

**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

**MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION**

I. INTRODUCTION

Complainant, Halsted Partners, filed the Complaint initiating this Docket on December 7, 2010. Complainant's claims relate to alleged inaccuracies in gas bills issued by Respondent, Peoples Gas Light and Coke Company ("Peoples Gas"), between 2000 and December 4, 2008.¹

Based on Complainant's admissions that it had knowledge of the alleged billing inaccuracies as early as 2000, Peoples Gas moved to dismiss Halsted Partners' Complaint as time barred under Section 9-252.1 of the Public Utilities Act ("Act"), which requires that a complaint relating to allegedly incorrect bills must be filed no more than two years after a customer "first has knowledge of the incorrect billing." 220 ILCS 5/9-252.1.

On February 18, 2015, your Honor found that the alleged billing inaccuracies described in the Complaint constitute a continuing violation that postponed the running of Section 9-252.1's two-year statute of limitations until December 17, 2008, *i.e.*, the date on which Peoples

¹ Complainant admits that on December 4, 2008, Peoples Gas installed new meters at its building located at 4356 N. Kenmore Avenue, Chicago, Illinois. *See* Affidavit of David C. LeSueur ("Affidavit"), a copy of which is attached as Exhibit A to Complainant's October 4, 2012 Response to Peoples Gas' Motion to Dismiss ("Response"), at ¶ 11. Complainant admits that on and after December 4, 2008, Peoples Gas accurately measured the gas Complainant consumed, *i.e.*, Complainant does not claim to have incurred overcharges after December 4, 2008. *Id.* Complainant also admits it is not requesting relief for alleged overcharges prior to the year 2000. *See id.* at ¶ 6.

Gas allegedly issued its final erroneous bill (“February Ruling”). *See* February Ruling at pps. 2-3. Your Honor also found it “unnecessary to reach a decision on the issue of [Complainant’s] knowledge of the incorrect billing,” and ruled that Complainant’s December 7, 2010 Complaint was timely filed. *Id.* Accordingly, your Honor denied Peoples Gas’ Motion to Dismiss (“Motion”). *Id.* at p. 3.

Peoples Gas respectfully submits that your Honor relied on and applied the continuing violation doctrine in error. Specifically, neither Section 9-252.1 nor applicable case law supports application of the continuing violation doctrine to the facts of this case. Accordingly, Peoples Gas requests that your Honor: (i) reconsider and vacate the February Ruling; (ii) grant Peoples Gas’ Motion; and (iii) dismiss Halsted Partners’ Complaint.

II. ARGUMENT

As accurately stated in the February Ruling:

[i]t is well established that the Commission derives its authority solely from the Act. Because the Commission is purely a statutory creation and possesses no inherent or common law authority, it has jurisdiction over Halsted Partners’ Complaint only if there is statutory authority for the Commission to entertain it.

February Ruling at p. 1. Thus, the Commission’s power to adjudicate is controlled by the legislature. The limitations period the legislature included in Section 9-252.1 of the Act is jurisdictional, and the Commission cannot modify Section 9-252.1’s limitations period.

In relevant part, Section 9-252.1 provides:

[w]hen a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error either in charging more than the published rate or in measuring the quantity or volume of service provided, the utility shall refund the overcharge with interest from the date of overpayment at the legal rate or at a rate prescribed by rule of the Commission. . . . Any complaint relating to an incorrect billing 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.

Notwithstanding the express language of Section 9-252.1, the parties disputed whether its limitations period began to run on: (i) the date Complainant first had knowledge of Peoples Gas' allegedly incorrect billing (*i.e.*, during or after 2000 but on or before December 7, 2008);² or (ii) the date of the last allegedly erroneous bill Peoples Gas issued to Complainant (*i.e.*, December 17, 2008). *See* February Ruling at pps. 1-2.

Your Honor resolved the dispute by finding:

the continuing violation doctrine applies in this proceeding. Thus, consistent with the application of the continuing violation doctrine in Docket Nos. 99-0388 and 99-0429, it is unnecessary to reach a decision on the issue of knowledge.

February Ruling at p. 2; *see also* February Ruling at pps. 1-2 (citing *Field v. First Nat'l Bank of Harrisburg*, 249 Ill. App. 3d 822, 619 N.E.2d 1296 (1993), for the proposition that “[u]nder the continuing violation doctrine, the applicable statute of limitations does not begin to run until the date of the last alleged violation in a series of related wrongs”).

Your Honor further found that the two-year limitations period in Section 9-252.1 did “not begin to run until Peoples Gas presented its last erroneous billing on December 17, 2008.”

