

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JOHN NORBECK, DIRECTOR,	:	
BUREAU OF STATE PARKS,	:	
PENNSYLVANIA DEPARTMENT OF	:	
CONSERVATION AND NATURAL	:	
RESOURCES	:	
Complainant	:	
v.	:	Docket No. C-2008-2051267
PECO ENERGY COMPANY	:	
Respondent.	:	

REPLY EXCEPTIONS OF PECO ENERGY COMPANY

Dated: May 21, 2010

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I. Introduction

PECO Energy Company (“PECO” or “Respondent”), by and through its attorneys, Reger Rizzo & Darnall LLP, hereby files its Reply Exceptions to the Exceptions filed on May 11, 2010 of The Commonwealth of Pennsylvania Department of Conservation and Natural Resources (“Complainant” or “DCNR”) to the Initial Decision (“ID”) of Administrative Law Judge Cynthia W. Fordham (“ALJ Fordham” or “Judge Fordham”) issued on April 22, 2010.

The dispositive issue in this complaint proceeding is who owns the underground line located within the confines of the Ridley Creek State Park (“Park”). The Complainant argues that although it designed, built and paid for the line within the confines of the Park, PECO is the owner of the line and is therefore responsible for its maintenance and repair. PECO contends that the line is a customer service line, ownership was never transferred to PECO and its actions and practices are consistent with its tariffs, Commission regulations and the Public Utility Code (“Code”).

ALJ Fordham carefully weighed the testimony of the expert witnesses and found that PECO’s expert’s testimony should be given more weight than that of the Complainant. As a result, she concluded that the Complainant’s position (that PECO owned the line) was inaccurate and that the Complainant failed to carry its burden of proof that the line in question was the responsibility of PECO for repairs and maintenance. *ID* at 31.

The Complainant’s Exceptions argue that the conclusions of law in the ID are insufficient to support the Commission’s order dismissing the complaint. *Exceptions* at 1. No exceptions are taken to any of the Findings of Fact or the procedural rulings set forth in the Initial Decision.

The Initial Decision is founded on competent and relevant record evidence and sufficiently specific and should be adopted without modification. The Complainant failed to carry its burden of proof that PECO owns the line in question. The ALJ properly weighed the record evidence and found PECO's expert testimony more credible than the testimony proffered by the Complainant. The Conclusions of Law set forth in the ID correctly apply the relevant statutes and legal principles to the record evidence. The Conclusions of Law along with the very extensive Findings of Facts made by Judge Fordham is more than sufficient to support the conclusions reached in the Initial Decision. The Commission is under no obligation to make every possible conclusion of law which may be drawn from the facts. The Commission should adopt the Initial Decision without modification.

II. Initial Decision

ALJ Fordham succinctly stated the uncontested facts in this complaint proceeding:

- PECO refused to install an underground facility in 1972 to serve Ridley Creek State Park and the two lessees of the Park.
- PECO offered to install an aerial facility but the Park rejected that offer.
- The Complainant's predecessor hired a contractor, Higgins, to install an underground facility which was configured to several buildings in the Park.
- The Complainant designed, built and paid for the underground electric facilities that serve the Park.
- Whichever party owns the facilities is responsible for the maintenance and repair.

ID at 22.

ALJ Fordham made eighty-nine (89) findings of fact (*ID* at 8-21) and four (4) conclusions of law (*ID* at 31) and concluded that:

The Complainant has failed to sustain its burden of proof. The record evidence shows that the Complainant hired a contractor to install the underground cable in 1972. Based on the Commission's regulations, the Respondent's tariff and its Design practices, the

Complainant owns the facilities that are 18 inches over the Park's property line. The Respondent was not responsible for maintaining or repairing the facilities. When the outage occurred, the Respondent sent a crew to restore the power. The Complainant has failed to present evidence that the thumper used by the Respondent's crew damaged the line. Accordingly, the complaint is dismissed in its entirety.

