



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.nj.gov/bpu

CUSTOMER ASSISTANCE

MARK AND ANDREA NEWTON,

PETITIONERS,

v.

PUBLIC SERVICE ELECTRIC AND
GAS COMPANY,

RESPONDENT.

ORDER ADOPTING
INITIAL DECISION

BPU Docket No.: EC06070563U
OAL Docket No.: PUC 11000-2006N

(SERVICE LIST ATTACHED)

BY THE BOARD:

The within matter involves Mark and Andrea Newton's ("Petitioners") dispute regarding the charges of Public Service Electric and Gas Company ("Respondent"), and Petitioners' diversion of service claims against Respondent. The New Jersey Board of Public Utilities ("Board" or "BPU") was asked to determine whether a diversion of service occurring subsequent to October 2005 exists at the Petitioners' residence and to determine whether the Petitioners' utility service may be discontinued by Respondent. This Order sets forth the background and procedural history of Petitioners' claims and represents the Board's Final Order in the matter pursuant to N.J.S.A. 52:14B-10.

Background/Procedural History

On June 3, 2005, Petitioners filed an Order to Show Cause and Verified Complaint against Respondent in the Superior Court of New Jersey, Chancery Division, Essex County, alleging that Respondent failed to investigate a diversion of utility service at Petitioners' residence. Petitioners alleged that as a result of the diversion, Respondent had billed them for utility service consumed by other tenants and the landlord at the property. Respondent acknowledged that there had been a diversion but that it had been corrected. Subsequent to a September 8, 2005 hearing, the Honorable Donald J. Volkert, Jr., J.S.C. ordered Respondent to close Petitioners' utility account, which was the focus of the diversion of service allegation, and open a new account, and ordered the Petitioners to make all payments on the new account in a timely manner. Judge Volkert's ruling on the pre-October 2005 diversion ("Judge Volkert's pre-October 2005 diversion ruling") was issued May 12, 2006.

Petitioners, on April 17, 2006, filed a second Order to Show Cause with the Supreme Court of New Jersey, Chancery Division against Respondent, alleging that Respondent provided Petitioners with "exaggerated and inflated billing" and seeking to avoid discontinuance of their service. Pursuant to an April 26, 2006 order in the matter, the Honorable Renee Weeks, J.S.C. ordered that Respondent is "preliminarily restrained from terminating Plaintiff's electrical and gas service until further court order." Judge Weeks' Order at 2. Respondent, on May 3, 2006, filed its Opposition to Petitioners' Order to Show Cause, arguing that Judge Weeks' Order must be dismissed because Judge Volkert's previous pre-October 2005 ruling is *res judicata* on the issue of whether Petitioners are obligated to continue to pay their bills.

Following a hearing pertaining to Petitioners' second Order to Show Cause, the Honorable Kenneth S. Levy, J.S.C., in a decision filed June 22, 2006, ordered the matter be transferred to the Board as a result of primary jurisdiction as to the diversion of service issue alleged by the Plaintiffs to have occurred subsequent to October 2005 ("Judge Levy's Transfer Order"). In his ruling transferring the matter to the Board, Judge Levy ordered Respondent to make the application necessary to transfer the matter to the Board for it to "determine whether a diversion of service exists and to determine whether utility service to the [Petitioners] may be discontinued." Judge Levy's Transfer Order at 2. Judge Levy further ordered that the restraints ordered on April 26, 2006 remain in place pending further order of the court.

Per Judge Levy's Transfer Order, Respondent, on July 28, 2006, submitted a letter application to Board Secretary, Kristi Izzo transferring the diversion of service issue to the Board for resolution. The Board transmitted this matter to the Office of Administrative Law ("OAL") for hearing and initial disposition as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. This matter was assigned to Administrative Law Judge (ALJ) Walter M. Braswell.

The matter was originally scheduled for hearing on December 19, 2006, but it was rescheduled for January 9, 2007 due to Petitioners' failure to appear at the hearing. Respondent, however, was present at the December 19 hearing.

Prior to the January 9, 2007 hearing, Petitioners issued a subpoena to Respondent requesting a printout of monthly bills for tenants residing in Petitioners' apartment building from January 2002 to present. Respondent opposed the production of materials prior to October 2005, the date set forth in Judge Levy's Transfer Order. In his January 10, 2007 Discovery Order ("Discovery Order"), ALJ Braswell directed Respondent to respond to discovery requests, "but only in so far as the discovery pertains to service issues alleged by Petitioners to have occurred subsequent to October 2005." Discovery Order at 1. ALJ Braswell also ordered Petitioners to contact his office to inform him when Respondent could gain access to Petitioners' apartment to conduct a test for the diversion occurring subsequent to October 2005. However, ALJ Braswell later indicates in his Order on Motion for Summary Decision¹ that the Petitioners failed to inform his office when Respondent could conduct the investigation into the diversion of service.²

¹ALJ Braswell, in issuing an Order granting Respondent's Motion to Dismiss, stated that for purposes of the proceeding, Respondent's motion would be treated as a motion for summary decision. Accordingly, the Board will refer to the ALJ's Order as an Order on Motion for Summary Decision.

²After ALJ Braswell issued his Discovery Order, on January 11, 2007, Petitioners filed a motion in the Superior Court of New Jersey, Essex County, seeking reconsideration of Judge Levy's Transfer Order. The motion was heard by Judge Weeks on March 16, 2007 and the motion was denied on April 18, 2007.

At the January 9, 2007 hearing, Petitioners made a motion to disqualify ALJ Braswell from the proceedings, alleging that ALJ Braswell failed to state on the record what had taken place at the December 19, 2006 hearing, at which the Petitioners failed to appear. Petitioners additionally alleged that ALJ Braswell acted condescendingly toward the Petitioners, conducted proceedings off the record, improperly ordered that Petitioners be sworn in before making an opening statement, exhibited bias toward the Petitioners and engaged in an unprofessional matter.³ Petitioners also sought oral argument on the motion.

ALJ Braswell denied Petitioners' motion, stating that Petitioners failed to make a showing of "bias, prejudice or unreasonable actions." Order on Motion Seeking Disqualification of ALJ Walter M. Braswell at 6. Petitioners' request for oral argument was also denied. In a February 9, 2007 Final Order, Laura Sanders, Director of the OAL, affirmed ALJ Braswell's denial of Petitioners' motion, finding that the ALJ's disclosed former employment and past representation of an adversary to Respondent was not sufficient to require ALJ Braswell's disqualification over the proceeding. Furthermore, Director Sanders, found that Petitioners failed "to articulate a reasonable basis to conclude that the judge is either biased or unprofessional." Final Order on Motion Seeking Disqualification of ALJ Braswell at 4.

On April 4, 2007, the Board received a request from Petitioners for interlocutory review of ALJ Braswell's Discovery Order denying Petitioners' request regarding discovery served on Respondent for the period commencing January 2002. Petitioners argued that the issue before the Board is one diversion of service claim, which includes the diversion alleged to have occurred pre-October 2005. Therefore, Petitioners argued that the discovery should not be limited, but should include the period commencing January 2002.

