Agenda Date: 5/19/15
Agenda Item: 7B

STATE OF NEW JERSEY

Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CUSTOMER ASSISTANCE

PETER TRIESTMAN,	)	ORDER ADOPTING
Petitioner,	)	INITIAL DECISION ON REMAND FROM
	)	THE SUPERIOR COURT, APPELLATE
v.	)	DIVISION, FOR ADDITIONAL
	)	PROCEEDINGS
PUBLIC SERVICE ELECTRIC AND GAS	)	
COMPANY,	)	OAL DOCKET NO. PUC 03572-15
Respondent.	)	BPU DOCKET NO. EC12030239U

Parties of Record:

Kevin Crawford Orr, Esq., Law Offices of Kevin Crawford Orr, for Petitioner
Alexander C. Stern, Esq., Public Service Electric and Gas Company

BY THE BOARD[1]:

I. INTRODUCTION

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

A hearing was held on July 27, 2012, before Administrative Law Judge ("ALJ") Kimberly A. Moss. After reviewing the record, the Board adopted the Initial Decision, in part, and remanded, in part. The remanded matter was transmitted to the OAL and filed on March 5, 2013, and a telephone conference was held on March 26, 2013. ALJ Moss conducted hearings on June 24, 2013 and September 10, 2013 on the remanded issues. On October 7, 2013, the ALJ issued her initial decision, dismissing the petition. Peter Triestman v. Pub. Serv. & Gas Co., OAL PUC 03126-13, initial decision at 13, (Oct. 7, 2013) ("October 7, 2013 Initial Decision")

[1] Commissioner Upendra J. Chivukula recused himself due to a potential conflict of interest and as such took no part in the discussion or deliberation of this matter.

By Order dated December 18, 2013 ("December 18, 2013 Order"), which is incorporated by reference herein, the Board adopted the Initial Decision rendered on October 7, 2013 and dismissed the petition. On or about January 29, 2014, Triestman filed a Notice of Appeal from the December 2013 Order. Following briefing and oral argument, the Appellate Division, by a decision dated March 13, 2015, remanded the case to the Board and instructed the Board to transmit the matter to the OAL so that Triestman "may have a full and fair opportunity to offer evidence" on the nature of his tenancy. Peter Triestman v. Pub. Serv. Electric & Gas Co., No. A-2404-13 (App. Div. Mar. 13, 2015) (slip op. at 9). The Appellate Division also directed that the proceedings be completed within forty-five days. Ibid.

Having now received the April 27, 2015 Initial Decision ("2015 Initial Decision") based on the Appellate Division's remand directive, and having reviewed the entire record, and for the reasons more fully set forth below, the Board **ADOPTS** the 2015 Initial Decision and **HEREBY DISMISSES** the Petition.

II. BACKGROUND AND PROCEDURAL HISTORY

1. Petition

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

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

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

2. Answer

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

According to PSE&G, it conducted a field investigation on February 4, 2011, which revealed the Petitioner was utilizing a 4,000-square foot open loft area for both commercial and residential

purposes. (Answer ¶ 7). PSE&G claimed that it investigated whether it could classify the Petitioner's account as "residential" and whether it would benefit the Petitioner to do so. (Answer ¶ 8).

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

3. July 27, 2012 Hearing

At the first evidentiary hearing[2] on July 27, 2012, the Petitioner testified about the alleged diversion of his gas and electric service, the improper classification of his apartment, and PSE&G's subsequent errors in revised bills.

Mr. Sequeira, a field service technician for PSE&G, testified that Petitioner's electric meter stopped after he shut off all breakers. (1T69-10 to -14). But, in his report dated December 8, 2011, Mr. Sequeira acknowledged that one of the Petitioner's breakers was wired to the lights in the stairwells on all four floors of the building. (Exhibit P-3 to Initial Decision). It was also made clear at the hearing that if a diversion is discovered in a commercial building, it is left to the tenants and landlord to resolve the dispute, as opposed to a residential building, where PSE&G revises the bills and bills the landlord for diverted service. (1T82-13 to -14; 1T86-14 to -19). According to Mr. Edward Sullivan, a PSE&G employee of forty-six years, tenants do sometimes pay for common areas and that PSE&G does not concern itself with the lease agreements between landlords and their tenants. (1T49-2 to -9). But, during cross examination, Mr. Sullivan stated PSE&G should have followed up when it realized the Petitioner's breaker was connected to the lights in the stairwell. (1T57-22 to -23).

To support his allegation of diversion of gas service, Petitioner stated that PSE&G continued to bill him for gas usage even after he had shut off his gas appliances, including his heating system. (1T 21-T32). Further, he testified that the pipes in his apartment froze while the pipes on the third floor remained running. (1T17-14 to 17; 1T18-8 to 9). In response to this allegation, Mr. Sequeira pointed to the December 2011 test, the result of which was that Petitioner's gas meter spun when he turned on the heat and stopped when he shut it off. (1T 69-18 to 20). He concluded there was no diversion of gas service. (1T 69-23 to 24).

To support the improper classification of his apartment as commercial, Petitioner testified that his family lived in the space and does not operate a business there. (1T8-19 to 22; 1T9-1T 10). Mr. Sequeira testified that he visited Petitioner's apartment in February 2011 to determine whether it was commercial or residential, but Petitioner refused to let him enter the apartment. (1T65-4 to 8). Mr. Sequeira concluded, however, that Petitioner operated a show business because he could see stage designs in the apartment and the building owner told him the Petitioner had a show business. (1T74-1T 75). Despite these findings, PSE&G changed Petitioner's commercial gas meter to a residential meter in February 2011, and changed the commercial electric meter to a residential meter in December 2011. (1T76-3 to 7; 1T77-12 to 21). According to Mr. Sullivan, Petitioner actually benefited from the commercial rate. (1T50-16 to 23).

[2] The hearing transcripts have been designated: 1T (July 27, 2012); 2T (June 24, 2013); 3T (September 10, 2013); 4T (April 21, 2015).

4. August 20, 2012 Initial Decision

In her first Initial Decision, ALJ Moss found that Petitioner's meter was wired to the lights of the stairwell of all four floors and Petitioner never agreed to pay for lights outside of his premises. Peter Triestman v. Pub. Serv. Electric & Gas Co., OAL PUC 5419-12, initial decision at 5, (Aug. 20, 2012). Therefore, the ALJ concluded Petitioner experienced a diversion of electric service. Id. at 8. Unlike ALJ Moss's decision regarding electric service, however, the Initial Decision did not make any findings of fact or conclusions to resolve the dispute about diverted gas service.

The ALJ also concluded that Petitioner was incorrectly billed for gas usage at a commercial rate from July 2009 until February 2011 and incorrectly billed for electric usage at a commercial rate from July 2009 until December 2011. Ibid.

The Initial Decision ordered PSE&G to:

> 1. Determine the amount attributable to Petitioner's diversion of service and to contact the Petitioner's landlord to correct the diversion;
>
> 2. Re-bill the Petitioner for gas usage from July 2009 to February 2011 at the residential rate in effect during those months; and
>
> 3. Re-bill the Petitioner for electric usage from July 2009 to December 2011 at the residential rate in effect during those months.
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> [Id. at 8-9.]

