



Agenda Date: 4/18/19
Agenda Item: 7A

STATE OF NEW JERSEY

Board of Public Utilities

44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350

Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CUSTOMER ASSISTANCE

JOSEPH A. CANNING, SR., Petitioner)	ORDER ADOPTING INITIAL DECISION
V.)	
ATLANTIC CITY ELECTRIC COMPANY, Respondent)	DOCKET NO. EC16100995U OAL DOCKET NO. PUC 18763-16

Parties of Record:

Joseph A. Canning, Sr., petitioner, *pro se*
Renee E. Suglia, Esq., on behalf of Respondent, Atlantic City Electric Company

BY THE BOARD:

The within matter is a billing dispute between Joseph A. Canning, Sr. ("Mr. Canning" or "Petitioner") and Atlantic City Electric Company ("ACE" or "Respondent" or "Company"). This Order sets forth the background and procedural history of Petitioner's claims and represents the Final Order in the matter pursuant to N.J.S.A. 52:14B-20. Having reviewed the record, the Board of Public Utilities ("Board") now ADOPTS the Initial Decision dated March 7, 2019, as follows.

PROCEDURAL HISTORY

On or about October 21, 2016, Mr. Canning filed a petition with the Board requesting a formal hearing to help resolve a billing dispute between him and ACE, regarding electric service rendered at his residence at Haddock Drive, Sewell, New Jersey ("the property") under Account No. XXXXXXXX644. Petitioner alleged that he received an outrageously high bill from ACE in the amount of \$10,000 due to a defective meter situation. Petitioner also stated that despite paying his regularly monthly service charges, ACE turned off his electric service.

On or about November 29, 2016, ACE filed an answer to the petition. ACE advised that on or about May 7, 2014, a meter person was sent to the property to check on the status of the electric meter. According to ACE, during that visit, the meter person discovered tampering and proceeded to replace the meter. ACE advised Petitioner about the meter tampering and admitted that a charge of approximately \$10,000 was added to Petitioner's electric account,

which represented the amount the Company determined that the Petitioner owed due to the meter tampering. ACE also advised that electric service at the property was disconnected in September 2016.

Subsequently, on December 14, 2016, this matter was transmitted to the Office of Administrative Law ("OAL") for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23. This matter was assigned to Administrative Law Judge ("ALJ") Elia A. Pelios. Evidentiary hearings were held before ALJ Pelios on July 27, 2017 and April 23, 2018. On July 27, 2017, Kimberly Camp, Marianne Murphy and Emilio Melendez testified on behalf of the Respondent. (1T).¹ At this hearing, the Respondent's witnesses introduced and pre-marked exhibits R-1 through R-8.² Petitioner testified on his own behalf on April 23, 2018. (2T).

The record was closed on March 7, 2019. On that same date, Judge Pelios issued an initial decision in favor of Respondent, denying the relief sought by Petitioner and dismissing the petition.

No exceptions to ALJ Pelios' Initial Decision were received by the Board.

EVIDENTIARY HEARING

On July 27, 2017, the hearing on this billing dispute was heard before ALJ Pelios. (1T). Kimberly Camp, a senior investigator for ACE, testified on behalf of Respondent. (1T8:13 to 1T84:3). Ms. Camp testified that she has been working for the Company for about thirty-six (36) years and has held her current position for the past six (6) years, which includes investigating meter tampering for Respondent. (1T10:20 to 1T11:14). Ms. Camp testified about when the tampered meter was discovered at the property. (1T12:5 to 1T17:3; 1T33:6 to 1T36:1; 1T63:25 to 1T68:2). She testified that on March 7, 2014, while the meter person from ACE had difficulty accessing the meter, he could visually see that the meter was not registering. (1T29:15 to 1T31:18; 1T34:1 to 1T36:1; 1T64:1 to 1T67:19; 1T77:1 to 1T79:13). Ms. Camp further testified that the meter person reported to her that he discovered a zip-tie inside the meter cover. Ibid. After introducing the meter and zip-tie removed from the property into evidence, Ms. Camp described the obstruction reported by the meter person, and explained how a zip-tie inside of the meter cover would create a drag on the disc and slow consumption. (1T17:4 to 1T22:12). She also testified that the Company contacted Petitioner via letter about the meter issue, and never received a response. (1T26:17 to 1T28:24). She further testified that the Company adjusted Mr. Canning's account based on the meter tampering. (1T22:17 to 1T26:13; 1T52:23 to 1T53:4; 1T68:4-11). She explained that after researching Petitioner's electric billing history from 2005 to the date that the tampering was discovered, it was clear that consumption usage dropped in 2009, and that after the tampered meter was replaced in 2014, electric consumption at the property returned to pre-2009 usage. Ibid.

