

7th Floor, Rachel Carson State Office Building
P.O. Box 8767
Harrisburg, Pennsylvania 17105-8767

December 22, 2009

Office of Chief Counsel

(717) 772-4171
FAX (717) 705-2830

James McNulty, Secretary
Public Utility Commission
2nd Floor North
Commonwealth Keystone Building
Harrisburg, PA 17110

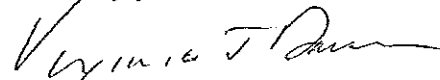
Re: DCNR v. PECO
Docket No: C-2008-2051267

Dear Secretary McNulty:

The attached document is the Department's Reply Brief of the Commonwealth, sent also this day by electronic and first class mail to counsel for PECO and Administrative Law Judge Fordham.

Thank you for your attention to this matter.

Sincerely yours,


Virginia J. Davison
Assistant Counsel

**COMMONWEALTH OF PENNSYLVANIA
IN THE
PUBLIC UTILITY COMMISSION**

C-2008-2051267

JOHN NORBECK, DIRECTOR OF THE BUREAU OF STATE PARKS
OF THE DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA

v.

PECO ENERGY COMPANY

**REPLY BRIEF OF THE COMMONWEALTH
DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES**

Virginia J. Davison
Assistant Counsel
Department of Conservation and
Natural Resources
400 Market Street, PO Box 8767
Harrisburg, PA 17105-8767
Telephone: 717-772-4171
ID No. 44717

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REPLY BRIEF OF THE COMMONWEALTH

This brief responds to two aspects of the PECO Post-hearing brief: the classification of the line that runs under Gradyville Road and the value of the testimony offered by the Company's expert.

A. The Regulations Regarding Service Lines

The brief submitted by PECO reveals the Company's complete failure or refusal to accept that the Commission's regulations must take precedence over the Company's tariff, at least as interpreted by Scott Neumann. The brief repeats Mr. Neumann's testimony regarding the line that runs under Gradyville Road, calling it a service line that ends 18 inches into Park property. The Company's position depends on that line ("the short line") having the legal classification of "service line." The line is not a service line. It cannot enjoy that status because it does not fulfill the requirements established by the regulatory definition of service line.

DCNR, and no doubt the Commission, can understand PECO's reluctance to embrace the regulation and the case law that makes the regulation superior to the tariff in the event of a conflict of terms.¹ If the Commission sees a conflict between the regulatory definition and PECO's application of "service line," it will need to conform its findings to the regulation. Administrative convenience is not a valid reason for adopting a position inconsistent with the law. See Office of Consumer Advocate v. Pa. American Water 1997 Pa. PUC LEXIS 163.

¹ See Captex Piece Dye, Inc. v. UGI Corporation, 1983 Pa. PUC LEXIS 40; 57 Pa. PUC 200 and PUC v. North East Heat & Light Co., 1987 Pa. PUC LEXIS 236; 64 Pa. PUC 395. See also 52 Pa. Code § 64.213, concerning telecommunications regulation. "A public utility commission, like any other agency, cannot ignore or fail to apply its own regulations, and the persons subject to the regulations are also bound." Consumer Advocate v. Pa. Utility Comm., 853 A 2d. 1097 (Cmwlth. Ct. 2004) aff'd. by the Supreme Court without published opinion.

In DCNR's view, there is no need to apply the law concerning the relative importance of the Code, regulations, and tariff in this dispute. There is really no conflict between the regulation and the tariff. The tariff and the regulatory definition of service line can be read together to give effect to both which satisfies the Statutory Construction Act and imparts an orderly solution to the quandary presented by the 1972 construction and the 2007 outage, which brought up the ownership issue.

Because the line that runs under Gradyville Road ("the short line") cannot be a service line, it need not stop at the point the Company argues is the point of delivery.² The service line is the only line that has the 18-inch limitation set by the regulations and Section 6.1 of the tariff.