5. Compliance Letter

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

6. December 19, 2012 Board Order

On December 19, 2012, the Board adopted the ALJ's decision in part, and remanded in part, following a review of the record and the exceptions and reply to exceptions filed. Specifically, the Board found that the Initial Decision's conclusions about Petitioner's diversion of service regarding the hallway lights, his right to a revised electric bill, and his request for residential rates were reasonable and fully supported by the record. Peter Triestman v. Pub. Serv. Electric & Gas Co., BPU EC12030239U, final decision at 9, (Dec. 19, 2012).

The Board remanded the matter, directing the OAL to determine:

> 1. if compliance with requirements as set forth in N.J.A.C. 14:3-7.8 regarding the diversion of gas service was satisfied;
>
> 2. provide findings of fact and conclusions of law on whether there is further diversion of electric service based on Petitioner's allegations that there are other electrical appliances in use that supply service outside of his unit which he is paying for and based on his allegation that PSE&G did not properly investigate the diversion of electric service; and
>
> 3. provide findings of fact to support the conclusion that there was a diversion of gas service.
>
> [Id. at 9]

7. Hearing on Board Remand

In response to the Board's remanded issues, ALJ Moss held an evidentiary hearing on June 24, 2013 and on September 10, 2013. Mr. Sullivan testified that he oversaw Mr. Sequeira's investigation of Petitioner's complaint. (2T76-3 to -12). He also explained the steps that were taken while testing for a diversion in Petitioner's unit and the steps that were taken after the Board issued its December 19, 2012 Order, particularly the several attempts to contact the landlord, Mr. Jose Gomes. (2T77-17 to 78-23). Mr. Sullivan testified that he still does not believe a diversion of service existed. (2T79-23). Further, when asked if PSE&G was dealing with a residential or commercial premise in the present matter, Mr. Sullivan testified it was not residential because the landlord described the building as a commercial building and because the landlord indicated that Petitioner did not have a lease with the landlord. (2T90-11 to -15, 2T131-5 to -12). Also, Mr. Sullivan stated that even if the unit was considered residential, there can be no diversion under the law because Petitioner would be the primary beneficiary of any alleged diversion. (2T93-21 to 2T94-3). Mr. Sullivan explained that Petitioner is not a "tenant-customer" under N.J.A.C. 14:3-7.8 because Petitioner does not rent a dwelling unit in a multi-family building or owns it as a condominium. (2T108-18 to -23).

The ALJ continued her evidentiary hearing on September 10, 2013. PSE&G presented Mr. Gomes who testified that he is the principal of Tall Oak Builders, Inc. ("Tall Oaks"), which owns 115 Monroe Street, Newark, Essex County, New Jersey, where Petitioner occupies the fourth floor of that building.[3] (3T6-23 to 3T7-10). Mr. Gomes further stated that when Petitioner was looking to rent the 5,000 square-foot area, a lease was never signed, that he and Petitioner discussed the area's use as commercial, and that the fourth floor did not have a kitchen before Petitioner occupied it. (3T7-13 to 3T8-5). Mr. Gomes testified that he and Petitioner agreed that Petitioner is responsible for utilities. (3T8-6 to -11).

[3] On June 24, 2013, Petitioner testified that there are two separate entrances to the building in question. One is labeled 115 Monroe Street, which is Petitioner's entrance and to all floors except the first floor. There is an entrance labeled 113 Monroe Street, which is only for the first floor. (2T46-17 to -21). However, "115 Monroe Street" will be used to reference the entire building in question.

When asked about the diversion of service regarding the hallway lights, Mr. Gomes stated that Petitioner was the only tenant presently in the building and, so, would be the primary beneficiary of the hallway light bulbs. (3T10-5 to -14). Additionally, Mr. Gomes was not aware of any diversion of service at 115 Monroe Street. (3T9-18 to -23).

Mr. Gomes described the occupied space at 115 Monroe Street. Specifically, he stated that a councilman occupies the 500 square foot space on the first floor, the second floor is used for cell phone company equipment storage, the third floor is vacant, Petitioner occupies the fourth floor, and three cell phone companies (Nextel, Verizon, and Metro PCS) pay for cell tower space on the roof. (3T13-3 to 3T15-9).

PSE&G then called Mr. Sequeira to testify about his February 2011 investigation of Petitioner's complaint. Specifically, he stated that the electrical diversion check consisted only of a breaker and meter test, and the gas diversion check consisted of a heater and meter test. (3T38-8 to 3T40-2). Further, Mr. Sequeira testified that he did not find any diversion at all, for electric or gas, and he continued to believe there was no diversion of electric or gas, because when he shut off both the electric and gas meters, the meters stopped running. (3T46-23 to 3T41-2). Mr. Sequeira also testified that PSE&G does not perform diversion of service investigations on commercial premises. (3T43-24 to 3T44-4). But he admitted to doing a diversion investigation at Petitioner's unit because there was an obligation once PSE&G changed Petitioner's meters to residential. (3T44-10 to -16).

Mr. Sequeira testified that he was not able to fully conduct an investigation of Petitioner's premises to determine whether it was residential or commercial. (3T47-13 to -19). Specifically, he explained that Petitioner would not let him in; so, he was only able to peek through the door. (3T47-19 to -24). He noticed open float lamps and stage sets, an area that could have been a kitchen, a ceiling heater, a commercial heater, and a water heater in the basement for Petitioner's unit. (3T48-2 to 3T50-13).

Mr. Sequeira testified that he had the bookkeeping department change Petitioner's rate to residential because Petitioner showed him racks of clothes by the front door and told him he was living there so he took his word for it that it was residential. (3T51-10 to 13). Mr. Sequeira also acknowledged his report, recorded on February 1, 2011, where he observed a range, gas range, refrigerator, microwave oven, dishwasher, central hearing and water heating electric. (3T 51-15 to 21). Mr. Sequeira also admitted that after the Board issued its December 19, 2012 Board Order, no additional investigations took place. (3T55-23 to -25).

8. October 7, 2013 Initial Decision

On October 7, 2013, ALJ Moss issued an Initial Decision. See October 7, 2013 Initial Decision, supra. The ALJ found that Mr. Gomes rented the fourth floor unit at 113-115 Monroe Street to Petitioner as a commercial unit and that all the other tenants in the same building are commercial tenants. Id. at 8. Specifically, the ALJ found that three cellphone companies shared a room on the second floor for their equipment, and had antennas on the roof and that the third floor had been vacant for several years. Ibid. The ALJ also found that Petitioner did not rent a dwelling unit in a multi-family building, nor did he own a condominium at 115 Monroe Street. Ibid.

The ALJ further found that Petitioner first contacted PSE&G in May 2009, requesting to be billed at a residential rate and alleging there was a diversion of service. Ibid. On February 1, 2011,

Mr. Sequeira requested PSE&G change Petitioner's account to residential. Ibid. The ALJ determined that the diversion of service investigation took place on December 8, 2011, more than two months after Petitioner's request, but during that investigation, Petitioner allowed Mr. Sequeira only limited access to the unit. Finally, ALJ Moss found that PSE&G does not conduct diversion-of-service investigations on commercial premises. Id. at 8-9).