Next, Marianne Murphy testified on behalf of Respondent. She testified that she has been employed by ACE for eighteen (18) years in the billing department, and that she has been at her

¹ 1T refers to the transcript of the July 27, 2017 hearing; 2T refers to the transcript to the April 23, 2018 hearing.

² Exhibits R-2, R-3, R-4, R-5, R-7 and R-8 were moved into evidence at the July 27, 2017, hearing. (See 1T27:9 to 1T28:10; 1T65:23 to 1T75:21; 1T117:21 to 1T119:2; 1T120:2 to 1T122:6; 1T136:16 to 1T138:21). Exhibit R-6 was moved into evidence at the April 23, 2018 hearing. (See 2T7:13-25). However, R-1 was not offered into evidence.

current title of senior legal analyst in the regulatory and executive customer relations department for the last ten (10) years. (1T87:7 to 1T88:9). With regard to Petitioner's billing dispute, Ms. Murphy testified that as a theft of service case, she reviewed the account and investigation, and as a result of her review, the account was adjusted based on prior usage. (1T88:5 to 1T90:12). She testified that in looking at past usage, it was determined that Petitioner owed approximately \$10,159.53, and that his account was adjusted in accordance with Company policy. (1T93:1 to 1T95:15; 1T95:19 to 1T97:21; 1T100:1-10; 1T118:1-25).

Emilio Melendez also testified on behalf of Respondent. Mr. Melendez testified that he has worked for ACE for approximately seven (7) years, and for the last three (3) years has overseen electric meter testing. (1T140:12 to 1T142:16). He testified that Petitioner's meter was tested after removal from the property, and that it passed the test for accuracy. (1T143:1 to 1T145:12). He testified that the meter was tested without any obstructions and was found to be working properly. (1T143:17 to 1T150:17). In his testimony, he explained that from his experience, once an obstruction was removed, it would perform accurately unless there was damage to the meter itself. Ibid.

On April 23, 2018, Mr. Canning testified on his own behalf. Petitioner testified about where the meter was located on the property and described the property layout. (2T8:18 to 2T18:3). He then specifically testified about May 7, 2014, which was the date when the tampered meter was discovered at the property. (2T19:13 to 2T20:13). Petitioner stated that he received a letter from Respondent about the tampered meter and the adjusted bill charges. (2T20:17 to 2T21:10).

On cross-examination, Petitioner testified about the property, the meter location, the occupancy and size of the home, as well as the number of appliances operating in the home. (2T23:7 to 2T29:15). He admitted that meter readers sometimes had issues accessing the meter, and that he did receive estimated readings on occasion. (2T26:1 to 2T27:1). Petitioner also admitted that there was a problem with the meter. (2T32:19-23).

On March 7, 2019, Judge Pelios issued an Initial Decision, in favor of Respondent, denying the relief sought by Petitioner and dismissing the petition. In the initial decision, ALJ Pelios made specific findings of fact based upon his review of the testimony, documentary and physical evidence: (1) Petitioner's recorded usage of electricity supplied by ACE was significantly lower from 2009 through 2014 than it had been from 2005 to 2009; (2) ACE conducted an investigation and the meter was replaced; (3) after replacement of the meter, recorded usage returned to levels consistent to those observed between 2005 and 2009; (4) the removed meter was tested and found to be accurate pursuant to regulatory parameters; and (5) ACE advised Petitioner of the meter tampering, and Petitioner failed to respond until ACE attempted to collect on the adjusted bill. (ID at 6; 9).

