.] Nor does the Commission have authority to add new terms to the statute. It is never proper for a court to depart from plain language by reading into a statute exceptions, limitations or conditions which conflict with the clearly expressed legislative intent.

See Ex. B to Supporting Memorandum - *Malibu Condominium Assoc.* - at 21; *but see* Ex. B to Response - *Consolidated Communications* - at 13 (in connection with a *timely* Section 9-252.1 complaint, Commission granted relief in excess of the two-year period in Section 9-252.1 based on the “continuing violation doctrine”).

III. CONCLUSION

Complainant's Complaint is barred by the two-year statute of limitations in Section 9-252.1 of the Public Utilities Act. Accordingly, Complainant is not entitled to any relief. Additionally, Complainant is not entitled to any relief because (i) Complainant cannot recover relief for more than two years prior to the date it filed its Complaint, and (ii) Complainant did not incur any alleged overcharges during that two-year period. Therefore, the Commission should dismiss Complainant Halsted Partners' Complaint with prejudice and award Peoples Gas any additional relief it deems just and proper.

People Gas hereby requests oral argument on its Motion to Dismiss.

Dated: October 19, 2012

Respectfully submitted,

THE PEOPLES GAS LIGHT AND
COKE COMPANY

By: /s/ Kathleen R. Pasulka-Brown
One of Its Attorneys

Kathleen R. Pasulka-Brown, Esq.
Pugh, Jones & Johnson, P.C.
180 North LaSalle St., Suite 3400
Chicago, Illinois 60601
Telephone: (312) 768-7800
Facsimile: (312) 768-7801
E-Mail: kpasulka-brown@pjjq.com