ALJ Moss concluded that Petitioner was not a "tenant-customer" in accordance with N.J.A.C. 14:3-7.8(a), which is the diversion-of-service rule. Because a "tenant-customer" is a "residential customer of record at the time of the complaint who rents a dwelling unit in a multi-family building or owns a condominium" and the facts show that Petitioner did not rent in a multi-family building, the ALJ determined Petitioner was not eligible for a diversion-of-service investigation pursuant to N.J.A.C. 14:3-7.8(a). (October 7, 2013 Initial Decision, at 10). Additionally, the ALJ concluded that PSE&G did not conduct the diversion investigation in accordance with N.J.A.C. 14:3-7.8(d) because the investigation was not done within two months of the Petitioner's complaint. The ALJ determined, however, that Petitioner failed to show by a preponderance of the evidence, via his own diversion investigation, that there was any type diversion beyond the hallway light bulbs. (October 7, 2013 Initial Decision, at 12). Accordingly, the ALJ dismissed the Petition because Petitioner was not a "tenant-customer" within N.J.A.C. 14:3-7.8(a). No exceptions were filed following the October 7, 2013 Initial Decision.

9. The Basis for the Board's December 2013 Order

(a). Standard of review

The Board noted that N.J.A.C. 1:1-18.6(c) and N.J.S.A. 52:14B-10 both provide that an agency may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are "arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record." Peter Triestman v. Pub. Serv. Electric & Gas Co., BPU EC12030239U, final decision at 7, (Dec. 18, 2013) (hereinafter, "December 18, 2013 Order")..

(b). Credibility

The Board found that the ALJ had made several credibility determinations that were pertinent to her factual and legal conclusions, and the ALJ had the opportunity to observe the demeanor of Petitioner and found the Petitioner not to be credible. Ibid. (citing October 7, 2013 Initial Decision, at 7-8). The ALJ indicated that Petitioner kept interrupting the other witnesses and did not provide a foundation as to why the steps he took in his diversion investigation would prove more reliable than one conducted by PSE&G. Ibid. The Board found that the record supported the ALJ's reasoning, as Petitioner interrupted witnesses several times during the September 10, 2013 hearing, did not provide any foundation for his alleged diversion did not give Mr. Sequeira full access to his unit during the diversion investigation, and did not sign a lease to the premises. Ibid. (citing 3T48-24 to 3T49-9; 3T59-9 to -11; 3T72-24 to 3T73-4; October 7, 2013 Initial Decision, at 7-8). Therefore, upon review of the record, the Board found that the ALJ's determination regarding the credibility of Petitioner was not arbitrary, capricious, or unreasonable. Ibid.

The Board noted that the ALJ also had the opportunity to observe the demeanor of Messrs. Sullivan, Gomes, and Sequeira and found all three of them credible. (October 7, 2013 Initial Decision, at 7). Specifically, the ALJ indicated that Mr. Sullivan outlined the steps PSE&G took in the diversion investigation and the steps PSE&G took after the Board's December 19 Order

was issued. Additionally, the ALJ indicated that Mr. Gomes explained the rental agreement and the composition of the building where Petitioner rents, and that Mr. Sequeira admitted that he requested PSE&G change Petitioner's billing from commercial to residential, partly because Petitioner simply stated he was a residential tenant. Ibid. The Board thus found the ALJ's reasoning fully supported by the record. (December 2013 Order, at 7).

Mr. Sullivan described the field service reports submitted by Mr. Sequeira and how his tests of the electric breakers and gas meters demonstrated no diversion of service and also described PSE&G's attempts to contact Mr. Gomes. Id. at 8 (citing 2T 77-17 to 2T 78-22 to 23). Further, Mr. Sullivan was a PSE&G employee of 46 years and was well aware of the requirement that one must rent in a multi-family dwelling or own his or her unit as a condominium to be considered a "tenant-customer" under N.J.A.C. 14:3-7.8. (December 2013 Order, at 8) (citing 2T 73-13; 2T 108-18 to 23; October 7, 2013 Initial Decision, at 4).

Mr. Gomes testified that a councilman occupied the 500 square foot space on the first floor, the second floor was used for cell phone company equipment storage, the third floor was vacant, Petitioner occupied the fourth floor, and three cell phone companies - Nextel, Verizon, and Metro PCS - paid for cell tower space on the roof. (3T 13-3 to 3T15-9). Finally, the Board found that the ALJ's determination regarding Mr. Sequeira was supported by the record because Mr. Sequeira admitted that he had requested a change in Petitioner's billing, based on Petitioner's statement that he had a residential unit. (December 2013 Order, at 8) (citing 3T 51-10 to 13). Therefore, the Board found that the ALJ's determination regarding the credibility of Messrs. Sullivan, Gomes, and Sequeira was supported by sufficient, competent, and credible evidence in the record. (December 2013 Order, at 8).

(c). Petitioner's status as a "tenant-customer"

Based on the credible testimony, the ALJ determined that Petitioner was not a "tenant-customer" under N.J.A.C. 14:3-7.8(a), thereby not entitling him to a diversion of service investigation. (October 7, 2013 Initial Decision, at 10). The Board agreed with the ALJ, noting that the ALJ's finding of fact was supported by substantial evidence in the record, and that Petitioner was not a "tenant-customer" under N.J.A.C. 14:3-7.8(a) as a matter of law. (December 2013 Order, at 8).

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

> (d) Each utility shall investigate alleged diversions as follows:
>
> 1. When a tenant-customer alleges in good faith that the level of consumption reflected in his or her utility bill is unexplainably high, the tenant-customer may request the utility supplying gas, electricity, water and/or wastewater service to conduct a diversion investigation at no cost to the customer;
>
> 2. Such request shall be made in writing by the tenant-customer by completing and returning to the utility a diversion investigation application provided by the utility...;

> 4. The utility shall investigate the alleged diversion within two months of the receipt of the investigation request. Each diversion investigation shall include a meter test conducted in accordance with N.J.A.C. 14:3-4.4;
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> 5. The utility shall have the right of reasonable access pursuant to N.J.A.C. 14:3-3.6. For purposes of utility access, the alleged diversion is presumed to constitute a hazardous condition until the utility investigates;
>
> 6. If, as a result of such investigation, the utility determines that the service from the pipes and/or wires serving the tenant-customer has been diverted, the utility shall notify the landlord or his or her agent and instruct him or her to correct the diversion within 30 days through rewiring or repiping. However, this provision shall in no way prohibit a utility from disconnecting service if the utility determines that an unsafe condition exists.