ALJ Pelios further found that Respondent provided credible, specific and detailed testimony to support its finding that Petitioner's meter was tampered with in a manner that resulted in lower, inaccurate readings, which caused Petitioner to be billed for less electricity than was being consumed. (ID at 8). While ALJ Pelios found that the meter was tampered with, he did not make any findings as to the method of tampering or the identity of the person responsible for the tampering. Ibid.

ALJ Pelios noted that a public utility is required to operate in accordance with its Board approved tariff, and that the tariff is binding on the utility and its customers. N.J.A.C. 14:3-1.3(a); N.J.A.C. 13:3-1.3. (ID at 9). ALJ Pelios further noted that section 8.3 of the Company's tariff establishes that if it is determined that a meter has been tampered with, then a responsible

party is required to bear the costs incurred by the Company as a result of such tampering. (ID at 9-10). ALJ Pelios found that, based on the record, Petitioner is a "responsible party" contemplated by the tariff, and as a result, is responsible for the adjusted usage charges, which were properly assessed by the Company. Ibid.

Accordingly, ALJ Pelios found that Petitioner's meter was accurate under testing conditions, and that its accuracy while at the property was compromised due to physical tampering, which was discovered by the Company. ALJ Pelios concluded that Petitioner did not prove by a preponderance of the evidence that his meter was inaccurate or that there was an issue with how the Company conducted its meter testing, and thus, Respondent's adjustment of Petitioner's account was correct. (ID at 11).

DISCUSSION AND FINDINGS

In customer billing disputes before the Board, a petitioner bears the burden of proof by a preponderance of the competent, credible evidence. See Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is found to be preponderate if it establishes the reasonable probability of the facts alleged and generates reliable belief that the tended hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div.) cert. denied, 31 N.J. 75 (1959). Thus, Petitioner must establish his contention that the adjusted charge to his account is not proper by a preponderance of the credible evidence.

Pursuant to the Administrative Procedure Act, "[t]he agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c); N.J.A.C. 2:1-18.6(c). Here, ALJ Pelios found ACE's witnesses to be more credible than Petitioner. The testimony by the ACE witnesses showed that Petitioner's meter, which was removed in May 2014, had been tampered with and, as a result, Petitioner had been underbilled from about 2009 through 2014. Mr. Canning's testimony that he did not tamper with the meter and that he did not know how the adjusted charge could be based on actual readings was determined to be less credible. Based on a review of the record, the Board **ADOPTS** Judge Pelios' credibility determinations.

N.J.A.C. 14:3-4.6(e) provides that "[i]f a meter is found to be registering less than 100 percent of the service provided because of theft or tampering under (d)(1) above, the utility may require immediate payment of the amount the customer was undercharged." Petitioner did not provide any documentary or testimonial evidence that the meter was not tampered with. During his testimony, he also failed to explain why his electric usage was significantly lower between 2009 and 2014, and offered no explanation for why consumption reverted back to pre-2009 usage after the tampered meter was replaced.

Consequently, the Board **FINDS** that ALJ Pelios properly determined that Petitioner has not established by a preponderance of the evidence that he was improperly billed by ACE.

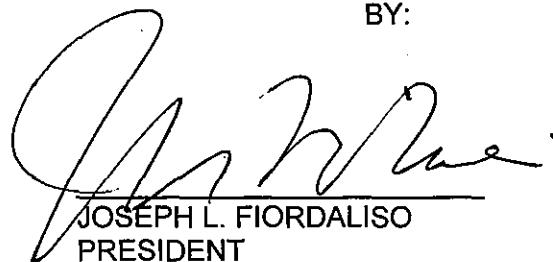
Thus, after careful review and consideration of the entire record and ALJ Pelios' credibility findings, the Board **HEREBY FINDS** the findings and conclusions of law of ALJ Pelios to be reasonable and, accordingly, **HEREBY ACCEPTS** them. Specifically, the Board **FINDS** that Petitioner failed to bear his burden of proof that the adjusted bill from ACE for past electric consumption was improper or inaccurate.

