BEFORE THE
PENNSYLVANIA UTILITY COMMISSION

John Norbeck, Director, Bureau of State Parks Pennsylvania Department of Conservation and Natural Resources	:	C-2008-2051267
v.	:	
PECO Energy Company	:	Before Cynthia Williams Fordham Administrative Law Judge

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

EXCEPTIONS TO INITIAL DECISION

The Commonwealth of Pennsylvania Department of Conservation and Natural Resources ("DCNR"), by and through it undersigned counsel, hereby files these exceptions to the initial decision issued in this matter by the Public Utility Commission on April 22, 2010 (the "Initial Decision") pursuant to 52 Pa. Code § 5.553. As set forth below, the conclusions of law provided in the Initial Decision are insufficient to support the Commission's order dismissing DCNR's complaint.

I. The Commission's Single Conclusion of Law Relating to the Requirements of the PECO Tariff is Insufficient to Support its Initial Decision.

1. The Commission includes a single conclusion of law relating to the tariff of the PECO Energy Company ("PECO") stating that an approved tariff is binding on the public utility and its customers (Initial Decision at 31, ¶ 3).

2. The Commission does not provide any conclusions of law regarding PECO's obligation under the Public Utility Code to make necessary repairs and to avoid imposing cost on its customers inconsistent with its tariff.

3. The Commission does not provide any conclusions of law regarding the PECO tariff provisions applicable to the Initial Decision.

4. The two cases cited by the Commission in its conclusion of law relating to the tariff (*Kossman v. Pa. Public Utility Commission*, 694 A. 2d 1147 (Pa. Cmwlth. 1997) and *Brockway Glass Co. v. Pa. Public Utility Commission*, 437 A. 2d 1067 (Pa. Cmwlth. 1983) provide support for DCNR's position in this case, which is contrary to the Commission's conclusion in the Initial Decision.

A. The Commission Failed to Provide Conclusions of Law Relating to Important Public Utility Code Requirements.

5. The Public Utility Code requires every public utility to provide reasonable service and facilities and make repairs to such service and facilities necessary to serve its customers and the public. 66 Pa.C.S. § 1501.

6. PECO failed to make the repairs necessary to provide reasonable service to its customers within Ridley Creek State Park (the "Park").

7. The Public Utility Code prohibits a public utility from imposing a cost on a customer other than as specified in its tariff. 66 Pa.C.S. § 1303.

8. PECO's refusal to make necessary repairs to the underground cable serving customers in the Park resulted in a cost to one of its customers, DCNR, that was prohibited under PECO's tariff.

B. The Commission Failed to Consider Tariff Definitions Important to Determining the Point of Delivery of Service.

7. The outcome of this case turns on the determination of the point at which PECO's supply line ends and the service lines for the customers located within the Park, including DCNR, begin.

8. PECO's tariff terms this point as the "point of delivery", which is defined as "the single point at which the service-supply lines of the Company terminate and the customer's facilities for receiving the service begin" (Initial Decision at 25, citing PECO Statement No. 1 – Neumann at 10).

9. The Commission relies upon Section 6.1 (Company's Service Lines) of the PECO tariff to conclude that the point of delivery in this case is the underground cable located 18 inches inside the Park boundary at Gradyville Road (Initial Decision at. 25).

10. Section 6 of PECO's tariff addresses private property construction and Section 6.1 provides as follows in relevant part:

> **6.1 COMPANY'S SERVICE LINES.** Where the Company has distribution facilities of adequate capacity on the highway or in other trunk line location adjacent to the premises to be served, it will provide, own and maintain standard service-supply lines as follows:
>
> (a) UNDERGROUND:
> Underground cable construction to a point approximately 18 inches inside the *property line of the customer* …
>
> (b) AERIAL:
> A single span of aerial open wire or cable construction to the first suitable support of the customer, nominally 100 feet inside the *property line of the customer* …

(PECO Statement No. 1 at 8 Neumann; PECO Cross Ex. 2) (emphasis added).

11. The Park boundary at Gradyville Road is not the property line of the separate customers within the Park being served by PECO.

12. The tariff definitions of the terms "customer" and "property line" are key to analyzing the proper point of delivery, but are not considered in the Initial Decision.

13. A "customer" is "any person, partnership, or corporation, lawfully receiving service at a single meter location from the company" (DCNR M.B. at 7).