The Board pointed out that the rulemaking history of N.J.A.C. 14:3-7.8 also shows the rule's applicability to "tenant-customers" only. N.J.A.C. 14:3-7.8 diversion of service, formally known as N.J.A.C. 14:3-7.16, began as a proposal in May 1983. See 15 N.J.R. 787. In its proposal, the definition of "tenant-customer" as found in N.J.A.C.14:3-7.6 was defined as "a residential customer of record whose meter is located off his or her rented own premises." 15 N.J.R. 788. Before its adoption in November of 1983, the Board considered several comments on the proposal and stated in its summary of comments that "commercial tenants are not covered by the rule." 15 N.J.R. 1950. Thereafter, the Board amended the definition of "tenant-customer" to mean a "residential customer of record at the time of the complaint who rents a dwelling unit in a multi-family building or owns a condominium." 15 N.J.R. 1952. Because the Board amended the definition of "tenant-customer," the Board's intent was to clear any ambiguity in the applicability of N.J.A.C. 14:3-7.8, by specifically stating that "commercial tenants are not covered by the rule." 15 N.J.R. 1952. (December 18, 2013 Order, at 9).

Given the diversion of service rule's strict applicability to "tenant-customers," the substantial evidence in the record supporting the ALJ's credibility determinations and legal and factual conclusions that Petitioner was not a "tenant-customer," the Board found that N.J.A.C. 14:3-7.8 did not apply to Petitioner because he was not a "tenant-customer" as defined under N.J.A.C. 14:3-7.8. Accordingly, the Board found that PSE&G should bill Petitioner at a commercial rate going forward because the record fully supported that Petitioner was a commercial tenant. (December 2013 Order, at 9).

(d). Diversion of Service

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

was not a tenant-customer in accordance with N.J.A.C. 14:3-7.8(a). (October 7, 2013 Initial Decision, at 12).

(e). Modifying the December 19, 2012 Board Order

In its December 19, 2012 Order, the Board found that Petitioner experienced a diversion of electric service stemming from the eight hallway lights in the stairwell of the building. Peter Triestman v. Pub. Serv. Electric & Gas Co., BPU EC12030239U, final decision at 8, (Dec. 19, 2012). As a result, the Board ordered PSE&G to credit Petitioner for the diversion. Ibid. Additionally, the Board ordered PSE&G to retroactively apply residential rates to Petitioner's bills. Id. at 9.

Given the newly presented evidence and for the reasons noted earlier, the Board modified its earlier ruling that Petitioner should be billed at a residential rate. Also, the Board modified its earlier ruling that there was a diversion of electric service in Petitioner's unit. In addition, because the Board found that Petitioner was a commercial tenant, the Board ordered PSE&G to bill Petitioner on the commercial tariff going forward. The Board also declined to disturb any credits given to Petitioner resulting from the December 19, 2012 Board Order finding a diversion. (December 18, 2013 Order, at 10).

Accordingly, after careful review and consideration of the entire record, the Board found that the factual determinations and legal conclusions of ALJ Moss in the October 7, 2013 Initial Decision were reasonable and based upon sufficient, competent, and credible evidence. Thus, the Board adopted the Initial Decision and dismissed the Petition. The Board further ordered PSE&G to bill Petitioner on the commercial tariff going forward. (December 18, 2013 Order, at 11).

III. REMAND OF THE APPELLATE DIVISION FOR ADDITIONAL PROCEEDINGS

1. Procedure on Remand

On March 13, 2015, the Appellate Division remanded this matter to the Board, because "Triestman appears not to have been given a full and fair opportunity to offer evidence on the commercial/residential question." Peter Triestman v. Pub. Serv. Electric & Gas Co., No. A-2404-13 (App. Div. Mar. 13, 2015) (slip op. at 9).. Additionally, the Appellate Division directed that the Board transmit the matter to the OAL and allow Triestman to present additional evidence and arguments on whether the tenancy was residential or commercial, and that the proceedings be completed within forty-five days. Ibid. On March 16, 2015, the Board transmitted the matter back to the OAL with the Appellate Division's remand order attached. On March 24, 2015, ALJ Moss issued a Notice of Hearing scheduling a prehearing conference for April 6, 2015, and an evidentiary hearing for April 29, 2015. On March 24, 2015, ALJ Moss issued a revised Notice of Hearing rescheduling the evidentiary hearing for April 21, 2015. Accordingly, by letter dated April 1, 2015, the Office of the Attorney General advised the Appellate Division of the status of the OAL proceedings, noting that the Board typically convenes at regularly monthly agenda meetings, and that May 20, 2015 would be the next regularly scheduled agenda meeting following the OAL-scheduled evidentiary hearing[4].

[4] The Board subsequently changed the agenda meeting date to May 19, 2015.

2. Evidentiary Hearing and the ALJ's Findings and Recommendations on Remand

In her March 24, 2015 Initial Decision, ALJ Moss noted that the Appellate Division had remanded the case so that Petitioner "may offer any additional evidence and argument he may wish to assert about whether the tenancy was residential or commercial." Peter Triestman v. Pub. Serv. & Gas Co., OAL PUC 03572-15, initial decision at 2, (Mar. 24, 2015) (hereinafter, "March 24, 2015 Initial Decision").. ALJ Moss conducted the remand hearing on April 21, 2015, and closed the record on that date. The only witness to testify at this hearing was Triestman. Also, ALJ Moss accepted in evidence various documents, as indicated in the list of exhibits attached to the March 24, 2015 Initial Decision.

Triestman had a verbal agreement with Tall Oaks for a month-to-month tenancy, for the premises located at 113-115 Monroe Street, 4th floor, City of Newark, County of Essex, and State of New Jersey from December 18, 2007, to January 2015. (4T11-5 to 4T19-24; 4T47-17 to 4T48-6). To support his position for residential tenancy, Triestman testified that on November 22, 2007, he wrote a check for $8,000 to Tall Oaks, memorializing it as a residential lease deposit for the fourth floor unit of 115 Monroe Street. (4T11-7 to 24; P-11). Also, Triestman continuously resided at 115 Monroe Street between December 18, 2007 and May 12, 2012, when he filed his diversion complaint in this case. (4T11-5 to 4T19-24). But a signed, written lease agreement never existed at that time. (4T18-2 to -17).

In addition, Triestman recalled a meeting between the parties in 2009 "to discuss rent arrearages, money withheld because of repairs and increased electric cost to remediate habitability issues and also to possibly give us a lease, a residential written lease." (4T30-8 to -12; P-23). According to Triestman, "[i]t was always residential and Mr. Gomes [k]new that from the beginning." (4T30-16 to -17). Triestman testified that the premises located at 113-115 Monroe Street, 4th floor, City of Newark, County of Essex, and State of New Jersey was listed as his residential address for various matters, including an adoption, his New Jersey driver's license, and filing of income tax. (4T32-8 to 4T40-14). According to Triestman, a PSE&G February 2011 field investigation conducted by Mr. Sequeira noted the premises as residential. (4T40-15 to 4T44-16).