Respondent opposed Petitioners' request for Interlocutory Review, arguing that the Discovery Order must not be reviewed because Petitioners' request for interlocutory review was untimely and that Petitioners failed to provide Respondent with appropriate notice of their request within the proper time period. Respondent further argued that if the Discovery Order was to be reviewed by the Board, Petitioners' request to expand the scope of discovery should be denied because a review of the record indicates that the "first" diversion of service issue addressed in Judge Volkert's pre-October 2005 diversion ruling had been corrected and ordered that Petitioners pay their bills from October 2005 forward. Additionally, Respondent noted that Petitioners' untimely motion in Superior Court seeking reconsideration of Judge Levy's Transfer Order had been denied. Respondent further argued that the ruling on the reconsideration of the time period set forth in Judge Levy's Transfer Order is *res judicata* on the issue of expansion of the scope of the Discovery Order. Respondent also contended that Judge Levy transferred only the issue of alleged diversion of service occurring after October 2005 to the Board and that ALJ Braswell's Discovery Order reflects that fact.

In an Order issued July 12, 2007, the Board denied the Petitioners' request finding that there was no good cause shown to review ALJ Braswell's Discovery Order on an interlocutory basis. The Board, in denying the request, relied on evidence that the diversion occurring before

³At the January 9, 2007 hearing, ALJ Braswell advised the parties that he had worked at Elizabethtown Water Company for approximately twenty three (23) years. ALJ Braswell additionally stated that he had recently represented a client who owned property in Princeton, NJ, which was located near a site currently owned by PSE&G, and he had assisted that client in reaching a settlement with PSE&G regarding a contamination claim. According to ALJ Braswell's Order on Motion regarding his disqualification, he heard no objection from the parties.

October 2005 had been corrected and that Petitioner was no longer responsible for any payments owed to Respondent for services provided prior to October 31, 2005.⁴

Following the Board's Order on Petitioners' request for interlocutory review, another peremptory hearing at the OAL was scheduled for September 18, 2007. During the hearing, at which Respondent and Petitioner Ms. Andrea Newton appeared, Ms. Newton requested an adjournment and presented a doctor's note advising ALJ Braswell that Petitioner Mark Newton was incapacitated until September 26, 2007 due to an illness. Ms. Newton stated that due to Mr. Newton's illness, as well as her own, Petitioners would not be able to continue with the hearing as scheduled. Counsel for Respondent informed the Court that Respondent has been unable to perform the investigation of the diversion of service because Petitioners failed to contact ALJ Braswell's office and provide access pursuant to the Discovery Order. Additionally, Respondent requested sanctions entered against Petitioners for failing to abide by ALJ Discovery Order and asked that Petitioners be directed to pay the undisputed charges that remain owed.

ALJ Braswell initially denied Ms. Newton's request because she is a named party to the action, and Ms. Newton left the courtroom stating that she was unable proceed with the hearing due to her medical conditions. After reviewing the doctor's note provided by Ms. Newton, ALJ Braswell reversed his denial for request for an adjournment and rescheduled a peremptory hearing for October 2, 2007. ALJ Braswell stated that at or before the October 2 hearing, Respondent may make its request for sanctions against Petitioners for failing to go forward with the proceeding on a timely basis. ALJ Braswell also noted that Respondent was to attempt to gain access to Petitioners' residence in order to perform the diversion of service investigation.

Subsequently, Petitioners failed to appear at the October 2, 2007 hearing. ALJ Braswell stated on the record that a notice dated September 18, 2007 and sent by his office on September 21, advised the parties of the rescheduled hearing date, which was scheduled to accommodate the incapacitation of Petitioner Mark Newton.⁵ Additionally, ALJ Braswell noted that Respondent requested to file a motion, which was to be filed by October 16, 2007 at the OAL with a copy to Petitioners.

On October 16, 2007, Respondent filed a motion for an order dismissing the petition with prejudice, permitting the immediate discontinuance of utility service to Petitioners and awarding attorneys' fees to Respondent. Petitioners did not file a response to Respondent's motion. In a November 2, 2007 Order on Motion for Summary Decision, ALJ Braswell ordered that the Petitioners' petition be dismissed with prejudice and that Respondent be permitted to disconnect utility service to Petitioners' residence. ALJ Braswell, finding no regulatory authority for awarding the cost of attorney's fees, denied Respondent's request for attorney's fees. The Order was subsequently transferred to the Board on November 2, 2007 pursuant to N.J.S.A. 52:12B-10.⁶

⁴In a May 11, 2006 letter, Respondent advised Judge Levy that all debts owed prior to October 31, 2005, the date Petitioner Andrea Rutty (also known as Andrea Newton) filed for Chapter 7 bankruptcy, were discharged.

⁵At the September 18, 2007 hearing, Petitioner Andrea Newton provided ALJ with a doctor's certification indicate that Mark Newton would be incapacitated until September 26, 2007.

⁶ALJ Braswell's Order on Motion for Summary Decision will be discussed at length *infra*.

On November 28, 2007, the Board issued an Extension Order extending the time for issuing a final decision, due to the fact that the period for exceptions to ALJ Braswell's November 2, 2007 Order extends beyond the date of the finalization of the agenda for the Board's last agenda within the initial period for consideration. The Extension Order extended the time limit for the Board to render a Final Decision to January 31, 2008 and was subsequently approved by Chief Administrative Law Judge Laura Sanders on November 30.⁷

In a letter brief dated November 15, 2007 and filed with the Board on December 6, 2007, Petitioners submitted their Exceptions to ALJ Braswell's Order on Motion for Summary Decision, pursuant to N.J.A.C. 1:1-18.4. In their Exceptions, Petitioners requested that the Order be vacated, that additional parties and issues be joined in the instant matter and that the Board's review of the Order be stayed pending appeal of orders issued in other forums.⁸

Petitioners, in a letter dated December 14, 2007 and filed with the Board on January 3, 2008, reiterate their request for a stay pursuant to N.J.A.C. 14:1-8.2 and state that they had not received a final order relating to their request for an interlocutory review.⁹

In a letter dated March 28, 2008, Respondent requested an extension of one month in order to prepare a response to Petitioners' Exceptions. Respondent explained that it had not been served Petitioners' Exceptions and received a courtesy copy of the Exceptions from the DOL on or about March 19, 2008. On April 8, 2008, the Board issued an Extension Order extending the time limit for the Board to render its Final Decision until June 16, 2008. On May 15, 2008, the Board received a request from Respondent for an additional extension of 30 days to file a reply to Petitioners' Exceptions because Respondent did not receive confirmation that its request for an extension was granted until May 9, 2008.¹⁰ On May 23, 2008, Respondent filed its reply to Petitioners' Exceptions to ALJ Braswell's Order on Motion for Summary Decision. The Board requested an additional extension in order to review the filed Exceptions and Replies.