Accordingly, the Board **HEREBY ADOPTS** the Initial Decision in its entirety and **ORDERS** that that the Petition be **DISMISSED**.

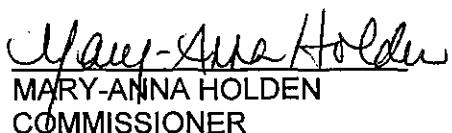
This order shall be effective April 28, 2019.

DATED: 4/18/19

BOARD OF PUBLIC UTILITIES
BY:



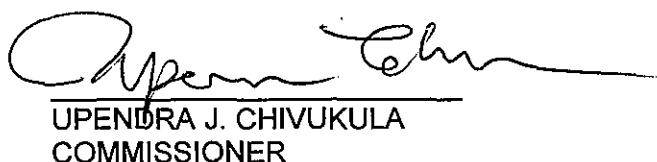
JOSEPH L. FIORDALISO
PRESIDENT



MARY-ANNE HOLDEN
COMMISSIONER



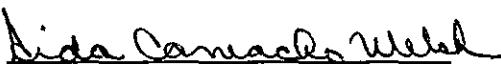
DIANNE SOLOMON
COMMISSIONER



UPENDRA J. CHIVUKULA
COMMISSIONER



ROBERT M. GORDON
COMMISSIONER

ATTEST: 
AIDA CAMACHO-WELCH
SECRETARY

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

JOSEPH A. CANNING, SR.

V.

ATLANTIC CITY ELECTRIC COMPANY

**BPU DOCKET NO. EC16100995U
OAL DOCKET NO. OAL PUC 18763-16**

SERVICE LIST

Joseph A. Canning, Sr.
76 Haddock Drive
Sewell, NJ 08080

Renee E. Suglia
Assistant General Counsel
Atlantic City Electric Co.
500 N. Wakefield Drive
Post Office Box 6066
Newark, DE 19714-6066

Eric Hartsfield, Director
Division of Customer Assistance
Board of Public Utilities
Post Office Box 350
Trenton, New Jersey 08625-0350
Eric.hartsfield@bpu.nj.gov

Julie Ford-Williams, Chief
Division of Customer Assistance
Board of Public Utilities
Post Office Box 350
Trenton, New Jersey 08625-0350
Julie.ford@bpu.nj.gov

Renee Greenberg, Esq.
Deputy Attorney General
Department of Law & Public Safety
Division of Law
Post Office Box 45029
Newark, NJ 07101-45029
reneee.greenberg@law.njoag.gov



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. PUC 18763-16

AGENCY DKT. NO. EC16100995U

JOSEPH A. CANNING, SR.,

Petitioner,

v.

ATLANTIC CITY ELECTRIC COMPANY,

Respondent.

Joseph A. Canning, Sr., petitioner, pro se

Renee E. Suglia, Esq., Assistant General Counsel, Atlantic City Electric Company
(Wendy Stark, Vice President and General Counsel)

Renee Greenberg, Deputy Attorney General, for Staff of the Board of Public Utilities
(Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 23, 2018

Decided: March 7, 2019

BEFORE ELIA A. PELIOS, ALJ:

STATEMENT OF THE CASE

Petitioner Joseph A. Canning, Sr., (Canning) appeals the determination by respondent, Atlantic City Electric Company, that his electrical meter was tampered with so as to warrant an adjustment for the period of 2009-2014.