Finding that the short line and the "long line," the continuation of the 5000-volt line to the Mansion, together create a trunk line is the most reasonable result for the Commission to reach. A trunk line is a subset of the line extensions, the subject of Section 7 of the tariff. Finding that the entire line is a trunk line not only fits the definitions of line extension (regulatory) and trunk line (Section 7.1 of the tariff), it also solves the problem which is raised by finding that the "long line" is a service line, the only possible alternative, under the regulations, to the trunk line designation. That problem with classifying the line as a service line arises at the beginning of the long line: Where is the beginning? The short line would have to be considered simply an addition to the supply line, allowing the aerial line along Gradyville Road to become the underground line required for the long line to be considered a service line (regulatory

² Neither the tariff definitions of point of delivery nor Section 3.3 of the tariff imposes the 18-inch limitation on the point of delivery. That limitation comes up only in documents that are not law. (H.T. 177, 178)

definition). In this scenario the question of where the service line would begin is unanswerable.

The better conclusion is that the entire line is a trunk line. It connects to customers by two single-phase distribution lines that run from the junction box to individual customers (DCNR Ex. 1) and, farther along the 3-phase segment and after the transformer, to the Mansion's receiving equipment, the meter.

B. PECO's Testimony

Although there was quite a bit of "extra" unsworn testifying by the Company's counsel during the Company's case, all the sworn testimony was offered by Scott Neumann.

1. The Commission decided at the hearing that Mr. Neumann could offer his interpretation of the tariff. (H.T. 130) His authority was not extended to the never-approved Design Practices and Electrical Requirements that are DCNR Ex. 10 and PECO Redirect Ex. 1 (H.T. 132) which are the bases for the 18-inch limitations alleged for facilities other than a service line.

2. All of Mr. Neumann's testimony to the effect that the short line installed in 1972 was a service line is erroneous. The regulation which defines (and defined) service line eliminates that line from the definition. All the tariff interpretation that depends upon that definition is therefore also erroneous.

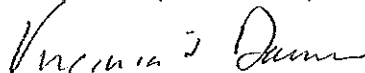
3. The courts have determined that hearsay admitted without objection cannot, without corroboration, be used by an administrative forum to support a necessary finding. See Anderson v. Department of Public Welfare, 79 Pa. Cwlth. 182, 468 A.2d 1167 (1983), cited in W.S. v. Department of Public Welfare, 882 A.2d 541 (Pa. Cwlth. 2005).

Mr. Neumann's hearsay statements, which purport to explain how the Company operated during the years before he joined it in 1985, have not been corroborated to the extent they rely on legally useless citations to the tariff that lead to circular reasoning. "Legally useless citations" also includes citations that are not to the tariff, but, rather, to the Design Practices (DCNR Ex. 10) or Electrical Requirements (PECO Redirect Ex. 1), which do not have the force of law.

CONCLUSION

Logic and careful analysis, as opposed to the Company's interpretation by habit and convenience, require the conclusion that the 5000-volt line belongs and always belonged to PECO. Respect for the relative positions of the regulations, the tariff, and the Company's unapproved engineering guidances and the rules of evidence demands that PECO take responsibility for the 5000-volt distribution line.

Respectfully submitted,



Virginia J. Davison
Assistant Counsel
Department of Conservation and
Natural Resources

CERTIFICATE OF SERVICE

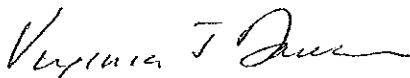
I hereby certify that I have this day served an electronic mail copy of the Reply Brief of the Commonwealth by John Norbeck and the Department of Conservation and Natural Resources upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54.

Cynthia Fordham, Administrative Law Judge
801 Market Street
Philadelphia, PA 19107
cfordham@state.pa.us

Ward Smith, Esquire
Exelon Business Services Co.
2301 Market Street
Philadelphia, PA 19102
ward.smith@exeloncorp.com

An electronic copy was also served upon the Secretary's Bureau of the PUC via e-file.

Dated this 22nd day of December, 2009.


Virginia J. Davison

Counsel for:

Pennsylvania Department of Conservation and Natural Resources