February Ruling at p. 3. Accordingly, your Honor deemed the Complaint timely and denied Peoples Gas' Motion. *Id.*

² As used in Section 9-252.1, 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.” *King's Walk Condominium Assoc. v. Commonwealth Edison Co.*, Docket No. 08-0264 (July 27, 2011), a copy of which is attached as Exhibit A, at p. 11. Complainant admittedly first had knowledge of Peoples Gas' allegedly inaccurate bills during or after 2000 but on or before December 7, 2008. *See* Complaint at ¶¶ 5 and 14; Affidavit at ¶¶ 6 and 9.

As demonstrated below, the authorities on which the February Ruling is based do not support application of the continuing violation doctrine to the claims in this case. Therefore, Peoples Gas respectfully submits it was error to apply the continuing violation doctrine in this Docket. Peoples Gas further submits that in connection with claims subject to Section 9-252.1's statute of limitations, it is improper to deem it "unnecessary to reach a decision on the issue of knowledge," because Section 9-252.1 expressly mandates consideration of a customer's knowledge.

A. Docket No. 99-0388 Does Not Analyze the Issue Presented in this Docket

The general issue raised in *Time Warner Cable v. Commonwealth Edison Company*, Docket No. 99-0388 (December 21, 1999), related to "the two-year statute of limitations applicable to complaints filed with the Commission pursuant to Sections 9-252 and 9-252.1" *Time Warner Cable*, a copy of which is attached as Exhibit B, at p. 1. Review of *Time Warner Cable* reveals that on interlocutory review, the Commission adopted the continuing violation doctrine, as then applicable in Illinois judicial proceedings, without considering – let alone analyzing – the significant differences between the limitation provisions in Sections 9-252 and 9-252.1. *Id.* at pps. 1-2. Consequently, *Time Warner Cable* provides no insight into the issue presented in this Docket, *i.e.*, whether the specific language of Section 9-252.1's two-year statute of limitations precludes application of the continuing violation doctrine. Thus, at best, *Time Warner Cable* provides only superficial support for the February Ruling.

Notably, any arguable support provided by *Time Warner Cable* is undermined – if not wholly eliminated – by the fact that on December 5, 2001, the Commission dismissed the Complaint initiating *Time Warner Cable* with prejudice pursuant to the parties' Joint Motion to

Dismiss. *See* Group Exhibit C. Thus, the Commission never entered a final order in *Time Warner Cable*, and its interim order on interlocutory review should not be given any weight.

B. Docket No. 99-0429 Shows the Continuing Violation Doctrine is Inapplicable in this Docket

In *Consolidated Communications Consultant Services, Inc. for the Chicago Housing Authority v. Illinois Bell Telephone Company*, Docket No. 99-0429 (June 14, 2001), a copy of which is attached as Exhibit D, the Commission considered both Sections 9-252 and 9-252.1, but **exclusively** applied the continuing violation doctrine to the statute of limitations in Section 9-252. *Id.* at p. 13 (finding, “the Commission concludes that the Complaint is governed by the limitations provision in Section 9-252.1 and was timely filed under that section. The Commission also concludes that if the Complaint were instead governed by Section 9-252, it would still be timely filed because the continuing violation doctrine regards the pertinent events here as having concluded on the last date of the alleged violation”).

Specifically, when the Commission analyzed the timeliness of Complainant CHA’s complaint under Section 9-252.1, the Commission never mentioned the continuing violation doctrine and did not cite *Time Warner Cable*. *See generally* Ex. D at pps. 8-11. Rather, after “conclud[ing] that Section 9-252.1 applies,” the Commission focused its analysis solely on determining “whether CHA acquired knowledge of the dialing deficiencies within the two-year period preceding the filing of the Complaint in August, 1999.” *Id.* Ultimately, the Commission found:

CHA acquired knowledge of the dialing deficiencies [“in the fall of 1998”] after the professional testing by Consolidated verified some of the employee concerns received by Ms. Coutee. Until that time, CHA would not necessarily know whether its employees or its telecommunications system needed remediation Therefore, we do not believe that CHA acquired knowledge, for statute of limitations purposes, until Consolidated

investigated CHA's telecommunications system and determined that there were deficiencies in the Centrex.

Id.