ID at 31.

III. The Complainant's Exceptions

The Complainant has not excepted to any of the eighty-nine (89) Findings of Fact or the procedural rulings set forth in the Initial Decision. As such, those findings and rulings are deemed uncontested.

The Complainant states that the conclusions of law provided in the Initial Decision are insufficient to support the Commission's order dismissing the complaint¹. *Exceptions* at 1. The arguments presented by the Complainant are without merit. PECO incorporates its arguments as set forth in its *Main Brief* at pp. 30-42 and *Reply Brief* at pp. 5-10 and pp. 14-18.

Specifically, two Exceptions are identified and each Exception is addressed separately.

Complainant's Exception #1: The Commission's single conclusion of law relating to the requirements of the PECO tariff is insufficient to support its Initial Decision.

PECO Response: The Conclusion of Law relating to the PECO Tariff is amply supported by the substantial record evidence. Moreover, the Conclusion of Law, along with the very extensive Findings of Fact made by the Administrative Law Judge, is more than sufficient to support the conclusions reached in the Initial Decision. The Commission should adopt the Initial Decision without modification.

Conclusion of Law # 3 states: An approved tariff is binding on the public utility and its customers. *Kossman v PA PUC*, 694 A.2d

¹ It should be noted that the Complainant did suggest "findings of law" in its *Main Brief*. A review of those suggestions revealed that they were not conclusions of law but rather proposed variations on the findings of facts previously suggested. The Complainant provided no record support for these suggested conclusions as required by the 52 Pa Code § 5.501(a)(2) and (b)(2).

1147 (Pa. Cmwlth. 1997), *Brockway Glass Company v PA PUC*, 63 Pa. Cmwlth. 238, 437 A.2d 1067 (1981).

The Complainant argues that the Initial Decision failed to: (1) provide conclusions of law relating to the obligations of utilities under the Public Utility Code; (2) consider tariff definitions to determine the point of delivery of service; and (3) consider tariff provisions to determine that the underground cable is a supply line extension.

The Complainant is incorrect that the ID needs to set forth conclusions of law that define the obligations of a utility under the Public Utility Code. A conclusion of law is defined as “a conclusion drawn by the court in the exercise of its legal judgment from the facts found by it, which, in connection with the findings of fact, constitute the basis of the decision of the case.” 53 AmJ1st Trial §1132.

Commission orders must be sufficiently specific to enable an appellate court to determine the controverted question and whether proper weight was given to the evidence. *Jones Motor Company, Inc. v PA PUC*, 195 A.2d 125 (1963). The Commission is under no obligation to make every possible conclusion of law which might be drawn from facts. *Reynolds Disposal Co. v PA PUC*, 468 A.2d. 1179 (1983). Furthermore, as the Supreme Court stated in *Pittsburgh Railways Co. v PA PUC*, 182 A. 2d 80 (1962), a complaint that the Commission’s findings are insufficient should come from the court and not a party to the proceeding.

The Complainant’s attempt to insert the issue of utility obligations under Section 1501 of the Code regarding unreasonable utility service for the first time at the briefing stage was properly rejected by Judge Fordham. *ID* at 30-31. The Complainant is again attempting to insert an issue not raised in the Complaint or addressed in the Complainant’s testimony. This attempt should again be rejected.

The Complainant is incorrect that the ALJ did not consider tariff definitions to determine the point of delivery of service or to determine that the underground cable is not a supply line extension. Both parties presented expert testimony as to appropriate interpretation of the Commission's regulations and PECO's tariff and practices for the fact scenario presented in the Complaint.

The Complainant sponsored the testimony of a consultant who was a former employee of the First Energy Company ("First Energy") (*Finding of Fact #77*). PECO presented the expert testimony of an employee whose job description includes interpreting PECO's tariffs as well as responding to customer inquiries regarding ownership and responsibility for facilities. (*Findings of Fact #78, 79, 80*).