Petitioners, in a letter dated April 14, 2008 and filed with the Board on April 29, 2008, object to Respondent's statement that Respondent was not served with a copy of Petitioners' Exceptions, and Petitioners repeat their allegations that Respondent has failed to serve documents and correspondence upon Petitioners. Additionally, Petitioners allege that Respondent terminated their utility services in violation of Superior Court orders, including Judge Levy's Transfer Order, and request that the Board compel Respondent to abide by the orders.¹¹

ALJ's Order at Issue

In his November 2, 2007 Order on the Motion for Summary Decision, ALJ Braswell ordered that the Petitioners' petition be dismissed with prejudice and that Respondent be permitted to disconnect utility service to Petitioners' residence. ALJ Braswell, finding no regulatory authority

⁷Additional Extension Orders were issued by the Board on January 17, 2008; April 8, 2008 and June 16, 2008 and all were subsequently approved by the OAL.

⁸Petitioners' filed Exceptions and other relevant documents will be discussed *infra*.

⁹Petitioners' January 3, 2008 letter will be discussed *infra*.

¹⁰The Order granting Respondent's extension was issued at the Board's May 8, 2008 agenda meeting.

¹¹Petitioners' April 29, 2008 letter will be discussed *infra*.

for awarding the cost of attorney's fees, denied Respondent's request for attorney fees. Furthermore, ALJ Braswell found that the Petitioners, who have received gas and electric services from Respondent for more than two and a half years without paying any portion of the accumulated charges, did not offer any evidence regarding the disputed charges.

Additionally, ALJ Braswell noted that N.J.A.C. 14:3-7.13¹² provides, in part, that "a utility shall not discontinue service because of non-payment of bills in cases where a charge is in dispute, provided that the undisputed charges are paid. . . ." Accordingly, ALJ Braswell authorized Respondent to discontinue Petitioners' utility service because Petitioners failed to make any payments for utility services provided by Respondent and have not offered any evidence regarding the disputed charges.

ALJ Braswell concluded that the dismissal of the matter is warranted because, in addition to finding that there was no genuine issue of material fact, Petitioners "have frivolously delayed the proceeding for over a year, have failed to appear at three preemptory hearing dates, have not made a single payment on their bill, and have shown no reason why the discontinuance of their service is prohibited." Order on Motion for Summary Decision at 6.

Petitioners' Position

Within their filed Exceptions, as well as their letter filed with the Board on January 3, 2008, Petitioners request a stay of the Board's review of the Order pending appeal of various issues litigated in the Superior Court, Chancery Division, Superior Court, Special Civil Part, and the Office of Administrative Law, regarding issues of discovery, Respondent's termination of Petitioners' utility service and personal property damage. Petitioners' Exceptions at 11-12. Petitioners, in their letter filed with the Board on January 3, 2008, rely on N.J.A.C. 14:1-8.2¹³ in support of their request and attach an Appellate Division Order on Motion granting reinstatement of Petitioners' appeal and ordering Petitioners to file their brief and appendix on or before January 8, 2008. Additionally, Petitioners cite to case law, which they argue supports their claim that Respondent's failure to serve a copy of the motion to dismiss should result in a denial of the motion.

Petitioners' also contend that Respondent's motion to dismiss should not have been granted because they were not served a copy of the motion and were not given an opportunity to respond. While Petitioners contend that they were not served a copy of the motion, Petitioners acknowledge receiving Respondent's motion in late October, but state that it was received after ALJ Braswell issued his Order on Respondent's motion.¹⁴ Petitioners' Exceptions at. 4-5. In support of their argument, Petitioners rely on N.J.A.C. 1:1-12.5, which states that a motion for summary decision "shall be served with briefs and with or without supporting affidavits."

Petitioners also argue that the Order granting Respondent's motion for summary decision is improper because ALJ Braswell was not an impartial fact finder. In relying upon, *City Check*

¹²This regulation has been recodified at N.J.A.C. 14:3-3A.2(e)(5).

¹³N.J.A.C. 14:1-8.2 refers to Argument on Exceptions.

¹⁴It is unclear if Petitioners are referring to ALJ Braswell's Order on Motion for Summary Decision, which was issued on November 2, 2007. OAL records for this matter do not include any orders issued by ALJ Braswell for the month of October. However, Respondent's motion requesting an Order dismissing the petition was filed with the OAL on October 16, 2007.

Cashing, Inc. v. Mfrs. Hanover Trust Co., 166 N.J. 49 (2001), Petitioners argue that summary decision is appropriate when no fair-minded fact finder or jury could reach a contrary conclusion. However, Petitioners allege that ALJ Braswell was not a fair and impartial fact finder, and that the basis for granting Respondent's motion is a result of ex parte proceedings with Respondent. Petitioners' Exceptions, at 9. Petitioners contend that had ALJ Braswell been fair and impartial, Petitioners' allegations of a diversion of service would have been determined pursuant to discovery and trial. In support of their argument, Petitioners also rely on *Crippen v. Central Jersey Concrete Pipe Co.*, 176 N.J. 397 (2003). Petitioners' Exceptions at 11.

Additionally, Petitioners argue that the Order should be vacated because Respondent's motion was granted as a result of ex-parte communications between ALJ Braswell and the Respondent. Petitioners argue that due to illness, Mr. Mark Newton could not attend a September 18, 2007 peremptory hearing before the OAL. However, as previously discussed, Co-Petitioner Ms. Andrea Newton did appear, as well as Respondent's counsel.¹⁵ ALJ Braswell, upon reconsidering Ms. Newton's request for an adjournment of the September 18, 2007 hearing, rescheduled the peremptory hearing for October 2, 2007. Petitioners further argue that they were unable to appear at the October 2, 2007 hearing because they did not receive notice from the OAL or Respondent of the re-scheduled hearing date and because they were recovering from their illnesses. Petitioners also claim that they did not attend the October 2 hearing because they did not receive the Board's final order regarding Petitioners' request for an interlocutory review.¹⁶ Petitioners claim that because they did not receive the Board's Order, Petitioners "were under the presumption that Judge Braswell acted out of the scope of his official duties, as all hearings should have been 'stayed' until the Board had rendered its decision." Petitioners' Exceptions at 11. In sum, Petitioners argue that the October 2, 2007 hearing was improper because they received no notice and could not attend due to illness, and that as a result their inability to attend the hearing, ALJ Braswell conducted an ex parte hearing with Respondent.

