



Duquesne Light

Our Energy...Your Power

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December 6, 2010

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Barbara R. Lolly v. Duquesne Light Company
Docket No. C-2010-2167824

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Exceptions. A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,

Krycia Kubiak
Assistant General Counsel
Duquesne Light Company

encs

cc: Barbara R. Lolly (w/enclosure)
Administrative Law Judge Katrina L. Dunderdale (w/enclosure)

Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BARBARA LOLLY)
)
 Complainant,)
)
 v.) Docket No. C-2010-2167824
)
 DUQUESNE LIGHT COMPANY,)
)
 Respondent.)

**EXCEPTIONS
OF
DUQUESNE LIGHT COMPANY**

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Dated: December 6, 2010

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INTRODUCTION

Duquesne Light Company (“Respondent”) files these Exceptions to the Initial Decision dated November 16, 2010, which assessed a penalty against Respondent. This matter arose following a denial of a claim for monetary damages that was submitted by Complainant.

A hearing was held on July 29, 2010 by telephone. A complete transcript of the hearing has been prepared. Complainant, Barbara Lolly, who was not present at the time of the incident, was the only witness to testify in support of her Formal Complaint. Respondent presented testimony from three witnesses, including the troubleshooter who investigated the claim and the third party claims administrator.

Respondent respectfully requests that the following Exceptions be granted and the Initial Decision be reversed as described more fully below.

ARGUMENT

Exception 1: The ALJ exceeded her authority by considering a claim for damages.

Respectfully, the ALJ erred when she reviewed the arguments of the Complainant concerning her request for damages in coming to her conclusions of law. The ALJ applied incorrect law in the section of the Initial Decision entitled “Complaint for credit due to damaged appliances.” The Commission does not have jurisdiction to consider requests for monetary damages.

The Commission was created by the State Legislature and as a result, its jurisdiction and authority are limited to those areas which are granted to it by statute, in the Public Utility Code, 66 Pa. C.S. §§101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. Feingold v. Bell of Pa.,

477 Pa. 1, 383 A.2d 791 (1977); Allegheny County Port Authority v. Pa. P.U.C., 427 Pa. 562, 237 A.2d 602 (1967); Behrend v. Bell of Pa., 257 Pa. Superior Ct. 35, 390 A.2d 602 (1978); Harrisburg Taxicab and Baggage Co. v. Pa. P.U.C., 786 A.2d 288 (Pa. Cmwlth. 2001); and City of Erie v. Pa. Electric Co., 383 A.2d 575 (Pa. Cmwlth. 1978). Parties to an action may not confer jurisdiction upon a tribunal where none exists. Roberts v. Martorano, 427 Pa. 581, 235 A.2d 602 (1967).

Additionally, a challenge to subject matter jurisdiction is never waived; this jurisdictional question may be raised at any stage of the judicial process. Commonwealth v. Atlantic & Gulf Coast Stevedores, Inc., 422 Pa. 442, 221 A.2d 128 (1966). Furthermore, the mere fact that a party to an action qualifies as a regulated utility does not automatically confer subject matter jurisdiction upon the Commission. DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. 374, 453 A.2d 595 (1982).

As directed by Section 501 of the Code, 66 Pa. C.S. §501, the Commission must “enforce, execute and carry out, by its regulations, orders or otherwise” all provisions of the Code. Section 701 of the Code, 66 Pa. §701, allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer. *See also*, 52 Pa. Code §5.21(a). Nothing in the Code, however, confers jurisdiction upon the Commission to award monetary damages. Accordingly, the Commission possesses no jurisdiction to consider any implied request for reimbursement for property damage. *See*, DeFrancesco v. Western Pennsylvania Water Co., *supra*, Elkin v. Bell of Pa., 491 Pa. 123, 420 A.2d 371 (1980); Feingold v. Bell of Pa., *supra*.

Furthermore, the Commission does not have jurisdiction to consider a request for monetary damages. Commission Administrative Law Judge Corbett has held, “Nothing in the Code confers jurisdiction upon the Commission to award monetary damages. Accordingly, the Commission possesses no jurisdiction to consider the Complainant’s request for monetary damages.” William McLafferty v. Duquesne Light Company, C-2009-2101144, 2009 Pa. PUC LEXIS 158.