Based on the date the Commission determined CHA acquired knowledge of dialing deficiencies in the Centrex, *i.e.*, "the fall of 1998," the Commission deemed CHA's Complaint timely under Section 9-252.1. *Id.*

After reaching the above conclusion regarding Section 9-252.1, the Commission considered the timeliness of CHA's Complaint under Section 9-252. *Id.* The Commission cited *Time Warner Cable* solely to support its analysis and findings under Section 9-252. *Id.* at pps. 11-12.³ In particular, after describing the repeated overcharges at issue in *Time Warner Cable*, the Commission in *Consolidated Communications* found:

the continuing violation doctrine applies. Consequently, the limitations period under Section 9-252 would not begin until Ameritech presented its last erroneous billing CHA's August, 1999 Complaint was, therefore, timely filed under Section 9-252.

Id. at p. 12.

As demonstrated above, *Consolidated Communications* does not support the February Ruling. Instead, *Consolidated Communications* supports its reversal, because despite considering Sections 9-252 and 9-252.1 and the continuing violation doctrine, the Commission only applied the continuing violation doctrine to claims governed by Section 9-252.

Relatedly, it should be noted that the rationale for applying the continuing violation doctrine solely in cases governed by Section 9-252 is clear. The statute of limitation in Section 9-252 provides:

[a]ll complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the produce, commodity or

³ *Consolidated Communications* was issued before the Commission dismissed *Time Warner Cable*.

service as to which complaint is made was furnished or performed
[220 ILCS 5/9-252.]

Applying Section 9-252's statute of limitations in a straightforward, mechanical manner could potentially produce inappropriately harsh results. For example, if within two years of the date a customer received a product, commodity or service, the customer did not know and could not discover that it had been damaged, the customer would be precluded from seeking relief. A customer's potential ability to rely on the continuing violation doctrine could, in some instances, ameliorate this result by postponing the running of Section 9-252's statute of limitations until the injurious conduct damaging the customer ceased.

In contrast, in connection with claims governed by Section 9-252.1, application of the continuing violation doctrine is wholly unnecessary. The statute of limitations in Section 9-252.1, which is triggered by knowledge, is akin to a discovery rule. *See* February Ruling at p. 2 (characterizing Peoples Gas' position as being based on "the discovery rule in Section 9-252.1"); *see also Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 347, 770 N.E.2d 177 (2002) (explaining, "under the discovery rule, a cause of action accrues, and the limitations period begins to run, when the party seeking relief knows or reasonably should know of an injury and that it was wrongfully caused"). Thus, Section 9-252.1's two-year limitations period never begins to run until a customer has knowledge of allegedly incorrect billing. *See* 220 ILCS 5/9-252.1. Consequently, application of Section 9-252.1's two-year limitations period could not produce the potentially harsh results that application of Section 9-252's two-year limitations could produce. Therefore, there is no need to postpone the running of Section 9-252.1's two-year limitations period past the first date of a customer's knowledge by applying the continuing violation doctrine.

Moreover, as noted in *Rodrigue v. Olin Employees Credit Union*, 406 F. 3d 434, 444, Fn. 2 (7th Cir. 2005) (citing *Belleville Toyota, Inc.*, 199 Ill. 2d at 347):

[b]ecause the continuing violation rule can serve to toll the statute of limitations even beyond the point at which the plaintiff knows or reasonably should know that she has suffered an actionable harm, there is, as the Illinois Supreme Court has pointed out, some tension between that rule and the discovery rule.

The above-described tension clearly suggests that, without some compelling reason, the continuing violation doctrine should not be applied in addition to (or, in this case, instead of) the knowledge-based statute of limitations the legislature included in Section 9-252.1.

Finally, and most important, applying the continuing violation doctrine in cases governed by Section 9-252.1 flies in the face of the express language of the statute. As set forth above, the limitations provision in Section 9-252.1 mandates that a complaint relating to allegedly incorrect billing be filed “no more than 2 years after the date the customer **first has knowledge** of the incorrect billing.” 220 ILCS 5/9-252.1 (emphasis added). Accordingly, the Commission, a creature of state, cannot rely on the judicially created continuing violation doctrine to allow a customer to sue on claims governed by Section 9-252.1 when, as in this case, the customer first has knowledge of allegedly incorrect billing more than two years before filing its complaint. Doing so would effectively read Section 9-252.1’s mandatory knowledge-based trigger right out of its two-year limitations provision. As *Consolidated Communications* shows, the Commission cannot disregard the plain language of the statute in this manner. *Cf. Consolidated Communications*, Ex. D at p. 13 (justifying application of the continuing violation doctrine to the limitations provision in Section 9-252, which is **not** expressly triggered by first knowledge, stating, “the doctrine applies an interpretive gloss to the ‘plain language’ of Section 9-252”). The February Ruling should be reconsidered and vacated on this basis alone.