Citing to *Wilson v. Amerada Hess Corp.*, 168 N.J. 236 (2001), Petitioners contend that Respondent's motion for dismissal of the petition should have been denied because Respondent's failed to provide Petitioners with any discovery responses pursuant to ALJ Braswell's Discovery Order. Petitioners contend that had Respondent provided the information pursuant to ALJ Braswell's Discovery Order, Petitioners would have been able to offer evidence related to the disputed charges. Petitioners' Exceptions at 8. Petitioners, relying on *Salomon v. Eli Lilly & Co.*, 98 N.J. 58 (1984), argue that a judge should not grant a motion for summary judgment if the discovery has not been completed. Furthermore, Petitioners assert that a court should afford every litigant who has a bona fide cause of action, or defense, the opportunity for a complete determination of the case.¹⁷ Petitioners also argue that the motion should not have been granted because ALJ Braswell made no factual findings and that the judge accepted as true Respondent's assertions without permitting Petitioners to respond. Petitioners rely on *Bally Manufacturing Corp. v. N.J. Casino Control Commission*, 85 N.J. 325 (1981) for the proposition

¹⁵A discussion of the events occurring at the September 18, 2007 peremptory hearing appear *supra*.

¹⁶Petitioners claim that their request for interlocutory review was with regard to their motion to disqualify ALJ Braswell. However, Petitioners' requested an interlocutory review related to ALJ Braswell's Discovery Order. The Board's Order was issued on July 12, 2007.

¹⁷Petitioners rely on *Velantzas v. Colgate-Palmolive Co. Inc.*, 109 N.J. 189 (1988) in support of their argument.

that an agency must conduct an evidentiary hearing if disputed facts exist. Petitioners further argue that if Petitioners were permitted the opportunity to present evidence and testimony, a rational judge could have found in favor of Petitioners.

Petitioners also contend that ALJ Braswell's Order on Summary Decision is replete with inaccuracies. Petitioners contend that ALJ Braswell's statement in Paragraph 6 of the Order, in which it is stated that Judge Volkert's ruling indicated a resolution of the pre-October 2005 diversion of service issue is false. Petitioners claim that Judge Volkert stated that he was not ruling on the diversion issue and that the matter would be heard before Judge Levy.¹⁸ Petitioners further allege that ALJ Braswell merely reviewed what Respondent had represented in its draft Order to the detriment of Petitioners. Petitioners' Exceptions at 5, fn 2.

Additionally, Petitioners take issue with ALJ Braswell's statement in his Order that "Petitioners have frivolously delayed the proceeding for over a year, have failed to appear at three peremptory hearing dates, [and] have not made a single payment on their bill." Order on Motion for Summary Decision at 6. Petitioners claim it was Respondent that delayed the proceedings by failing to timely file their "complaint."¹⁹ Petitioners, in objecting to the statement that they failed to appear at three peremptory hearings, note that they were unable to appear because they "possessed germane and unavoidable illnesses,"²⁰ Petitioners' Exceptions at 9, and that they did not have notice of the December 19, 2006 and October 2, 2007 hearings.

In response to ALJ Braswell's statement that Petitioners "have not made a single payment on their bill," Petitioners argue that they did not make payments on the "fraudulent and exaggerated bills" for various reasons including that the owner of the premises was conspiring with the Respondent in tampering with meters and failing to correct violations, and Respondent's failure to conduct a valid investigation of Petitioners' diversion claim. Petitioners' Exceptions, at 9.

Petitioners also seek to have additional parties joined as well as the issue regarding the manner in which Respondent investigated Petitioner's diversion of service complaints. Petitioners request that the owner of the subject premises, whom Petitioners does not name, and the Essex County Welfare Agency (ECWA) be joined as parties in the instant matter. Petitioners allege that the diversion of service was caused by actions of the owner. Additionally, Petitioners claim that a contract for payment of utility services was created between Respondent and ECWA, but due to the diversion of service at the premises from May 2004 to May 2005, ECWA was "precluded, and otherwise refused" to pay utility payments until October 2004, when ECWA observed the defective wiring upon inspection of the premises.

In Petitioners' filed April 10, 2008 letter, Petitioners argue that Respondent's violated Judge Levy's Transfer Order when it discontinued Petitioners' utility service on three occasions, causing \$7,000 in damage. Petitioners ask that Respondent be compelled to abide by the Superior Court orders restraining Respondent from terminating Petitioners' utility service.

¹⁸As discussed above, Judge Volkert's pre-October 2005 diversion ruling resolved Petitioners' diversion of service claim contained in Petitioners' first Order to Show Cause. Judge Levy's Order transferred Petitioners' diversion of service claims subsequent to October 2005 to the Board for adjudication.

¹⁹Respondent's "Application to Transfer Proceeding," dated July 28, 2006, was filed with the Board on July 31, 2006. It is unclear why Petitioners allege that this application was not filed until October 2006.

²⁰Petitioners have attached to their Exceptions doctor's notes indicating that they were ill and/or hospitalized during various dates in September and October 2007.

Petitioners also contend that the manner in which Respondent conducted an investigation of Petitioners' complaints of a diversion of service should be made part of the present proceeding.

Respondent's Position

Respondent argues that ALJ Braswell's Order on its motion for summary decision should become a final decision because it was based on "factual findings and sound legal reasoning and conclusions." Respondent additionally argues that Petitioners were properly served with Respondent's motion, and that Respondent, to date, has not been served with Petitioners' letter brief containing their formal exceptions.²¹ Respondent also acknowledges that on or about June 28, 2007, Petitioners filed a Notice of Appeal with the Superior Court, Appellate Division. Although Respondent notes that it has not received a copy of Petitioners' appeal or brief in support of the appeal, Respondent believes that Petitioners have appealed the transfer of the diversion of service issue from the Superior Court, Chancery Division to the OAL.²²

Respondent attacks the validity of Petitioners' filed Exceptions, arguing that the Exceptions fail to meet the criteria required by N.J.A.C. 1:1-18.4 et seq. and that Petitioners have attempted to delay the proceedings before the Board by "filing pleadings that have no reasonable basis in fact or law." Respondent's Reply at 2.

Respondent also argues that its Motion was granted because there was no genuine issue of material fact present in the case and accordingly ALJ Braswell's Order must become a final decision pursuant to N.J.S.A. 52:14B-10. Respondent relies on N.J.A.C. 1:1-12.5(b), which states in pertinent part that a motion for summary decision "sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The rule further states that "[i]f the adverse party does not so respond, a summary decision, if appropriate, shall be entered." Ibid.

Respondent further states that the standard for determining a motion for summary decision in the OAL and agency proceedings is the same as applied in New Jersey state courts.²³ Respondent argues that summary decision is "'designed to provide a prompt, businesslike and inexpensive method' to dispose of actions which do not present any genuine issue of material fact," *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 74 (1954). Respondent notes that ALJ Braswell found that Respondent had shown that there was no genuine issue of material fact and that "Petitioners had offered only facts which were immaterial or insubstantial in nature." Furthermore, Respondent notes that in determining whether a genuine issue of material fact exists, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520, 523 (1995).

²¹The Division of Law supplied a courtesy copy to Respondent.

²²The transfer was ordered by Judge Levy on June 22, 2006.

²³The standard is codified at R. 4:46-2.

Respondent does not address Petitioners' request for a stay of the Board's proceedings pending Petitioners' appeal, Petitioners' allegations that Respondent failed to provide discovery responses, and its request to join parties and issues to the present matter before the Board.