Judge Fordham properly reviewed the testimony of both experts, considered the Complainant's position and rejected its argument based on the evidence of record. *Initial Decision* at 31. The Commission held in *Roane v PA Power & Light Co.*, Docket No. F-00217293, Order entered November 14, 1996:

In determining the weight to be attached to the testimony of the witness, it is proper for the presiding judge to consider the witness's appearance, general bearing, conduct on the stand, demeanor, manner of testifying, such as candor or frankness, or the clearness of his/her statement and the intonation of his/her voice. The credibility is a matter within the purview of the presiding judge who hears the matter.

As the record evidence clearly established, the witness for the Complainant based his conclusion that PECO owned the line in question on his experience as an employee of First Energy and his familiarity with the First Energy system (*Finding of Fact #77*). First Energy's tariffs define the term "point of delivery" differently than PECO's tariff. (*Finding of Fact #83*). The term "point of delivery" is defined differently in different utility tariffs. (*Finding of Fact*

#77). For First Energy customers, the “point of delivery” is at the meter. (*Finding of Fact #84*). “Point of delivery” in the PECO tariff is defined as the point at which the supply line and the customer installation connect. (*Finding of Fact #82*). Since the service in this case an underground cable, the point of delivery is 18 inches across the property line of the Park. (*Finding of Fact #82*).

The record evidence supports a finding that it is irrelevant to the disposition of the question of ownership that there are four separate customers (each with its own PECO meter) located within the Park. PECO’s practices, as implemented under its Electric Service Requirements, have resulted in numerous situations in which customers own and maintain direct-buried cable that connects their structures to PECO facilities in the streets. (*Finding of Fact #88*). As PECO’s expert witness Scott Neumann testified, there are at least four parks other than Ridley that have customer-owned underground cables which connect customer structures to the PECO system in the streets. (*PECO Statement No. 1* at 14).

The Complainant in its Main Brief fails to show why the regulations and tariff provisions cited and relied upon by PECO were not applicable. *ID* at 30-31. This issue was also not addressed in the Exceptions. Rather, the Complainant argues that public policy dictates that PECO take ownership and maintenance of the line:

The cost of the supply line extension servicing 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 the 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.

Exceptions at 8.

The Complainant has failed to carry its burden of proof that the supply line owned by PECO. The Complainant failed to introduce competent evidence, which supports its conclusions that PECO owned the line or that DCNR transferred ownership of the line to PECO. (*Finding of Fact #32*).

Furthermore, Judge Fordham properly ruled that any discussion of PECO Tariff 2.3 raised in the Complainant's Main Brief at pp. 14-15 should be disregarded since it was raised for the first time in the Main Brief. *ID* at p. 31. The Complainant states, "it was properly raised and discussed in DCNR's Main Brief." *Exceptions* at p. 4. There is no further discussion as to why the ALJ allegedly erred by not addressing this argument or where in the record this issue was ever raised. Simply because the Complainant states that it is properly raised without further discussion does not make the issue appropriate for discussion. As PECO pointed out in its Reply Brief, this issue was not referenced in the Complaint nor in any of the testimony of DCNR's twelve witnesses. PECO has had no opportunity to develop a record or cross-examine on any of these arguments and it would be patently unfair to allow the Complainant to introduce this argument into the proceeding at this point. *PECO Reply Brief* at p. 8.

The first Exception filed by the Complainant should therefore be denied in its entirety. The Initial Decision is amply supported by substantial evidence and should be adopted without modification.

Complainant's Exception #2: The Commission's single conclusion of law relating to the requirements of its regulations is insufficient to support its Initial Decision.

PECO Response: The Conclusion of Law relating to the Commission's regulation is amply supported by the substantial record evidence. Moreover, the Conclusion of Law, along with the very extensive Findings of Fact made by the Administrative Law Judge, is more than sufficient to support the conclusions reached in the Initial Decision. The Commission should adopt the Initial Decision without modification.