PROCEDURAL HISTORY

Canning filed his petition with the New Jersey Board of Public Utilities (BPU) on October 21, 2016. On December 14, 2016, the BPU, transmitted the petition to the New Jersey Office of Administrative Law (OAL) for a hearing as a contested case. Hearings were held on July 27, 2017 and April 23, 2018 and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Kimberly Camp (Camp) testified on behalf of the utility. She has been an employee of Atlantic City Electric for thirty-six years and was a senior investigator in August 2017. Camp has a degree in criminal justice and has had continuing education in business management. Her job involves investigations of tampering and meter fraud. She has investigated over 3,000 cases while at Atlantic City Electric.

Regarding the property located at 76 Hadden Drive in Turnersville, New Jersey, a technician received an order on May 7, 2014, to investigate and verify the meter which was not registering. When he arrived at the property, the gate was locked, so he went to the office to get access and documentation of the visit. The technician discovered that the meter was not properly serviced. The seal on socket was blue which indicates to an observer that the original seal had been removed. The BT seal was also missing on the meter. Meters are not installed without one inside the case. There was a zip tie resting on top of the spinning disc that causes drag which has the effect of slowing the meter. The meter was replaced and tested. Once the new meter was in place the consumption levels at the property went back to normal.

Camp has seen this sort of tampering before. She explained that the meter spins as consumption of electricity occurs, and that putting something on top of the disc causes drag which slows the spinning down, which slows the recording down. It was determined that this constituted tampering. After the meter was exchanged, looking back to 2005 to 2009 revealed there were good consumption readings from June 2009 until May 2014.

Consumption appeared to be low after that and once the meter was exchanged, consumption went back to the pre-2009 levels.

Camp indicated that the determination was made on May 7, 2014. A letter was sent to petitioner on July 15, 2014 advising Canning as to the issue. A letter addressed the issue and invited petitioner to call to respond. She acknowledged that there may have been a simple explanation, however, no response was ever received. Since there was no response received the final determination that was made was that there was a theft of service. Petitioner was given an opportunity to address this charge and did not. The bill was therefore adjusted accordingly.

On cross-examination, Camp noted that she was an investigator for six years and was in the field twenty-eight to twenty-nine years. She stated that the technician called her on the phone, sent in the form, and informed her what he had done. Camp did not know where the meter or the gate are located at the residence in question, but she stated that the rotation of the disc tells if the meter is or is not registering. Camp further indicated that a meter could be read from 1,015 feet away, that meters are read once a month, and the reading is entered into the system. If the problems observed are recorded, she stated that the BT seal is never removed, even if it is brought in to be tested. The socket seal is green and is only removed if it is cut. If the socket seal is cut it is replaced with a blue seal. If it is not on the socket during a reading, it is replaced with a blue seal which indicates that this earlier seal had been removed and found that way. It is unlikely that the meter was broken. The BT seal is on the back. No meter is ever installed without a BT seal. The meter cannot be opened if the BT seals in place. A foreign object cannot be placed on the disc unless the enclosure of the meter is opened. The meter field personnel who did the reading was Travis McCarthy, who was not present at the hearing though he is still working with the company. Mr. McCarthy was out in the field on the day of the hearing. Once-a-month meter readings are performed. She acknowledged that the utility does use black zip ties, but not clear zip ties like the one found inside the meter and stated that meter people use black zip ties. Camp also noted that there is no reason for a contractor to ever open the cover of a meter.

Camp acknowledged that increase or decrease in consumption is not on its face evidence of tampering. She first spoke the petitioner in 2016, when his service was being turned-off. She indicated that the petitioner used profanity with her and so she hung-up the phone. Camp stated that when the meter was taken it was tested without the foreign object present and tested 100 percent accurate, although she acknowledged she neither conducted nor observed the test.

Camp reiterated that the technician did not get access to the meter, but the foreign object was observed so that is why the meter was pulled and replaced. Atlantic City Electric does not read its own meters—they contract with South Jersey Gas; this contract requires the meter readers read the meter and report safety hazards. The socket was not open so there was no damage to petitioner's meter.