Discussion

First, the Board must determine whether Petitioners' filed Exceptions satisfy the requirements provided in N.J.A.C. 1:1-18.4. Pursuant to N.J.A.C. 1:1-18.4, any party may file written exceptions with the agency head within 13 days from the date the judge's initial decision was mailed to the parties and a copy of the filed Exceptions shall be served on all other parties and the judge. Furthermore, Exceptions shall:

1. Specify the findings of fact, conclusions of law or dispositions to which exception is taken;
2. Set out specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge; and
3. Set forth supporting reasons. Exceptions to factual findings shall describe the witnesses' testimony or documentary or other evidence relied upon. Exceptions to conclusions of law shall set forth the authorities relied upon. N.J.A.C. 1:1-18.4 (b).

In addition, N.J.A.C. 1:1-18.4(c) prohibits evidence not presented at the hearing to be submitted as part of the Exception, or incorporated or referred to within exceptions.

As required by the aforementioned regulation, Exceptions must be filed within a 13-day period, unless extensions are requested and granted pursuant to N.J.A.C. 1:1-18.8. ALJ Braswell's Order was dated November 2, 2007 and mailed to the parties on November 5, 2007. Although Petitioners' Exceptions were dated on November 15, 2007, it was not filed²⁴ with the Board until December 6, 2007, after the 13-day time period. While Petitioners' failed to file its Exceptions within the 13-day time limit, the Board has the discretion to relax or disregard procedural rules if the adherence to the rules would result in unfairness or injustice. N.J.A.C. 1:1-1.3. Because it is unclear why there is nearly a 3 week difference between the date of Petitioners' Exceptions and when it was filed with the Board, the Board will disregard the time requirements of N.J.A.C. 1:1-18.4 and consider Petitioners' Exceptions.

Additionally, Respondent takes issue with the substance of Petitioners' Exceptions, claiming that they do not meet the requirements set forth at N.J.A.C. 1:1-18.4(b). The Board disagrees with Respondent's objections. Petitioners' Exceptions do specify the findings of fact and conclusions of law to which it takes exception. Within their Exceptions, Petitioners state their disagreement with ALJ Braswell's recitation of the facts and granting of the Respondent's motion. Additionally, Petitioners, by requesting that the Order granting Respondent's motion be vacated, proposes a disposition in lieu of the ALJ's determination, thus satisfying the second prong of N.J.A.C. 1:1-18.4 (b). Therefore, the Board will consider Petitioners' Exceptions in its review of ALJ Braswell's Order.

²⁴Filing means "receipt of an original or clear copy of a paper by the proper office or officer." N.J.A.C. 1:1-2.1. Petitioners' exceptions were dated stamped by the Office of Case Management at the Board on December 6, 2007.

Petitioners filed two letters with the Board on January 3, 2008 and April 29, 2008. While Petitioners' letters were filed with the Board after the 13-day filing period for Exceptions, which is provided in N.J.A.C. 1:1-18.4, these letters will be considered as Exceptions. As stated above, N.J.A.C. 1:1-1.3 permits the Board to relax or disregard procedural rules if adherence to the rules would result in unfairness or injustice. Taking into account Petitioners' *pro se* status and because the letters were filed before Respondent filed its Reply, the Board will consider these letters.

Before the Board reviews the merits of ALJ Braswell's Order and the subsequent Exceptions and Reply, the Board must address Petitioners' request for a stay of the Board's proceeding pending Petitioners' appeal to the Appellate Division. First, Petitioners' reliance on N.J.A.C. 14:1-5.2 et seq. and N.J.A.C. 14:1-8.2 is not appropriate as the cited regulations are not applicable or relevant to Petitioners' request for a stay. Second, notwithstanding Respondent's speculation that Petitioners are appealing Judge Levy's Transfer Order transferring the diversion of service issue to the OAL for determination, the Board, having not been provided with a copy of Petitioners' appeal, is not aware of the basis for the appeal. Additionally, Petitioners' attachment of the Order on Motion issued by the Appellate Division does not provide the Board with the substance of the appeal.

Third, Petitioners' request is premature as the Board has not issued a final decision in this matter. Per Judge Levy's Transfer Order, the matter was transferred to the OAL for adjudication, and an initial decision was issued. As stated in N.J.A.C. 1:1-18.6(f), "[w]hen a stay of the *final decision* (emphasis added) is requested, the agency shall respond to the request within 10 days." Pursuant to N.J.A.C. 1:1-2.1, a decision is deemed a final decision when an agency head adopts, rejects or modifies an initial decision or by non-action by the agency by operation of N.J.S.A. 52:14B-10.²⁵ Although the OAL decision before the Board is an Order on Summary Decision and not termed an initial decision, the Board will apply N.J.A.C. 1:1-18.6(f) as it contemplates the OAL decision that is ultimately transferred to the agency for review. The Board will not grant Petitioners' request for a stay as it would be inappropriate to do so before the Board issues its final decision. The Petitioners are not without recourse as they may seek a stay of the Board's final decision, pending their appeal, pursuant to N.J.A.C. 1:1-18.6(f).

In reviewing the ALJ's Order, the Board must determine whether the Order meets the legal standards for determining whether a motion for summary decision should be granted. A motion for summary decision may be granted if "there is no genuine issue as to any material fact" and that "the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). Summary decision in administrative proceedings parallels summary judgment in the courts.²⁶ Summary decision is "designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at a trial." *Judson v. Peoples Bank and Trust Company of Westfield*, 17 N.J. 67, 74 (1954). In administrative proceedings, as in the courts, it is "the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact." *Id.* at 74. Thus, "all inferences of doubt are drawn against

²⁵N.J.S.A. 52:14B-10 (c) states "The head of the agency, upon a review of the record submitted by the administrative law judge, shall adopt, reject or modify the recommended report and decision no later than 45 days after receipt of such recommendations."

²⁶See R. 4:46-2.

the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated." *Id.* at 75.

In *Brill v. Guardian Life Insurance Co.*, 142 N.J. 520, 539-40 (1995), the New Jersey Supreme Court applied the summary judgment standard employed by the federal courts. Under *Brill*, once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply create some doubts as to the material facts. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Rather, *Brill* requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. If the evidence, along with reasonable inferences, could sustain a judgment in favor of the nonmovant, the motion must be denied.

First, the Board rejects Petitioners' argument that ALJ Braswell's Order was improper due to Petitioners' claims that they were not served with a copy of the motion and afforded an opportunity to respond. Petitioners admit, however, that they received a copy of the motion in late October. Petitioners' Exceptions at 5. Thus, Petitioners have made contradictory statements in their Exceptions concerning the receipt of Respondent's motion. Moreover, in response to Petitioners' claims, Respondent notes in its Reply that Respondent's motion was served upon Petitioners by regular and certified mail on or about October 15, 2007 and is supported by its Certification of Service submitted with its motion. Furthermore, Petitioners' allegations that Respondent willfully served Petitioners in an untimely manner and after the issuance of ALJ Braswell's Order is without merit because Respondent's motion was dated October 15, 2007 and ALJ Braswell's Order was issued on November 2, 2007.