Triestman also testified that although the form lease received in November 2007 originally indicated that the premises would be used for the purpose of "warehouse/office," he crossed that out and wrote down "residential." (4T 14-11 to 17). That lease indicates a term from December 1, 2007 to November 30, 2012. (P-13). Later, Triestman received a revised lease indicating "Warehouse/Residential" with a term of December 1, 2007 to December 31, 2008, and he claimed to have marked up the lease with provisions that were not acceptable before visiting Mr. Gomes to tender his $8,000 rental deposit. (P-14; 4T 16-23 to 4T 17-12). But the unsigned revised lease states that "Tenant must obtain a Certificate of Occupancy before residing in the said space and is responsible for obtaining such at tenant's cost, if required by City of Newark." (P-14 at 2).

ALJ Moss found that Triestman was provided with two leases by Tall Oaks: the first on November 14, 2007, which stated that the premises would be used for the purpose of warehouse/office; and the second on November 20, 2007, stating that the premises would be used for warehouse/residential purposes.; Triestman signed neither lease. (March 24, 2015 Initial Decision at 5). Also, Tall Oaks accepted a deposit check in the amount of $8,000, indicating "Residential lease deposit." Ibid. ALJ Moss also found that Triestman and his wife notified the New Jersey Department of Motor Vehicles, the Social Security Administration, and

the State of New Jersey of the change of address; Triestman's 2009-2012 income tax return 1040 forms indicated 113 Monroe Street, Newark, New Jersey as his address; Triestman and his wife were in the process of adopting a child in 2007; and the adoption home interviews were done at 115 Monroe Street. Ibid.

For various unresolved landlord-tenant issues, Tall Oaks filed a complaint against Triestman in Landlord/Tenant Court, Docket Number ESX-LT-18296-13, which was withdrawn without prejudice around June 28, 2013. Tall Oaks also sued Triestman in the Superior Court, Law Division, Essex County, Docket Number ESX-L-6736-13 ("Law Division Case"), alleging, among other things, that Triestman owed over $150,000 in rent. (4T65-22 to 25).

ALJ Moss noted Triestman's deposition transcript in the Law Division Case (R-7), page 207, where he testified that he later found out that the premises were commercial and not zoned for residential use, and he did not realize he did not have the right to rent the premises residentially. (March 24, 2015 Initial Decision at 4; R-7, at 207-20 to 25). According to Triestman, if the building was zoned commercially, then Tall Oaks was responsible for obtaining any waiver before renting the premises to him, and "he [Mr. Gomes] didn't even have the right to rent it, but he did." (R-7, at 207-20 to 208-9). Triestman testified: "I didn't realize he didn't have the right to rent it residentially." (R-7, at 218-9 to 10).

ALJ Moss noted that on page 218 of Triestman's deposition transcript, he admitted that when he rented the premises, he knew that there was no shower, water heater, or kitchen cabinets. (March 24, 2015 Initial Decision at 5-6). Triestman also admitted in deposition testimony for the Law Division Case, Tall Oaks had disputed his claim that the rental was residential, and the settlement agreement with Tall Oaks required him to seek residential occupancy status from the City of Newark. (4T 65-6 to 4T 70-25).

Also, ALJ Moss found that in Mr. Gomes' deposition Mr. Gomes testified that he had rented the space as a commercial space only, but Triestman changed it to a residential unit. (March 24, 2015 Initial Decision, at 6). ALJ Moss found that Mr. Gomes, in his certification dated June 5, 2013, stated that he rented the premises to Triestman for the operation of Triestman's business. Ibid. See also (P-38, at 133-13 to 144-20) (showing that Mr. Gomes testified, during his October 21, 2014 deposition in the Law Division Case, that the lease was commercial, because the space rented to Triestman was not suitable for residential purposes).

During his deposition testimony in the Law Division Case, Triestman testified that he never applied for a permit for the various works done in the building, and admitted that he is effectively living in an illegal apartment. (R-7, at 177-16 to 213-4). Also, he was not even concerned that he might overtax the drainage system in the building by various plumbing modifications because "[t]he building's empty." (R-7, at 208-13 to 209-1).

Also in the Law Division Case, Mr. Gomes testified that the rental space was an empty building. (P-38, 144-17 to 20). Because it was a commercial a warehouse, Petitioner was required to obtain a Certificate of Occupancy from the City of Newark before converting it into residential space. (P-38, 253-10 to 255-4). Although Gomes could not recall the year, he admitted that he had once visited the premises and discovered that Triestman was using the premises as a residential unit. (P-38, 197-18 to 198-18). ALJ Moss noted that during the July 27, 2012 evidentiary hearing, Triestman testified: "There is no lease. He would like it to be commercial and anyway he rented it to me." (March 24, 2015 Initial Decision at 6; 1T 75-25 to 1T 76-2). But there was no testimony regarding any other tenants at 115 Monroe Street. (March 24, 2015 Initial Decision at 6).

The Law Division Case settled and resulted in a signed written lease, for the first time, between Tall Oaks and Petitioner in April 2015, and includes a requirement that Triestman to apply to the City of Newark for permission to lawfully use the rental space for residential purposes. If Petitioner's cost to obtain a residential certificate for occupancy exceeds $500, then Triestman may vacate the premises or use the premises for exclusively commercial purposes. (March 24, 2015 Initial Decision at 3-5; 4T48-22 to 4T53-20). Petitioner testified during the April 21, 2015 evidentiary hearing that he still had not applied for the certificate of occupancy for residential use because Mr. Gomes "didn't actually sign [the lease] until a few days ago." (4T 70-24 to 25).

According to Triestman, the most compelling proof of his residential tenancy during the relevant period is Mr. Gomes's admission that he had visited the premises and observed that Triestman was using it as a residential unit. (4T 80-6 to 14; P-38, at 197-24 to 198-18). Triestman also argued that although there was no written lease signed by the parties when he filed his complaint for diversion of service, the unsigned revised lease indicates the intended uses as warehouse and residential. (4T 82-1 to 12).

PSE&G argued that the evidentiary record shows that this case is a landlord/tenant dispute involving a commercial building that Petitioner has desired to convert into residential space; the only beneficiary of the eight hallway light bulbs was Petitioner, as he is the only tenant using them; Petitioner did not pay his utility bill for several years; there was no diversion of service; and the Board regulations at N.J.A.C. 14:3-7.8 require in cases of diversion that the beneficiary of the service pay for the service. (4T94-11 to 4T96-15).

ALJ Moss, in her legal analysis and conclusions, considered Petitioner's arguments for claiming to be a residential tenant for the relevant period. ALJ Moss rejected Petitioner's claim that he was a residential tenant within the meaning of the diversion of service regulation and the statutes regarding action to correct substandard housing conditions. (March 24, 2015 Initial Decision at 6-9). Consistent with her October 17, 2013 Initial Decision, based on her review of the evidentiary record, ALJ Moss concluded that Petitioner was not a tenant-customer in accordance with N.J.A.C. 14:3-7.8(a), and Petitioner was not eligible for a diversion-of-service investigation. (March 24, 2015 Initial Decision at 9). Based on the record and the applicable law, ALJ Moss ordered and recommended that Triestman's petition be dismissed. Ibid.

3. Exceptions

Pursuant to N.J.A.C. 1:1-18.4, any party may file written exceptions with the Board within thirteen days from the date that the initial decision was mailed. A copy of the filed exceptions shall also be served on all other parties and the judge. N.J.A.C. 1:1-18.4(a).