14. The Initial Decision includes facts supporting the conclusion that DCNR, Bamash and Chidester each lawfully receive service from separate meter locations and, therefore, are separate PECO customers (Initial Decision at 12-14, ¶¶ 36-44).

15. To the extent the Commission's Initial Decision is based on a finding that DCNR is the only customer being served by the underground cable at issue, that finding would not be supported by Section 2.3 of the tariff (Single-point availability), which was properly raised and discussed in DCNR's main brief (DCNR M.B. at 14-15), and the Commission's review of this tariff provision would be required.

16. In addition, the tariff defines "property line" as the "division line between land held in or for private use, and land in which the public or the company has a right to use, or, the division line between separately owned or occupied land" (DCNR M.B. at 7-8).

17. The customers receiving service from PECO each separately occupy land within the Park.

18. The appropriate point of delivery under Section 6.1 of the tariff is 18 inches inside the division lines between the separately occupied land of each customer, not the Park boundary at Gradyville Road.

C. The Commission Failed to Consider Tariff Provisions Important to Determining that the Underground Cable is a Supply Line Extension.

19. DCNR asserted that the tariff provisions regarding PECO supply lines support the conclusion that much of the underground cable line at issue is a supply line, not a customer service line (DCNR M.B. at 10-12, 20).

20. Specifically, DCNR pointed to provisions in Section 7 of the tariff which address the PECO supply trunk line and supply line extensions (DCNR M.B. at 10-12, 20).

21. Section 7.1 of the tariff provides as follows:

> **7.1 TRUNK LINE CONSTRUCTION.** The Company will construct, own and maintain overhead or underground distribution facilities, either secondary, primary, or high tension, located on the highway or on rights-of-way acquired by the Company and used or usable as part of the Company's general distribution system.

(DCNR M.B. at 10).

22. Section 7.2 of the tariff requires PECO to construct extension to its supply trunk lines and establishes when a customer will be charged for such extensions (DCNR M.B. at 20).

23. The Initial Decision sets forth undisputed facts regarding PECO's acquisition of rights-of-way that allow PECO to extend the supply trunk line along Gradyville Road onto the Park and PECO offered in 1970 to construct an aerial line to provide service to the customers located within the Park (Initial Decision at 8-10, ¶¶ 8-14, 20).

24. PECO was unwilling, however, to extend the supply line via underground cable (Initial Decision at 10, ¶ 21).

25. Given PECO's refusal to construct the needed supply line extension and DCNR's need to complete improvements to the Park consistent with its statutory mandate[1] to

[1] *See* Section 302(a)(3) of the Conservation and Natural Resources Act, 71 P.S. § 1340.302(a)(3).

retain the "naturalistic appearance" of the Park, DCNR proceeded to construct the line itself (*Id.*, ¶ 19, 21).

26. PECO contends that DCNR owns the line and is responsible for its maintenance because DCNR constructed the line (Initial Decision at 29). However, the tariff provisions do not support this conclusion. If a line is properly classified as a supply trunk line under the tariff, thus making PECO responsible for the line, PECO cannot shift that responsibility to a customer by refusing to construct the line in the first place, unless the tariff provides for such a shift. Neither PECO nor the Commission in its Initial Decision points to any tariff provision that does so.

27. Similarly, PECO cannot adopt design practices and electrical service requirements that shift responsibility for a line unless the tariff provides for such shifting. PECO contends that DCNR's contractor did work that PECO would typically do if PECO owned the underground cable (*e.g.*, spliced the primary cables) and did the work in a way that differed from how PECO would do it if PECO owned the line (*e.g.*, split off phases of the cable to serve individual customers without modularizing the service) (Initial Decision at 11-12, ¶¶ 29-32). Given PECO's refusal to construct the underground cable, however, these deviations can hardly be used to alter the fundamental classification of the line under the tariff unless the tariff provides for such reclassification. Neither PECO nor the Commission in its Initial Decision points to any such authorization under the tariff.

D. The Cases Cited by the Commission in its Conclusion of Law Support DCNR's Interpretation of the Tariff.

28. The Commission cites two cases, *Kossman* and *Brockway Glass Co.*, *supra,* in its conclusion of law, which support its statement that an approved tariff is binding on the public utility and its customer.

29. These cases, however, support DCNR's contention that PECO owns the underground cable because PECO's ownership is consistent with the terms of PECO's tariff.