Petitioners' argument that the Order should be vacated because ALJ Braswell was not a fair-minded fact finder is also without merit. Petitioners offer no evidence to support their allegations that ALJ Braswell manifested bias toward Petitioners. Additionally, Petitioners' previous arguments that ALJ Braswell was unprofessional and exhibited biased conduct toward Petitioners have been previously rejected when Petitioners' motion to disqualify ALJ Braswell was denied.²⁷

Petitioners fail to provide evidence to support their allegations that the Order was a product of ALJ Braswell's bias toward the Petitioners. Additionally, Petitioners' accusation that ALJ Braswell conducted ex parte proceedings with Respondent is also without merit as Petitioners offer no evidence to support a conclusion that ALJ Braswell conducted such proceedings.²⁸ Petitioners' failure to appear at scheduled, peremptory hearings does not, on its own, justify an accusation that improper ex parte hearings took place.

Petitioners also argue that the motion for summary decision should not have granted because Petitioners were not provided with the discovery it requested from Respondent. Respondent does not address Petitioners' claim that Respondent failed to respond to Petitioners' discovery requests. The Board does acknowledge ALJ Braswell's Discovery Order issued January 10, 2007 which orders Respondent to "respond to discovery previously filed by Mr. Newton but only

²⁷Discussion of Petitioners' motion to disqualify ALJ Braswell is discussed *supra*.

²⁸Petitioners' reliance on the case law cited to above is misplaced. The case law cited are not directly on point, thus they do not support or refute Petitioners' arguments.

in so far as the discovery pertains to service issues alleged by Mr. Newton to have occurred subsequent to October 2005.”²⁹ Discovery Order at 1.

Petitioners, in arguing that ALJ Braswell's Order is without merit relies on *Wilson, supra*, 168 N.J. at 252-253, in which the New Jersey Supreme Court held that summary judgment should be reversed because plaintiffs were denied a full opportunity to prove that a genuine issue of material fact existed because the trial court denied plaintiff's discovery requests. However, in the present matter, the Petitioners' request for discovery was not denied by the court. Furthermore, it does not appear in the record that Petitioners sought to file a motion to compel Respondent to provide discovery pursuant from ALJ Braswell's Discovery Order if Respondent indeed failed to provide discovery responses. Additionally, N.J.A.C. 1:1-18.4 prohibits evidence not presented at the hearing to be submitted as part of, incorporated or referred to exceptions filed with the agency. Therefore, because Petitioners had not filed a motion to compel while the matter was before ALJ Braswell and in light of the prohibition of submitting new evidence within an exception, the Board will not consider Petitioners' argument that Respondent's failure to provide discovery responses precludes an Order for summary decision.

Petitioners argue that it was improper for ALJ Braswell not to make any factual findings. As stated above, in determining whether to grant a motion for summary decision, a judge must consider, when viewing the evidence presented in the light most favorable to the non-moving party, whether there exists a genuine issue of material fact. *Brill*, 142 N.J. at 523. Furthermore, when considering a motion for summary decision “[t]he judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Brill*, 142 N.J. at 540 quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In the present matter, ALJ Braswell was not required to make any factual findings in determining whether a genuine issue of material fact existed. Therefore, Petitioners' argument that the Order was improper because ALJ Braswell failed to make factual findings is without merit.

Having reviewed the record, the Order on Motion for Summary Decision and filed Exceptions and Reply, the Board adopts ALJ Braswell's Order on Motion for Summary Decision. Per Judge Levy's Transfer Order, the issue before ALJ Braswell was whether a diversion of service existed and whether utility service to the Petitioners may be discontinued. As stated above, the Board dismisses Petitioners' arguments that the Order should be vacated on the basis that Petitioners were not served with Respondent's motion, that ALJ Braswell was not an impartial fact finder, that the Order was determined as a result of improper ex parte meetings and that Petitioners were not provided with discovery. Additionally, the Board finds that Petitioners failed to show what portion of their unpaid bill is in dispute and why the discontinuance of their utility service is prohibited and have failed to articulate any reasonable basis for the Board to conclude that the motion for summary decision should not have been granted. Furthermore, the Board notes that pursuant to N.J.A.C. 1:1-12.5(b), “[i]f an adverse party does not so respond [to a motion for summary decision], a summary decision, if appropriate, shall be entered.” Therefore, because Petitioners failed to present any evidence to show the existence of a genuine issue of material fact and because Petitioners failed to respond to Respondent's motion, the Board finds that ALJ Braswell's Order granting summary decision is valid.

²⁹On April 4, 2007, Petitioners requested that the Board grant an interlocutory review of ALJ Braswell's Discovery Order and overrule his Order limiting Petitioners to discovery requests related to utility services subsequent to October 2005.

In his Order, ALJ Braswell found that Respondent may discontinue Petitioners' service due to non-payment. Petitioners' current balance as of the date of the Order was \$7, 352.46. ALJ Braswell states that pursuant to N.J.A.C. 14:3-7.13 [recodified at N.J.A.C. 14:3-3A.2(e)(5)], "a utility shall not discontinue service because of non-payment of bills in cases where a charge is in dispute, provided the undisputed charges are paid. . . ." Accordingly, ALJ Braswell found that because Petitioners offered no evidence to show which portion of their unpaid bill was in dispute and why Respondent should not be permitted to discontinue service, Respondent was authorized to discontinue utility serve to Petitioners' residence. Petitioners, in their Exceptions and subsequent letters, did not address ALJ Braswell's language permitting Respondent to discontinue Petitioners' utility service, but did request that the Board compel the Respondent to abide by the prior Superior Court Orders restraining Respondent from discontinuing Petitioners' utility services pending further order of the Court. In their April 29, 2008 letter, the Petitioners advise the Board that Respondent disconnected Petitioners' utility service three times, which resulted in damages totaling \$7,000. Respondent did not address Petitioners' claims in their Reply.

While the Board finds that Respondent may discontinue Petitioners' utility service pursuant to N.J.A.C. 14:3-3A.2(e)(5), Respondent must seek to vacate the restraint contained in Judge Weeks' April 26, 2006 Order and Judge Levy's Transfer Order. The Superior Court Orders preliminarily restrained Respondent from terminating the Petitioners' utility services until "further Court order." Notwithstanding that Judge Levy's Transfer Order did transfer the matter to the Board for it to determine whether a diversion of service exists and to determine whether Respondent may discontinue Petitioners' utility service, Judge Levy ordered that the "restraints ordered [in Judge Weeks' Order] shall remain in effect, pending further order of the Court." Judge Levy's Transfer Order at 2. Therefore, Respondent must seek relief from the Superior Court if it wishes to discontinue Petitioners' utility service.

With regards to the Petitioners' claims that Respondent shut off their utility service in violation of Judge Weeks and Judge Levy's Orders, the Board finds that the proper forum to adjudicate these claims and to impose any necessary sanctions is the forum which issued the Orders, i.e., the Chancery Division of the Superior Court.