Marianne Murphy (Murphy) testified next, she is employed by Pepco Holdings, who is the owner of Atlantic City Electric. Murphy is a senior analyst, spent ten years in the position, and eighteen years with Pepco Holdings in the billing department. Her previous positions included addressing customer complaints the Board of Public Utilities. Murphy noted that this matter was an alleged theft of service and that petitioner's account was adjusted based on prior usage history. She had read Ms. Camp's investigative report and she prepared summary document addressing the charges. Murphy compared the bills and usage documents as billed versus corrected. The per day average usage for 2008 to 2009, was applied. The readings after were consistent with tampering, and so estimated usage was determined on the prior bills. The amount of \$10,159.63 was arrived at the billing department who computed the adjustment and advised of the entire amount there is no month by month breakdown provided. Canning's account was adjusted with in accordance with company policy.

On cross-examination, Murphy stated that the account was reviewed and adjusted based on previous history. She was not aware of the number of people who live in the house and was not aware of any changes in the efficiency of lighting utilized inside the house. Murphy is familiar with the petitioner's account history. She could not say why it took Atlantic City Electric five years to address this issue but stated that the issue is not missed payment.

The next witness to testify was Emilio Melendez (Melendez), who has been employed by Atlantic City Electric as a meter service engineer for three years. He has been employed for seven years with Atlantic City Electric and oversees the testing of meters. Melendez performed the test on the petitioner's meter. The meter went to the meter shop in Mays Landing, New Jersey. The meter must be within $2\% \pm$ accuracy or and vary by no more than $2\% \pm$ in order to pass. The meter passed because its accuracy or its error range fell between ± 2 percent which is dictated by the New Jersey Administrative Code. Atlantic City Electric's internal policy is a $\pm 3\%$; 3% will not be put into service once the obstruction was removed. The meter performed as it should.

On cross-examination, Melendez acknowledged that a damaged meter can misperform and will not test accurately. He further indicated that he oversees the results and does not witness the actual test. Melendez stated that the meter was accurate within $\pm .3\%$.

Petitioner Canning testified on his own behalf. On May 7, 2014, Atlantic City Electric came to his house. He reviewed an aerial photo (R-3) and identified that the meter is on the right side of his house. There is a pool with fencing around as required. On the date in question the gate was locked so the meter reader had no access. Although the meter reader stated that he looked over the locked gate, Canning believes it is impossible because the meter is fifteen feet away from the gate, and the meter is lower than the rise of the air conditioning (AC) unit. Therefore, he believes it was unlikely to be seen over the gate and six-foot shrubs.

Canning stated that Ms. Camp was not at his house and that he had no notes. He cannot remember when he spoke to the technician, and he accepted the story about the knock on the door. Canning stated that his son's Jeep would have been in front of the house as he and his son were working on the Jeep when the technician arrived. The technician said to the petitioner that he needed access, so petitioner escorted the technician to the meter. He said that it seemed fine but that he wanted to change it out, so petitioner left him to it. When the technician finished, he said goodbye to Canning, left and never indicated any issues.

One month later, Canning received a letter from Atlantic City Electric adjusting his bill due to problems with the meter. After the new meter the bills were under \$200.00 a month. A \$10,000.00 adjustment was made. He did not pay his bill for fifty months.

On cross-examination, petitioner stated that the fence is forty-two inches high, and that the meter is behind and below the air conditioning unit and pretty-well hidden. Canning does not know if the technician had binoculars but stated that the technician came right from the truck to him, he did not appear over the fence at any time, he went directly in through the gate. In the past his wife has let meter readers in, but he has not. He has lived in the house since it was built around the year 2000, and in 2005 he had the pool installed. The pool is not heated, the house has gas heat and some gas appliances, the refrigerator and microwave are electric, there is a single zone HVAC and a gas dryer. His mother-in-law moved out, and he has four children. Canning moved out temporarily from 2009 through part of 2011. He never removed the meter, although he stated that electricians may have. He has installed sprinklers, recessed lighting, outdoor floodlights, and the pool. He did not put the zip tie in the meter and does not know who did. Petitioner never instructed anyone to put a zip tie in the meter and admits that there was probably a problem with the meter after reviewing reports (R-6). He cannot say what the problem was with the meter but does not believe it was zip tie. Canning does not know how the bills could be actual readings.