> (b) Exceptions must:
>
> > 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.

> (c) Evidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions.
> [N.J.A.C. 1:1-18.4(b)-(c).]

Triestman timely filed factual exceptions to the ALJ's findings regarding (i) residential tenancy and (ii) mixed use building. (Exceptions, at 4-6). Triestman took legal exceptions to the ALJ's application and construction of N.J.A.C. 14:3-7.8. (Exceptions, at 6-9). Lastly, he contended that the ALJ failed to address the original reasons for the Board's first remand. (Exceptions, at 10).

With his exceptions, Triestman attached the Appellate Division March 13, 2015 Remand Order; a copy of Triestman's reply brief in the appellate proceeding, which he states he provided to the ALJ in advance of the hearing; and his initial brief and appendix from the appellate proceeding. (Exceptions, at 2). Neither Triestman's initial appellate brief and appendix, nor his appellate reply brief and appendix, are listed as new exhibits moved into evidence in the March 24, 2015 Initial Decision. See (March 24, 2015 Initial Decision, at 11-12).

Specifically, Triestman asserted that he presented unrebutted evidence showing that the nature of his tenancy was residential. (Exceptions, at 4-5). He also argued that his tenancy was tacitly accepted by the landlord as a month-to-month. Id. at 5. Triestman also argues that ALJ Moss should have found that the premises was mixed use. Id. at 6. Triestman took exception with ALJ Moss's legal interpretation of N.J.A.C. 14:3-7.8. Triestman argued N.J.A.C. 14:3-7.8 must be applied to all residential customers, in light of the habitation statutes contained in N.J.S.A. 2A:42-85 et seq. (Exceptions, at 6-7).

On May 13, 2015, PSE&G submitted replies to the exceptions asserting that Petitioner's exceptions fail to satisfy the regulatory requirements and merely express displeasure with ALJ Moss's factual findings and conclusions of law. (Reply to Exceptions, at 6). PSE&G argued sufficient credible evidence was presented demonstrating that the 115 Monroe Street is a commercial building and not residential or "mixed-use." Ibid. PSE&G urged the Board to adopt the Initial decision. Id. at 8.

4. The Board Adopts the ALJ's Initial Decision Dismissing the Petition

Consistent with the Appellate Division's directives on remand, Triestman no doubt was granted a full and fair opportunity to offer evidence on the nature of his tenancy. Based on its review of the evidentiary record, as supplemented by the April 21, 2015 hearing, the Board **FINDS** that Triestman has failed to show that, for the relevant period, (i) he was a tenant-customer, as defined under N.J.A.C. 14:3-7.8; (i) any other tenant occupied the rental premises; (ii) any diversion of utility service occurred; (iv) his tenancy at the premises was residential; or (v) that he ever received residential occupancy status from the City of Newark.

The Board **ALSO FINDS** Triestman's exceptions to ALJ Moss's factual findings and conclusions of law do not warrant modification or rejection of the March 24, 2015 Initial Decision. Her finding that the premise was a commercial space is supported by sufficient, credible evidence in the record. She also found that Triestman's representations regarding the residential status of the premise was contradicted by his own statements in his deposition, and the new lease. (March 24, 2015 Initial Decision at 5-6). Moreover, ALJ Moss noted that "[t]here was no testimony regarding any other tenants at 115 Monroe Street." Id. at 6.

The Board therefore agrees with the ALJ's factual findings on those issues, particularly that Petitioner was not a tenant-customer in accordance with N.J.A.C. 14:3-7.8(a) and thus was not eligible for a diversion-of-service investigation. Indeed, Petitioner has not shown any diversion of service under N.J.A.C. 14:3-7.8. See Reed v. Atl. City Elec. Co., 2014 N.J. Super. Unpub. LEXIS 1477, at *5 (App. Div. June 20, 2014) (affirming the Board's order dismissing the petition, because Petitioners had offered no competent evidence that they were still being improperly charged for electric service consumed by other tenants).

Similarly, the Board **REJECTS** Triestman's legal exceptions that N.J.A.C. 14:3-7.8, in light of N.J.S.A. 2A:42-85 et seq. must be applied to "all residential tenants" rather than tenant-customers. (Exceptions, at 6). The provisions of N.J.S.A. 2A:42-85 et seq. authorize a tenant to bring a judicial action based upon an alleged diversion of service. See N.J.S.A. 2A:42-87 to -88. The provisions are not directly related to the Board's regulations obligating a utility to provide a diversion investigation at no cost to a utility customer. Triestman conflates the relief provided under N.J.S.A. 2A:42-85 et seq. with the Board's diversion regulation. Rather, the statute "simply confers authority upon county district courts to hear a particular type of dispute." Danmark, Inc. v. South Brunswick, 184 N.J. Super. 478, 486 (Law Div. 1982).

Upon careful review and consideration of the entire record, the Board **HEREBY FINDS** that the factual determinations and legal conclusions of ALJ Moss in the April 27, 2015 Initial Decision are reasonable and based upon sufficient, competent, and credible evidence. Accordingly, the Board **HEREBY ADOPTS** the Initial Decision and **ORDERS** that the Petition **BE DISMISSED**.

This Order shall be effective on June 5, 2015.

DATED: June 2, 2015

BOARD OF PUBLIC UTILITIES
BY:

RICHARD S. MROZ
PRESIDENT

JOSEPH L. FIORDALISO
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

ATTEST:

IRENE KIM ASBURY
SECRETARY

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

PETER TRIESTMAN, Petitioner,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Respondent.

BPU DOCKET NO. EC12030239U
OAL DOCKET NO. PUC5419-12

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. PUC 03572-15
AGENCY DKT NO. GC 12030239U
(ON REMAND PUC 5419-12)

PETER TREISTMAN,

Petitioner,

v.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

Kevin Crawford Orr, Esq. for petitioner

Alexander Stern, Esq., for respondent

Record Closed: April 21, 2015 Decided: April 27, 2015

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Peter Treistman (Treistman), disputes bills by respondent, Public Service Electric and Gas (PSE&G). He alleges that there was a diversion of service. Treistman's petition was filed with the Board of Public Utilities (Board) on March 12, 2012. The matter was transmitted to the Office of Administrative Law (OAL) and filed on April 24, 2012. A prehearing conference was held on May 14, 2012. The hearing

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

1. If compliance with requirements as set forth in N.J.A.C. 14:3-7.8 regarding the diversion of gas service was satisfied.

2. Provide findings of fact and conclusions of law on whether there is further diversion of electric service based on Petitioner's allegations that there are other electrical appliances in use that supply service outside of his unit which he is paying for and based on his allegation that PSE&G did not properly investigate the diversion of electric service; and

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

The remanded matter was transmitted to the OAL and filed on March 5, 2013. The hearing was held on June 24, 2013, and September 10, 2013. I rendered an initial decision on October 7, 2013 finding that Treistman was not entitled to a diversion of service because he was not a "tenant customer in accordance with N.J.A.C. 14:3-7.8(a). The Board of Public Utilities adopted the initial decision on December 18, 2013. The matter was appealed to the Appellate Division of Superior Court by petitioner. The Appellate Division remanded the case "so that Treistman may offer any additional evidence and argument he may wish to assert about whether the tenancy was residential or commercial." The remand hearing was held on April 21, 2015. I closed the record at that time.