In his Order, ALJ Braswell denied Respondent's request for attorney's fees and costs, finding no regulatory authority for awarding the cost of attorney's fees. However, the Board notes that N.J.A.C. 1:1-14.14(a)4 provides that a judge may order costs or reasonable expenses, including attorney's fees, to be paid to the State of New Jersey or an aggrieved party for "unreasonable failure to comply with any order of a judge or with any requirements of [the Uniform Administrative Procedure Rules]." Nevertheless, the Board will not disturb ALJ Braswell's denial of Respondent's request. First, Respondent has not filed any Exceptions with regard to ALJ Braswell's denial of its request for costs and attorneys fees. Furthermore, because sanctions, including attorney's fees, issued under N.J.A.C. 1:1-14.14(a)(4) may only be appealed interlocutorily to the Director of the OAL, the rulings issuing the sanctions may not be reviewed after a judge renders an initial decision in a contested case. N.J.A.C. 1:1-14.10 (j) & (l). Accordingly, the Board will not disturb the denial of Respondent's request for attorney's fees and costs.

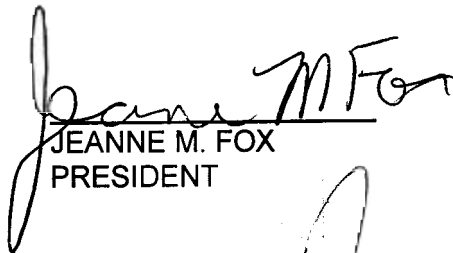
The Board also dismisses Petitioners' arguments that additional parties be joined to the present matter and additional issues be included. Petitioners do not provide any reasonable basis for why their request should be granted by the Board. Furthermore, as these arguments were not presented at hearing and therefore should not have been included in Petitioners' Exceptions pursuant to N.J.A.C. 1:1-18.4, the Board will not consider Petitioners' request.

Finally, Respondent's May 15, 2008 request for a 30-day extension to reply to Petitioners' exceptions is moot as Respondent submitted its Reply on May 23, 2008. Therefore, the request for an extension will not be considered by the Board.

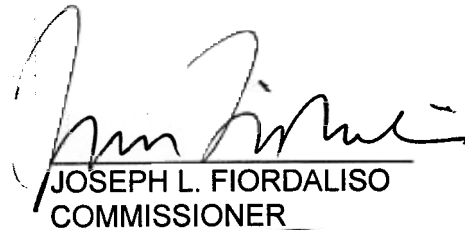
Upon review of the record, the Order on Motion for Summary Decision and the parties filed Exceptions and Reply, the Board HEREBY FINDS that the Motion for Summary Decision was properly granted by ALJ Braswell and that the Order satisfied the legal standard for summary decision. The Board HEREBY FINDS that Respondent is permitted to discontinue Petitioners' utility service pursuant to N.J.A.C. 14:3-3A.2(e)(5), but must first seek to vacate the restraints imposed by Judge Weeks and Judge Levy's Orders. The Board HEREBY FINDS that, pursuant to N.J.A.C. 1:1-14.10 (j) & (l), the Board does not have jurisdiction to disturb the ALJ's denial of Respondent's request for an award of attorney's fees and costs. The Board HEREBY DENIES Petitioners' request for a stay, Petitioners' request to add additional issues and parties, Petitioners' request to find Respondent in violation of the Superior Court Orders, and Petitioners' request for damages. Accordingly, the Board HEREBY ADOPTS the Order on Motion for Summary Decision in its entirety as if fully set forth herein.

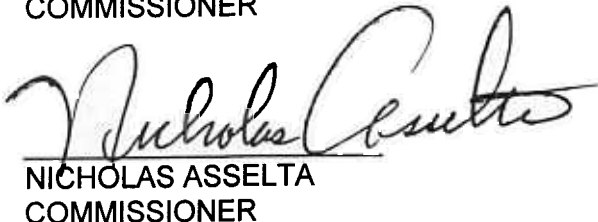
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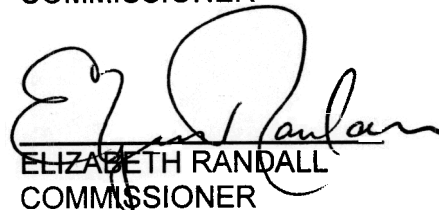
BOARD OF PUBLIC UTILITIES
BY:


JEANNE M. FOX
PRESIDENT


FREDERICK F. BUTLER
COMMISSIONER


JOSEPH L. FIORDALISO
COMMISSIONER

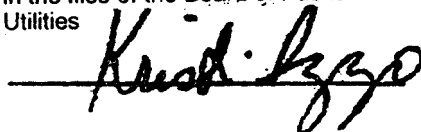

NICHOLAS ASSELTA
COMMISSIONER


ELIZABETH RANDALL
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



**MARK AND ANDREA NEWTON
V.
PUBLIC SERVICE ELECTRIC AND GAS COMPANY
BPU DOCKET NO. EC06070553U
OAL DOCKET NO. PUC 11000-06N**

SERVICE LIST

Mark and Andrea Newton
P.O. Box 6331
Newark, New Jersey 07106

Sheree L. Kelly, Esq.
PSEG Services Corporation
80 Park Plaza – T5G
Newark, New Jersey 07102-4194

Eric Hartsfield, Director
Division of Customer Assistance
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Julie Ford-Williams
Division of Customer Assistance
Board of Public Utilities
Two Gateway Center
Newark, New Jersey 07102

Jessica L. Campbell, DAG
Division of Law
124 Halsey Street – P.O. Box 45029
Newark, New Jersey 07102

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NEW JERSEY



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION TO DISMISS

OAL DKT. NO. PUC 11000-06N

AGENCY DKT. NO.

EC 060705534

KMS
DESLV
RPM
PSE&G
H. L. O
C. M. S.

MARK AND ANDREA NEWTON

Petitioner,

v.

PUBLIC SERVICE ELECTRIC AND
GAS COMPANY

Respondent.

Mark and Andrea Newton., appearing pro se

Sheree L. Kelly, Esq. appearing on behalf of respondent (Public Service
Electric and Gas Company)

Record Closed: October 2, 2007

Decided: November 2, 2007

BEFORE WALTER M. BRASWELL, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a motion, filed on October 16, 2007, by Public Service Electric and Gas Company (PSE&G) for an Order dismissing the petition (for purposes of this proceeding the motion will be treated as a motion for summary decision), with prejudice, committing the immediate discontinuance of utility service to petitioners and awarding cost of attorneys fees to PSE&G.