Conclusion of Law #4: The Commissions' 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.

The Complainant argues that the issue in this case is the location of the customer's property line and the regulatory provision cited in the Commissions' conclusion of law is insufficient to determine that location. *Exceptions* at 9.

The determination that the line in question was not the property of PECO is based on the substantial record evidence and stated in the extensive findings of fact enunciated in the Initial Decision. Judge Fordham correctly weighed the evidence of the expert witnesses and concluded that the determination as offered by the Complainant was not supported by the record evidence. *ID* at page 27. DCNR's expert witness based his analysis and conclusions on his expertise with the First Energy system, not the PECO system. (*Finding of Fact #77*). A "one size fits all" analysis is not applicable to the electric distribution systems of the regulated utilities. Judge Fordham properly evaluated the expertise of each expert witness and concluded that PECO's expert witness was more credible and his testimony should be given greater weight. Specifically, the ALJ found that the Complainant's expert's opinion that the point of delivery is at the meter was inconsistent with PECO's tariffs and its Electric Requirements. *ID* at pp. 25-27.

The Complainant did not present testimony that ownership of the line was transferred to PECO (*Finding of Fact #32*). or that PECO's actions were inconsistent with DCNR's ownership of the line. (*Finding of Fact #71*). The Complainant has not offered any argument based on the record evidence as to why its interpretation should be accorded more weight.

Finally, it must be noted that once again the Complainant has ignored the ruling of Judge Fordham regarding the ability of DCNR to contest PECO's actions in 1972. Judge Fordham ruled that the statute of limitations has expired and DCNR cannot now contest PECO's actions in

1972. This issue was first raised in the Complainant's Main Brief and no record evidence exists on this issue. *ID* at 31.

In its Exceptions, the Complainant states that rather than dispute PECO's refusal to construct the line in 1972, it designed and built the line and that "does not mean the underground cable was no longer a supply line extension under the Commission's regulations." *Exceptions* at 11.

The record evidence supports the finding that the line in question was **NEVER** a supply line owned by PECO but rather a customer service line, designed, built and paid for by the Complainant. *Findings of Fact #24 and 25*. PECO has never considered this line a company owned supply line or part of its distribution system and its actions are consistent with that finding. *Findings of Fact # 48 and 71*.

The second Exception filed by the Complainant should be denied in its entirety. The Complainant has offered no record evidence to support its position. Mere assertions are not evidence. The Initial Decision is based on competent and substantial record evidence and should be adopted without modification.

III. Conclusion

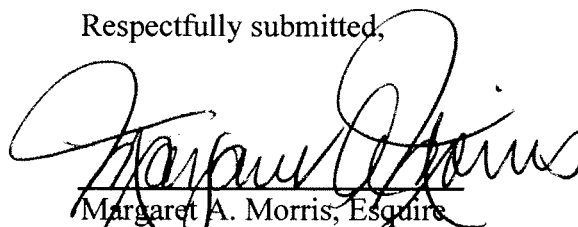
The Exceptions filed by DCNR are without merit. Its allegations/contentions are not supported by the record evidence and many of the "facts" alleged by the Complainant are not supported by the record evidence and none has been provided in support of its position. The Complainant has failed to carry its burden of proof that PECO owned the line in question. The ALJ properly weighed the expert testimony and found that the testimony of PECO's expert should be given more weight than the testimony offered by the Complainant's expert. The

Complainant never presented testimony that ownership of the line was transferred to PECO or that PECO's actions were inconsistent with DCNR's ownership of the line.

The Initial Decision is based on competent and substantial record evidence and should be adopted without modification.

WHEREFORE, PECO Energy Company requests that its Reply Exceptions be granted in their entirety, the Initial Decision adopted without modification and the Exceptions of The Commonwealth of Pennsylvania Department of Conservation and Natural Resources be dismissed in their entirety.

Respectfully submitted,



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