C. Following the Appellate Court Opinion in *Field*, the Illinois Supreme Court Modified and Limited the Continuing Violation Doctrine, Rendering Reliance on *Field* Inapposite

As the Seventh Circuit stated in *Rodrigue*, the Illinois Supreme Court’s opinion in *Belleville Toyota, Inc.* reveals:

the continuing violation rule does not apply to a series of discrete acts, each of which is independently actionable, even if those acts form an overall pattern of wrongdoing.

Id., 406 F. 3d at 442-43 (explaining, “[t]he Illinois Supreme Court has not adopted ‘a continuing violation rule of general applicability in all tort cases, or . . . cases involving a statutory cause of action.’ [Citation omitted.] Instead, the Court has carefully assessed the nature of a particular cause of action in order to determine whether the continuing violation rule should apply”).

Subsequently, in *Kidney Cancer Assoc. v. North Shore Comm. Bank & Trust Co.*, 373 Ill. App. 3d 396, 403-05, 869 N.E.2d 186 (1st Dist. 2007), the Illinois Appellate Court explained it is no longer sufficient to allege a scheme, plan or conspiracy to trigger application of the continuing violation doctrine. Rather, to rely on the continuing violation doctrine, one must allege that “the pattern, course, and accumulation of the defendant’s acts are relevant to the cause of action.” *Id.* at 405. For example, in a case involving continuing domestic abuse, the court recognized that discrete conduct, such as an assault or battery, could give rise to separate and distinct causes of action, but applied the continuing violation doctrine because the abuser’s “conduct as a whole, stated a cause of action for intentional infliction of emotional distress.” *Id.* at 403 (citing, *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278, 798 N.E.2d 75 (2003)). Similarly, in a case involving continuous and related medical negligence, a court deemed the continuing violation doctrine applicable because “the *cumulative* result [] of continued negligence [was] the

cause of injury’.” *Rodrigue*, 406 F. 3d at 442 (quoting *Cunningham v. Huffman*, 154 Ill. 2d 398, 609 N.E.2d 321, 325 (1993)) (emphasis in original).

Here, each of Peoples Gas’ allegedly incorrect bills is discrete, and each bill could support a distinct claim of incorrect billing. *See Kidney Cancer Assoc.*, 373 Ill. App. 3d at 403 (noting that in *Belleville Toyota, Inc.*, the Illinois Supreme Court found that “[b]ecause each allocation constituted a separate violation of the Act, each violation supported a separate cause of action).⁴ Equally significant, the totality of the challenged bills is not relevant to Complainant’s cause of action in any way; rather, the multiplicity of bills merely increases Complainant’s alleged damages. *See e.g., Rodrigue*, 406 F. 3d at 443 (declining to apply the continuing violation doctrine because “nothing about the repeated or ongoing nature of Wiltshire’s conduct affected the nature or validity of Rodrigue’s suit, beyond increasing her damages”); *Kidney Cancer Assoc.*, 373 Ill. App. 3d at 405 (finding, the “validity of the continuing violation rule is dependent upon the cause of action alleged”).

Accordingly, under current Illinois law, the fact that Peoples Gas allegedly issued multiple incorrect bills is not sufficient to trigger application of the continuing violation doctrine to the claims in this Docket. *See Bellville*, 199 Ill. 2d at 345-49; *Rodrigue*, 406 F. 3d at 442; *Kidney Cancer Assoc.*, 373 Ill. App. 3d at 405.

III. CONCLUSION

As demonstrated herein, the continuing violation doctrine cannot properly be applied to the claims in this Docket, which are governed by Section 9-252.1. Accordingly, because Complainant admittedly first had knowledge of Peoples Gas’ allegedly incorrect billing

⁴ Note, between December 7, 2008 and December 7, 2010, *i.e.*, the two-year period preceding the Complaint in this Docket, Complainant admits it was not inaccurately billed. *See* Fn. 1. Regarding bills issued prior to December 7, 2008, Complainant admits it first had knowledge of alleged billing errors on or before December 7, 2008. *See* Fn. 2. Accordingly, the Complaint is untimely.

sometime during the 11-year period between 2000 and December 7, 2008, *see* Fn. 2, Complainant's claims are time barred. *See* 220 ILCS 5/9-252.1. Therefore, Peoples Gas respectfully requests that your Honor reconsider and vacate the February Ruling, grant Peoples Gas' Motion to Dismiss Halsted Partners' Complaint, and grant Peoples Gas such additional and further relief as deemed just and proper.

Dated: March 30, 2015

Respectfully submitted,

THE PEOPLES GAS LIGHT AND
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