Complainant’s Formal Complaint addressed reimbursement for property damage, and the Commission does not have jurisdiction to consider this issue. The main complaint is with the claims decision itself. It is not proper for the Commission to consider whether Respondent acted reasonably in its denial of Complainant’s claim.

Although the ALJ first decided that Complainant failed to establish that Respondent violated the Commission’s regulations with respect to providing reasonable and adequate customer service, the ALJ then stated:

My review of the record evidence leads me to conclude Respondent provided unreasonable service ...when it failed to consider any material provided by Complainant during the complaint process before Respondent concluded its facilities were not at fault.... Respondent also failed to appropriately address the complaint when it set up a “claims process” and then “rubber stamped” its denial without considering any information or documentation from Complainant. In effect, the claim process Respondent established may look good in theory but it fails to deliver customer service. Initial Decision, pg. 8.

The Commission does not have jurisdiction to consider reimbursement for claims of property damage. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa. Comm. 1992) alloc denied 673 A.2d 293 (Pa. 1993).

Complainant spent the bulk of her testimony discussing her damages from an alleged surge. (Tr. pgs 9-14). Although the ALJ stated that Respondent did not consider “information”

from Complainant, the only information that Respondent did not receive before making its decision was the information on Complainant's damages and the costs associated with replacing her appliances. (Tr. pg. 13). Complainant had no information about the surge, about the operation of the circuit, and she was not even an eye witness to the event. (Tr. pg. 31).

As the Commission lacks jurisdiction to decide the issue of whether Complainant is owed damages, the Commission also lacks jurisdiction over Respondent's claims process. Respondent has hired an outside vendor to respond to the claims filed by the public. (Tr. pg. 60). A claims department is a policy decision made by Respondent to assist customers, and is required by neither regulation nor law.

Moreover, Complainant received prompt attention during the claims process. She entered her claim with the company and received an acknowledgment letter shortly thereafter. (Tr. pg. 11 and 61). That letter stated that Duquesne Light will investigate the cause of the claim. (Tr. pg. 61). It also stated that if the claim is accepted, then a request for proof of damages will be mailed. (Tr. pg. 61). Shortly following the receipt of the first letter, Pittsburgh experienced a massive snow storm that shut down mail service for a long time. (Tr. pg. 12). Complainant did call and speak with the claims department and she was told that the investigation into Respondent's liability. (Tr. pg. 12). The claims representative reviewed the information from Duquesne Light's records prior to making a decision. (Tr. pg. 66-67). Within a month, on March 3rd, Complainant received a final decision on the claim. (Tr. pg. 13 and 62).

A review of the Complainant's testimony and all of the evidence of record reveals that the heart of the Formal Complaint is that Complainant's request for damages was denied. She neither complains about the actions of the troubleshooter nor the response time to the claim for monetary damages, only that the decision was not the one that she sought. Whether the claims

decision was valid is not an issue within the jurisdiction of the Commission; therefore, a finding about the claims process is improper.

Exception 2: The ALJ erred in finding that Complainant satisfied her burden of proof.

In order to prevail before the Commission, a Complainant must satisfy the burden of proof. As Judge Dunderdale wrote in the Initial Decision,

“As the party seeking affirmative relief from the Commission, Complainant bears the burden of proof by substantial evidence. 66 Pa. C.S.A. §332(a). Substantial evidence is defined as such evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the evidence of a fact sought to be established. Norfolk & Western Ry. Company v. Pennsylvania Public Utility Commission, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Board of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); Murphy v. Department of Public Welfare, 480 A.2d 382 (Pa. Cmwlth. 1984”

Section 1501 of the Code, 66 Pa. C.S. §1501, requires a public utility to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. The ALJ stated that “Complainant has not met her burden of proving Respondent violated the Commission’s regulations by failing to provide reasonable and adequate customer service when the power surge occurred.” Initial Decision, pg. 6. However, she also stated, “Respondent provided unreasonable service to Complainant and her neighbors on February 3, 2010... Respondent failed to investigate properly.” Initial Decision, pg. 8.