30. In *Kossman*, a private developer (Kossman) of commercial shopping centers challenged certain charges imposed by the electric utility company (Duquesne) for construction of electric lines to serve the developer's facilities. 694 A.2d at 1149. The developer would have been entitled to a refund under the tariff if the lines were supply lines, but not if they were service lines. The developer argued that the lines serving the shopping centers were the same as supply lines serving large residential developments. *Id.* at 1152. The court disagreed finding that the lines to the shopping centers, like lines to large apartment buildings, were service lines to individual facilities and that such service lines were the same as service lines to individual residential customers each on one private parcel—not the same as not supply lines. *Id.* at 1152. PECO attempts in this case to characterize service to the customers located within the Park as service to a single property—the Park, but the definitions in PECO's tariff do not support this conclusion.

31. In *Kossman*, the court also observed that supply line costs becomes part of the utility's rate base paid for by all of the utility's customers because the customers receive benefits from these lines. *Id.* However, the court did not believe the cost of the lines serving the developer's commercial shopping centers should be paid by all of the utility's customers. *Id.* Unlike the developer in *Kossman*, DCNR is a state agency managing a park for the benefit of the

public. Therefore, the public policy implications present in *Kossman* are not present here. The cost of the supply line extension serving the customers within the Park should be paid by all of PECO's customers because they live near and can enjoy the benefits that this public Park has to offer. To conclude otherwise is not only inconsistent with the tariff, but also requires that taxpayers of the entire Commonwealth pay the cost of the line rather than the citizens most likely to receive the benefits of this public resource.

32. Like *Kossman*, *Brockway Glass Co.* also supports DCNR's position in that it emphasizes the importance of complying with the provisions of a tariff and the inability of a utility to take actions that vary the terms of the tariff. In *Brockway Glass Co.*, the company sought to reduce the rate it was paying for electricity because the company was terminating operations and reducing its electricity demands. 437 A. 2d at 1069. The utility company's tariff required a minimum advance notice of one year before a rate change could be implemented. *Id.* The Commission found that the utility company was bound by the tariff stating that "any attempt by it to vary the terms of the tariff either as to rate or notice requirements would have been ineffective." *Id.* at 1070. PECO likewise does not have the ability to modify the terms of its tariff through its practices or requirements.

II. The Commission's Single Conclusion of Law Relating to the Requirements of its Regulations is Insufficient to Support its Initial Decision.

33. The Commission's single conclusion of law with respect to application of its regulations states that the "Commission's regulation at 52 Pa. Code § 57.1 supports the position that ownership of the underground cable ends 18 inches over the *customer's property line*" (Initial Decision at 31, ¶ 4) (emphasis added).

34. The issue in this case, however, is the location of the customer's property line and regulatory provision cited in the Commission's conclusion of law is insufficient to determine that location.

35. The regulation cited by the Commission is part of the definition of the term "service line," which provides:

> *Service line*—The wires or cables and appurtenances which connect the electric supply line of the public utility with the customer's installation and which comply with either of the following:
>
> (i) If overhead-open-wire or cable-construction, the span, normally 100 feet, extending to a suitable support provided by the customer.
> (ii) If the electric supply line is of underground construction, the underground facilities extending to but not exceeding 18 inches inside the property line of the customer.

36. The Commission's only discussion of its regulations in the Initial Decision is the following paragraph:

> The Respondent's witness explained that the Commission's regulation, 52 Pa. Code § 57.1, states that a utility's electric supply lines end 18 inches over the customer's property line (PECO Statement No. 1 at 9 – Neumann). In addition, the Respondent submitted that the Commission's regulations define the term "customer's installation" in a manner that contemplates the possibility of significant customer-owned facilities – including cables – that may be necessary to bring the customer's installation into electrical contact with the utility's service line. The following definition is found in 52 Pa. Code § 57.1:
>
> > *Customer's installation*—Wiring and equipment on the premises of a customer, and poles, wires or cables and other facilities necessary to bring the terminus of the wiring of a customer to a location where it may be connected to the service line.

(Initial Decision at 24). While the definition of "customer's installation" includes the word "cable", the definition of "service line" and "electric supply line" also include this word, so the presence of the word "cable" in the definition of "customer's installation" does not dictate that DCNR owns the underground cable at issue.