FACTUAL DISCUSSION AND FINDINGS

Testimony

Peter Treistman

Treistman was sent a lease by Tall Oaks Builders (Tall Oaks) on November 14, 2007. The lease stated that the premises would be used for the purpose of warehouse/office. Treistman did not sign the lease; he made revisions to the lease and sent it back to Tall Oaks. Treistman was sent a second lease on November 20, 2007, which stated that the premises would be used for the purpose of warehouse/residential. Treistman did not sign this lease. Bettina Treistman (Wife of Treistman) wrote a check dated November 11, 2007, in the amount of $8,000 in the memo portion of the check she wrote "Residential lease deposit." This check was cashed by Tall Oaks. Treistman did not sign a lease for the premises until January 2015, prior to that it was a month to month tenancy. Treistman moved into the premises at 115 Monroe Street, Newark, New Jersey on December 18, 2007.

In November 2007, Treistman and his wife were in the process of adopting a child. As part of the adoption process a home study was done. The home study report includes a description of Treistman's home at 115 Monroe Street, Newark, New Jersey. The Home Studies and Adoption Services Police Clearance Forms for Treistman and his wife list their home address as 115 Monroe Street, Newark, New Jersey. A post placement interview was done with Treistman and his wife. The Post Placement Supervisory Report states that Treistman's address is 113 Monroe Street, fourth floor, Newark, New Jersey. The interview was conducted at that address.

Treistman and his wife changed their address with New Jersey Division of Motor Vehicles, Social Security and the State of New Jersey to reflect their address as 115 Monroe Street, Newark, New Jersey. Treistman's wife changed her address with the United States Citizenship and Immigration Services to 113 Monroe Street, 4th Floor,

Newark, New Jersey. Treistman states that the premises have two entrances one at 115 Monroe Street and one at 113 Monroe Street. Treistman's 2009, 2010, 2011 and 2012 Income Tax Return 1040 form all list his address as 113 Monroe Street, Suite 3, Newark, New Jersey.

Treistman sent several letters to Jose Gomes (Gomes), who is the owner of Tall Oaks, regarding the condition of the premises. Tall Oaks in an email dated May 13, 2009 agrees to schedule a meeting with Treistman to discuss rent arrears, habitability issues and a lease. The meeting was held on June 26, 2009 where rent arrears, repairs and the nature of the tenancy were discussed.

Tall Oaks filed a complaint against Treistman in Landlord/Tenant court with docket number LT-18296-13. The matter was withdrawn without prejudice on or about June 28, 2013. Litigation was commenced in the Law Division of Superior Court between Treistman and Tall Oaks. The settlement in that matter provides for a lease between the parties. The lease includes a provision for Treistman to apply to the municipality for permission to lawfully use the apartment for residential purposes. If his cost to obtain a residential certificate for occupancy exceeds $500, he can vacate the premises or use the premises for exclusively commercial purposes.

Depositions were done for the Law Division case. In Gomes deposition on page 198, he states that he went to the premises after Treistman moved in but before May 13, 2009. At that time he saw that Treistman and his wife were using the premises as a residence. Gomes also states in the deposition on page 254, that he rented the space as a commercial space, never a residential unit. Treistman changed it to a residential unit. Treistman testified that there was no dispute between himself and Tall Oaks as to whether the property was residential or commercial. In Treistman's deposition in the Law Division case on page 207 he states that he found out the premises were commercial and not zoned for residential use. He later states that he did not realize he did not have the right to rent the premises residentially.

In the hearing conducted on July 27, 2012, Treistman cross-examined Edward Sullivan who stated that the owner of the premises told him that it was always a commercial lease. Triestman then stated "There is no lease. He would like it to be commercial and anyway he rented it to me." (Page 75-76 of the transcript),

Having reviewed the testimony and evidence, I make the following **FINDINGS** of **FACTS**.

Treistman was provided with two leases by Tall Oaks one on November 14, 2007 which stated that the premises would be used for the purpose of warehouse/office and one on November 20, 2007 stating that the premises would be used for warehouse/residential purposes both of which Treistman did not sign. Gomes is the owner of Tall Oaks. Bettina Treistman paid Tall Oaks by check in the amount of $8,000 in the memo portion of the check she wrote "Residential lease deposit." Tall Oaks cashed the check. Treistman moved in to the premise at 115 Monroe Street, Newark, New Jersey on December 18, 2007. He and his wife notified New Jersey Department of Motor Vehicles, Social Security and the State of New Jersey of the change of address. Treistman's 2009-2012 Income Tax Return 1040 forms list 113 Monroe Street, Newark, New Jersey as his address. Treistman and his wife were in the process of adopting a child in 2007. The adoption home interviews were done at 115 Monroe Street.

A Landlord/Tenant action with Docket Number LT-18296-13 was instituted by Tall Oaks against Treistman. That matter was withdrawn after Treistman's lawyer sent Tall Oaks a letter alleging that Tall Oaks did not obtain a Certificate of Registration for the premises.

Treistman testified that there was no dispute between himself and Tall Oaks as to whether the premise was commercial or residential which is contradicted in several instances. Litigation was filed in the Law Division on a case between Treistman and Tall Oaks. In the deposition in the Law Division case, Treistman stated that he later found out that the premises were commercial. On page 218 of Treistman's deposition, he stated that when he rented the premises, he knew that there was no shower, water

heater or kitchen cabinets. Gomes in his deposition in the Law Division case on page 254 stated that he rented the space as a commercial space, never a residential unit but Treistman changed it to a residential unit. In his certification dated June 5, 2013, Gomes stated that he rented the premises to Treistman for the operation of Treistman's business. In the prior hearing Treistman stated:

> "There is no lease. He would like it to be commercial and anyway he rented it to me.

In the email exchange between the attorney for Treistman and the attorney for Tall Oaks (Exhibit P-23), there is differing opinions as to whether Treistman had a residential tenancy. In a meeting on June 26, 2009, between Treistman and Tall Oaks the nature of his tenancy was discussed. There clearly is was an issue between Tall Oaks and Treistman as to whether the premises were commercial or residential. The Law Division case was settled. As part of the settlement a lease was entered into by both parties. One of the conditions of the lease is for Treistman to apply to the municipality for permission to lawfully use the apartment for residential purposes. If cost to him to obtain a residential certificate for occupancy exceeds $500, he can vacate the premises or use the premises for exclusively commercial purposes.

There was no testimony regarding any other tenants at 115 Monroe Street.

LEGAL ANALYSIS AND CONCLUSIONS

Petitioner argues that he is a residential tenant within the meaning of the diversion of service regulation and the statutes regarding action to correct substandard housing conditions. Petitioner cites N.J.S.A. 2A: 42-85(d), N.J.S.A. 2A: 42-86(d) 15 N.J.R. 787, 15 N.J.R. 1950 and N.J.S.A. 43:3-1for this proposition.