Considering the testimonial, documentary and physical evidence submitted in this matter, I FIND that petitioner's recorded usage of electricity supplied by the respondent was significantly lower for the period of 2009-2014 than it had been for the period of 2005-2009. An investigation was conducted, and the meter was replaced. After the meter was replaced petitioner's recorded usage returned to levels consistent with those observed between 2005 and 2009. The respondent estimated usage for the period 2009-2014 based on the usage recorded in 2008 and 2009. The removed meter was tested and was found to be accurate. I further FIND that when advised of respondent's determination petitioner did not dispute or otherwise respond to the determination. It was only after respondent escalated its attempts to collect on the delinquency in paying the adjusted bill that petitioner brought the herein matter.

The respondent determined that petitioner's meter had been tampered with and that a condition existed where the seals to the meter had been broken and a zip-tie placed on the rotating disc of the meter which measures usage, creating drag which caused the disc to slow its rotation and read slow. The utility did not present the testimony of a witness who had observed this condition firsthand, but rather seeks to rely on reports containing information supplied by the employee who reported to the scene and purportedly observed the condition.

The reports presented though were not prepared by the meter reader, Mr. McCarthy. Rather, they were prepared by Ms. Camp, some time later pursuant to her investigation and reflecting what Mr. McCarthy had reported.

Such out-of-court statements, if offered to prove the truth of the matters stated, are hearsay. While the rules of evidence applicable to proceedings in the Judicial Branch permit certain hearsay to be accepted as competent evidence under recognized exceptions to the general rule excluding hearsay, in administrative hearings the rule governing the admissibility of hearsay evidence is different. That rule is codified at N.J.A.C. 1:1-15.5:

- a. Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
- b. Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

N.J.A.C. 1:1-15.5 (b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

It is common practice for administrative agencies to receive hearsay evidence at their hearings. . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. . . .

In the present matter, credible, specific and detailed testimony was provided by Ms. Camp as to the importance of a missing BT seal on the meter in question and company policy as to never removing a BT seal. She further detailed convincingly the significance and consequence of a missing BT seal in that it would provide access to the interior of the meter and compromises the integrity of the meter and its readings. Taken together with the testimony and evidence that once the meter was replaced the load reading returned immediately to pre-2009 levels after registering significantly lower for the period in question, I **FIND** that respondent has provided sufficient corroborating evidence to establish by a preponderance of credible competent evidence that the meter servicing petitioner's house was tampered with. I do not make any finding of fact as to the method of tampering or the identity of the tampering individual, but I do **FIND** that the meter was tampered with in a manner that resulted in a lower, inaccurate reading that resulted petitioner being billed for less electricity than he was consuming.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 14:3-4.5(a) provides that "Each utility shall, without charge, make a test of the accuracy of a meter upon request of a customer, provided such customer does not make a request for test more frequently than once in 12 months[.]" and N.J.A.C. 14:3-4.6(a) provides

that "Whenever a meter is found to be registering fast by more than two percent, or in the case of water meters, more than one and one half percent, an adjustment of charges shall be made in accordance with this section. No adjustment shall be made if a meter is found to be registering less than one-hundred percent of the service provided . . ."

In the present matter, the record reflects that the meter in question was tested and was determined to be accurate within the above regulatory parameters. However, respondent determined, and the record also reflects, that while the meter appeared to be functioning normally under testing conditions, the readings returned from the field in this matter were not an accurate reflection of petitioner's service consumption due to the apparent tampering with the meter, causing it to read slowly.