1. On or about June 3, 2005, in response to a shut off notice, pro se petitioners Mark and Andrea Newton, filed an Order to Show Cause and Verified Complaint against PSE&G alleging a diversion of utility service at their residence located in Newark, N.J. and alleging that PSE&G was billing petitioners for "gas, and electric service that PSE&G knows has, and is being consumed by the second floor tenants, third floor tenants and the common area of the residential premises....."
2. On or about August 30, 2005 PSE&G filed a Certification of Harry Jackson (field collection supervisor for PSE&G) in opposition to petitioners' Order to Show Cause and Verified Complaint. Mr. Jackson's Certification states in pertinent part that; "On June 28, 2005, I visited the property and verified that the 'Diversion of Service' had been corrected."
3. On September 8, 2005, a hearing on petitioners Order to Show Cause was held before the Honorable Donald J. Volkert, Jr., J.S.C. At the hearing, Judge Volkert ruled that the then current utility account number in the name of Andrea Rutty (wife of Mark Newton), should be closed and that a new account be opened in her name. The judge further ruled that the \$2, 706.74 outstanding bill due on the then current account be held in abeyance pending final resolution of petitioners Verified Complaint.
4. PSE&G closed the original account of Andrea Rutty (Newton) and opened a new account in her name.
5. The Judge further ruled that all payments on the new account were to be made in a timely manner. To date the petitioners have made no payments on the new account.
6. Judge Volkert's ruling, which required petitioners to make timely payments on their bills from October 2005 going forward, indicated a resolution of the diversion of service issue up to that point in time.

7. On or about April 17, 2006, petitioners filed a second Order to Show Cause against PSE&G alleging that PSE&G had provided petitioners with "exaggerated and inflated billing" for utility service.
8. On or about May 3, 2006 PSE&G filed a Letter Brief and certification of Counsel in opposition to petitioners Order to Show Cause.
9. On June 8, 2006, a hearing on petitioners Order to Show Cause was held before the Honorable Kenneth S. Levy, J.S.C. At oral argument, petitioners' alleged a new diversion of service to which they argued *res judicata* did not apply. Finding that the Board of Public Utilities (BPU) possess primary jurisdiction over such matters, Judge Levy ordered the second diversion, "alleged by the plaintiffs to have occurred subsequent to October 2005" transferred to the BPU.
10. After being received by the BPU the matter was subsequently transferred to the Office of Administrative Law and assigned to the undersigned for trial.
11. The matter was originally scheduled for trial on December 19, 2006. However, the petitioners failed to appear at the hearing. PSE&G was present at the hearing and was prepared to go forward with the testimony of its witness. Subsequently, OAL received a letter from the petitioners wherein they requested an adjournment of the December 19, 2006 hearing.
12. The matter was rescheduled to January 9, 2007. Prior to the hearing the petitioners issued a subpoena to PSE&G wherein they requested, among other things, historical bills.
13. At the January 9, 2007 hearing PSE&G opposed the discovery of materials prior to October 2005. PSE&G maintained that Judge Levy specifically ordered that only the diversion of service issue subsequent to October 2005 be considered by the BPU. In regard to the petitioners' discovery request I directed that PSE&G respond but only in so far as the discovery pertains to service issues alleged by Mr. Newton to have

occurred subsequent to October 2005. I also directed Mr. Newton to contact my office on or before January 16, 2007 to advise me when PSE&G could gain access to his apartment in order to conduct a diversion of service investigation.

14. To date petitioner has never contacted my office to advise me when PSE&G could gain access to his apartment for its diversion of service investigation.
15. On or about January 11, 2007 petitioners filed a motion in the Superior Court of New Jersey, Essex County, seeking reconsideration of Judge Levy's June 22, 2006 Order. Said Order limited the diversion of service issue to the time period after October 2005 and transferred the diversion of service issue to the BPU. This motion was heard by the Honorable Renee Weeks on March 16, 2007 and the motion was denied by her on April 18, 2007.
16. On or about January 15, 2007 petitioners filed a motion seeking my disqualification from the case. I denied the plaintiffs motion and the petitioners then appealed my denial to the director of OAL. By order dated February 9, 2007 OAL Director Saunders affirmed my denial of petitioners' motion.
17. On or about April 4, 2007 petitioners filed a motion with the BPU requesting interlocutory review of my January 10, 2007 scheduling order. The motion was denied.
18. The hearing in this matter was then rescheduled for a peremptory hearing date on September 18, 2007. PSE&G was present at the hearing and was prepared to go forward with the testimony of its witness. Petitioner, Andrea Newton, appeared at the hearing and presented a doctor's note to the Court advising that Mr. Newton was incapacitated until September 26, 2007. I instructed Mrs. Newton, as a named party in the case, to proceed with the hearing in Mr. Newton's absence. She refused and left the courtroom.

19. In the absence of Andrea Newton I reconsidered my ruling and in light of the doctor's note presented by Mrs. Newton I reconsidered my denial of petitioner's adjournment request and rescheduled the matter for a peremptory hearing date for October 2, 2007.
20. On October 2, 2007 PSE&G was present at the hearing and was prepared to go forward with the testimony of its witness. Petitioners failed to appear and to date have provided no explanation for the failure.

LEGAL ANALYSIS

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to R. 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. Id., at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. Ibid.

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995).

CONCLUSION

It should be noted that the petitioners have had adequate time to respond to the motion filed by PSE&G but failed to do so.

The petitioners' current balance with PSE&G is \$7,352.46. Petitioners have received both electric and gas (heating) services from PSE&G for more than two and one half years without paying any portion of their bill. Although the petitioners might be able to successfully argue that some small portion of their bill is still in dispute petitioners have offered no evidence to show why most, if not all, of their bill is for undisputed service that they used.

N.J.A.C. 14:3-7.13 provides in part as follows: "A utility shall not discontinue service because of non-payment of bills in cases where a charge is in dispute, provided the undisputed charges are paid...." Accordingly, since the petitioners have made no payments on the utility bill and since there has been no proof from the petitioners regarding what portion of the bill is disputed PSE&G is hereby authorized to discontinue utility service to petitioners' residence.

Since the petitioners have frivolously delayed the proceeding for over a year, have failed to appear at three peremptory hearing dates, have not made a single payment on their bill, have shown no reason why the discontinuance of their service is prohibited and because I find no genuine issue as to any material fact. I CONCLUDE that the petitioners' actions warrant the dismissal of this matter.

ORDER

Based on the foregoing, hereby **ORDER** petitioner's formal petition be **DISMISSED with PREJUDICE**.

It is further **ORDERED** that PSE&G be permitted to disconnect. utility service to petitioners' residence.

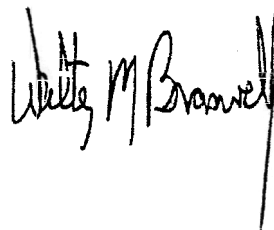
Finding no regulatory authority for awarding the cost of attorney fees that part of the motion filed by PSE&G is **DENIED**.

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, 2 Gateway Center, Newark, NJ 07102**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

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NEWARK, NJ



November 2, 2007

DATE

WALTER M. BRASWELL, ALJ

Date Received at Agency: 11-2-07



Mailed to Parties:

DATE
ljb.

OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO PUC 11000-06N