37. DCNR contends that the underground cable is a "line extension" to PECO's electric supply line and, therefore, owned by PECO. The term "line extension" is defined in the Commission's regulations as follows:

> *Line extension*—An addition to the public utility electric supply line necessary to serve the premises of a customer which addition is so located that it cannot be supplied by means of a service line from the existing electric supply line.

(DCNR M.B. at 6).

38. The following two terms used in the "service line" definition are also defined in the Commission's regulations (52 Pa. Code § 57.1) as follows:

> *Electric supply line*—The wires or cables, with the necessary supporting or containing structures and appurtenances, used in connection with an overhead or underground system of a public utility, providing electric power, located on a public highway or utility right-of-way and used to transmit or distribute electric energy.
>
> *Customer*—A party supplied with electric service by a public utility.

39. Application of the facts set forth in the Initial Decision support DCNR's contention that the underground cable is a "line extension" under the Commission's regulations.

40. The underground cable in question connects to PECO's overhead electric supply line at a pole located along Gradyville Road (Initial Decision at 10, ¶ 23).

41. PECO has an easement that allows it to extend its electric supply line by radiating an extension from poles along Gradyville Road to serve buildings on Park property (*Id.* at 9, ¶ 10).

42. PECO offered to construct an overhead extension of its supply line to serve the needs of customers in the Park in 1970 (*Id.* at 10, ¶ 20).

43. The Bureau of State Parks needed an underground cable, however, which PECO was not willing to install, so the Bureau constructed the underground cable itself (*Id.* at ¶¶ 19, 21).

44. The supply line extension was necessary because the premises of the customers that needed to be served were not along Gradyville Road and, therefore, the customer service lines could not connect to the existing supply line along Gradyville Road.

45. The underground cable extended the electric supply line so that customer service lines could then be constructed to serve the premises of each customer.

46. The function of the underground cable is exactly that described in the Commission's regulatory definition of a line extension.

47. PECO asserts that the underground cable cannot be a line extension because DCNR constructed it. However, nothing in the Commission's regulations allows PECO to transfer ownership of a supply line extension by refusing to construct it and forcing the customer to do so.

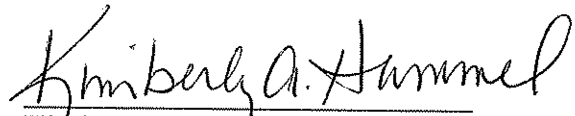
48. Like PECO's tariff, the Commission's regulations include provisions that allow PECO to pass the cost of the construction of line extensions on to its customers (*see* 52 P.S. § 57.19); however, doing so does not transfer ownership of the line extension to the customer.

49. The fact that the Bureau of State Parks constructed the line extension in 1972 rather than disputing PECO's refusal to do so and delaying completion of the Park improvements does not mean the underground cable was no longer a supply line extension under the Commission's regulations. Neither PECO nor the Commission points to any regulatory provision that would support such a result.

50. PECO points to its various design practices and electric service requirements to support its contention that DCNR owns the underground cable. However, PECO's practices or requirements cannot alter the Commission's regulations by shifting responsibility for a line extension from PECO to its customers. The Commission's regulations dictate that the underground cable is a supply line extension and that PECO had responsibility for repairing the underground cable.

For the reasons set forth in the above exceptions, DCNR respectfully requests that the Commission modify its Initial Decision to include specific conclusions of law relating to the Public Utility Code, PECO's tariff and the Commission's regulations consistent with these exceptions to conclude that (1) the underground cable in question is an extension of PECO's electric supply line, (2) PECO has responsibility for repairing the line, and (3) PECO must reimburse DCNR for the costs DCNR incurred to repair the supply line extension.

Respectfully Submitted,



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Date: May 11, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served upon the parties listed below an electronic mail copy of the Exceptions to the Initial Decision filed by the Department of Conservation and Natural Resources using the electronic filing system in accordance with the requirements of 52 Pa. Code § 1.54.

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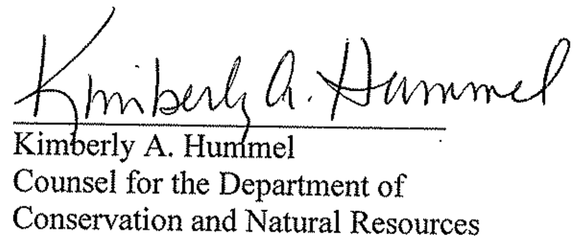

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Date: May 11, 2010