N.J.S.A. 2A:42-85 provides:

The Legislature finds:

a. Many citizens of the State of New Jersey are required to reside in dwelling units which fail to meet minimum standards of safety and sanitation;

b. It is essential to the health, safety and general welfare of the people of the State that owners of substandard dwelling units be encouraged to provide safe and sanitary housing accommodations for the public to whom such accommodations are offered;

c. It is necessary, in order to insure the improvement of substandard dwelling units, to authorize the tenants dwelling therein to deposit their rents with a court appointed administrator until such dwelling units satisfy minimum standards of safety and sanitation;

d. It is necessary to establish an efficient procedure whereby public officers, tenants and utility companies may act to stop and prevent wrongful diversion of utility services and thereby protect both the utility companies and their customers from fraud.

N.J.S.A. 2A: 42-86(d) provides:

"Dwelling" means and includes all rental premises or units used for dwelling purposes except owner-occupied premises with not more than two rental units.

N.J.A.C. 14:3-7.8(a) provides: "Tenant-customer" is a residential customer of record at the time of the complaint who rents a dwelling unit in a multi-family building or owns a condominium.

15 N.J.R. 787 is the legislative history for the proposed adoption of to the diversion of service regulation. 15 N.J.R. is the legislative history of the adoption of the diversion of service regulation.

N.J.S.A. 2A:42-85 and N.J.S.A 2A: 42-86(d) do not contradict N.J.A.C 14:3-7.8(a). There is a regulation to prevent the wrongful diversion of utility services which is N.J.S.A. 14:3-7.8. The definition of dwelling does not contradict N.J.A.C. 14:3-7.8(a) The legislative history of the proposal of the diversion of service regulation states that "Diversion of service is primarily an occurrence in low income inner city apartment

buildings..." 15 N.J.R. 787,788 (1983) The legislative history of the adoption of the diversion of service regulation includes a definition of tenant customer. It adds the language "Tenant customer is a residential customer of record **at the time of the complaint who rents a dwelling unit in a multi- family building or owns a condominium**," to the language in the proposal of the regulation.

There was no testimony regarding whether the building was a multi-family building. Treistman testified that he and his family lived on the premises. He did not testify that any other families lived in the building. In the previous hearings the testimony was that all of the other tenants in the building were commercial tenants.

There was a dispute between Treistman and Tall Oaks as to whether the premises were commercial or residential. This was addressed in the depositions of Gomes and Treistman in the Law Division case; as well as Gomes' certification and Treistman's statement in the prior proceeding.

N.J.S.A. 48: 3-1provides:

No public utility shall:

a. Make, impose or exact any unjust or unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, commutation rate, mileage and other special rate, toll, fare, charge or schedule for any product or service supplied or rendered by it within this state;

b. Adopt or impose any unjust or unreasonable classification in the making or as the basis of any individual or joint rate, toll, fare, charge or schedule for any product or service rendered by it within this state.

c. The word "board" as used in this chapter shall mean the board of public utility commissioners.

In this matter the classification of tenant customers having to rent a dwelling unit in a multi-family home was determined by the legislature. The Board has not adopted or imposed this classification; it is complying with the regulation enacted by the legislature. In addition the classifications are not unjust or unreasonable. The legislative history for

the diversion of service regulation states that diversion of service primarily occurs in low income inner city apartment buildings. Provisions of N.J.S.A. 2A:42-85 through N.J.S.A. 2A: 42-96 would allow petitioner to proceed in Superior Court specifically under N.J.S.A. 2A: 42-90(a) which provides:

> Set forth material facts showing that there exists in such dwelling or any housing space thereof one or more of the following: (1) a lack of heat or of running water or of light or electricity or of adequate sewage disposal facilities; **(2) a wrongful diversion of electric, gas, or water utility service by the owner or other party from the tenant of the dwelling without the consent of the tenant;** (3) the use by the owner or other party in the dwelling without the tenant's consent of electric, gas, or water utility service that is being charged to the tenant; (4) any other condition or conditions in substantial violation of the standards of fitness for human habitation established under the State or local housing or health codes or regulations; or (5) any other condition dangerous to life, health or safety.

I **CONCLUDE** that petitioner was not a tenant-customer in accordance with N.J.A.C. 14:3-7.8(a), and therefore was not eligible for a diversion-of-service investigation.

ORDER

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

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

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

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

April 27, 2015

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: April 27, 2015

Date Mailed to Parties:

ljb

EXHIBITS

For Petitioner:

P-11 Check from Bettina Treistman to Tall Oaks in the amount of $8,000 Dated November 22, 2007.

P-12 Lease Application Form from Tall Oaks Dated November 6, 2007

P-13 Proposed Lease between Tall Oaks and Treistman Dated November 14, 2007

P-14 Proposed Lease Agreement between Tall Oaks and Treistman Dated November 20, 2007

P-15 Adoption Home Study Report Dated January 24, 2008

P-16 Email to Gomes Dated January 30, 2008

P-17 Letter to Gomes dated July 22, 2008

P-18 Court Report for New Jersey Re-Adoption Dated November 28, 2008

P-19 Acknowledgement for Bettina Treistman from USCIS Dated January 24, 2009

P-20 Letter to Gomes from Treistman Dated January 29, 2009

P-21 Copy of Driver's License of Bettina Treistman

P-22 Email from Michael O. Bertone, Esq. to Treistman Dated May 13, 2009

P-23 Email from Michael Bertone, Esq. to Kevin Orr, Esq. Dated May 18, 2009

P-24 Fax from Michael Bertone, Esq. Dated June 25, 2009

P-25 Adoption Police Clearance form for Peter Treistman Dated November 19, 2010

P-26 Adoption Police Clearance form for Bettina Treistman Dated November 19, 2010

P-27 Adoption Child's Medical Dated December 6, 2010

P-28 Final Judgment of Adoption Dated December 16, 2010

P-29 Letter to Gomes from Treistman Dated December 24, 2010

P-30 Copy of Driver License of Peter Treistman

P-31 Copy of Direct TV Bill of Treistman Dated July 18, 2011

P-32 2009 1040 Income Tax Return Form

P-33 2010 1040 Income Tax Return Form

P-34 2011 1040 Income Tax Return Form

P-35 2012 1040 Income Tax Return Form

P-36 Not in Evidence

P-37 Summary of Rental Charges and Payments of Treistman

P-38 Transcript of the Deposition of Gomes Dated October 1, 2014

P-39 Settlement Agreement between Tall Oaks and Treistman

P-40 Letter from Kevin Orr, Esq. to Michael Bertone, Esq. Dated June 25, 2013

P-41 Letter from Michael Bertone to Kevin Orr Dated June 28, 2013

P-42 Not in Evidence

P-43 Certification of Jose Gomes

For Respondent:

R-6 Portion of the Transcript of the Testimony of Edward Sullivan in the Prior Hearing dated July 27, 2012

R-7 Deposition Transcript of Treistman Dated September 29, 2014