N.J.A.C. 14:3-1.3(a) provides that "each public utility shall, prior to offering a utility service to the public, submit a tariff or tariff amendments to the [BPU] for approval[.]" The tariff shall "clearly describe . . . all terms and conditions regarding the services[.]" N.J.A.C. 13:3-1.3(b)2. A utility is expected to operate in accordance with its tariff, N.J.A.C. 13:3-1.3(d), though any inconsistency between a tariff and the governing regulations is resolved in favor of the regulation, unless the tariff "provides for more favorable treatment of customers." N.J.A.C. 13:3-1.3(i). In other words, a tariff is essentially the law governing the relationship between a public utility and its customers and is binding upon those parties. Application of Saddle River, 71 N.J. 14 (1976).

Section 8.3 of the tariff governing the relationship between respondent and its customers provides, in pertinent part, that:

The customer shall not allow or permit any individual or entity, other than a duly authorized employee(s) of the Company to make any internal or external adjustments of any meter or any other piece of apparatus belonging to the Company. In the event it is established by a Court of Law, the Board of Public Utilities, or with the customer's consent, that the Company's wires, meters, meter seals, switch boxes, or other equipment on or adjacent to the customer's premises have been tampered with, the responsible party shall be required to bear all of the costs incurred by the Company, including but not

limited to the following: (i) investigations; (ii) inspections; (iii) costs of prosecution including legal fees; and (iv) installation of any protective equipment deemed necessary by the Company. The responsible party shall be the party who either tampered with or caused the tampering with a meter or other equipment of knowingly received the benefit of tampering by or caused by another.

Furthermore, where tampering with the Company's or customer's facilities results in the incorrect measurement of the service supplied by the Company, the responsible party, (as defined above) shall pay for such service as the Company shall estimate from available information to have been used on the premises but not registered by the Company's meter or meters. Under certain conditions, tampering with the Company's facilities may also be punishable by fine and/or imprisonment under applicable New Jersey law.

In the present matter, while no finding of fact was made to determine whether petitioner was the individual who tampered with respondent's equipment, the record is sufficient to support a determination that petitioner is within the contemplation of the tariff the "responsible party" and I so **CONCLUDE**. I further **CONCLUDE** that the tariff, which governs the relationship between petitioner and respondent, explicitly permits the company to estimate the level of usage, as they have in this matter, when tampering occurs.

In an administrative proceeding, the petitioner bears the burden of proof by a preponderance of the competent, credible evidence as to those matters which are justiciable before the OAL. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the facts alleged and generates reliable belief that the tended hypothesis, in all human likelihood, is true. See, Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div.) cert. denied, 31 N.J. 75 (1959).

Respondent has demonstrated that while the meters in question was accurate under testing conditions, its accuracy was compromised due to physical tampering which impeded the meter's reading.

Absent any competent evidence challenging the accuracy of the meters or disputing the tests, calculations or methods employed by the respondent, beyond speculation, hypothesizing, and conjecture, I must **CONCLUDE** that petitioner has not met his burden of proof in demonstrating that respondent has erred in adjusting his account. The Adjustment must be **AFFIRMED**.

ORDER

The respondent's adjustment to petitioner's account is **AFFIRMED**. Petitioner's appeal is **DENIED** and **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.

March 7, 2019

DATE

Date Received at Agency:

Date Mailed to Parties:

nd



ELIA A. PELIOS, ALJ

APPENDIX

WITNESSES

For Petitioner:

Joseph A. Canning, Sr.

For Respondent:

Kimberly Camp

Marianne Murphy

Emilio Melendez

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Not Offered

R-2 Letter from Kimberly Camp, Sr. Investigator, Revenue Protection, to Joseph Canning, Concerning Case #14-18888, Acct #3102119-9999-3, Tampering, dated July 15, 2014

R-3 Pepco Holdings, Energy Diversion Investigation-Case Report 18888, Meter # 105 300 539, dated July 7, 2014

R-4 Meter

R-5 Zip Tie

R-6 Atlantic City Electric Company, Usage Detail from June 2009 through May 2014, Account Number S5001007644

R-7 Atlantic City Electric Company, Summary, From June 2010 to August 2015

R-8 Letter from Customer Care, Atlantic City Electric Company, to Joseph Canning, Concerning Tampering Discovery, dated June 15, 2015