Contrary to the ALJ’s assertions, there is no evidence of record that Respondent failed to investigate properly. Complainant made no such assertions. Complainant was not complaining about the manner in which Duquesne Light responded to the service issue. In fact, Respondent was on her street investigating the incident before she arrived home and noticed that her lights were out or that there was damage. (Tr. pg. 9). She also detailed in a positive manner the way in

which the employee talked to her and explained the situation. (Tr. pg. 10). Respondent presented uncontroverted evidence of a thorough investigation. Therefore, Complainant did not meet her burden and establish that Respondent violated a regulation or statute.

In support of her conclusion, the ALJ made the following findings of fact:

“13. Respondent’s field representative inspected the facilities on February 3, 2010 after receiving complaints about a power surge and loss of electricity but did not see anything unusual or dysfunctional about the transformer or other facilities which service Complainant’s residence. (Tr. 33-35).

14. The only problem noted by Respondent’s field representative on February 3, 2010 was that the neutral on the primary side of the transformer ‘spit a little’ and appeared to be loose which could have caused a loss of voltage at the transformer.” Initial Decision at 4.

It is on the basis of these findings of fact that the ALJ has determined that the investigation was insufficient.

There is additional uncontroverted information on the record that details the full investigation that Respondent performed. Gerald Paul, a Duquesne Light employee with approximately thirty years of experience with the company, was dispatched to Clearview Avenue on February 3, 2010, at 3:45 p.m. (Tr. at 33). His first act was to check the transformer. (Tr. at 34). He then checked the voltage. (Tr. at 34). He did not identify any problems with the transformer or the voltage, so his next step was to walk along the line. (Tr. at 34). This investigation did not identify any problems, so he then interviewed customers near the transformer to determine if they had witnessed anything unusual. (Tr. at 34).

Mr. Paul’s investigation through interviews did reveal a possible cause of the problem in the neighborhood. A man who lived at the house near the pole with the transformer told Mr. Paul that dumpsters were being moved earlier that day near that pole. (Tr. at 35). When Mr. Paul returned to the pole, he saw green paint on the pole. (Tr. at 35). Mr. Paul testified that he assumed that a truck hit the pole and shook the line and perhaps caused the wires to come in

contact with one another. (Tr. at 35). This assumption explained the voltage spike. Therefore, although Mr. Paul did not see the truck collide with the pole, based upon his years of experience, that was his reasonable assumption of the cause of the trouble. (Tr. at 35).

Furthermore, Mr. Paul inspected the transformer. He found that the neutral on the primary side was loose in the primary bushing when he wiggled it. (Tr. pg. 39). Although he did not believe that that could cause a surge, he had the transformer replaced as a precaution. (Tr. pg. 38). Instead, it was possible that when the truck hit the pole, the high voltage wires banged together causing the surge. (Tr. pg. 37). This would have been a momentary condition, causing no permanent damage to the facilities, and not caused by a problem with the facilities. (Tr. pg. 34). At the time that Mr. Paul was investigating, all of the customers had power and there was nothing noticeably wrong with any of Respondent's facilities. (Tr. pg. 34).

Mr. Paul's failure to find a definitive cause to the problem does not amount to unreasonable service. Mr. Paul diligently reviewed the situation and talked to the customers involved. Even Complainant did not criticize Mr. Paul's work in investigating this problem.

The Public Utility Code does not require that the service provided be perfect, but that it be reasonable. O'Connor v. PECO Energy Company, PA PUC Docket No. C-00945774 (1994). The Commission approves the cost of providing a utility system that is designed to provide reasonable service at reasonable rates – not perfect service without regard to cost. In re: Tariff Provision of PECO Energy Co., PA PUC Docket No. M-00960882; R-0943065 (1997). Reasonable service may result in occasional loss of service or property damage. *Id.*

In order to establish a sufficient case against a utility to satisfy the burden of proof, a complainant must show the utility is responsible or accountable for the problem described in the complaint. David Lee v. Pennsylvania American Water Corp., PA PUC Docket No. C-2008-

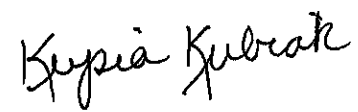
2064234 (2010). Even pro se complainants must provide relevant and necessary information. Shank v. PPL Electric Utilities Corp., C-2009-2087300 (2009).

The only evidence of record is that the surge could have been caused by a third party's truck collision with the pole, which would have caused a momentary contact of the high voltage wires. No alternative scenarios were presented, and no evidence was presented which would undermine this theory. When Mr. Paul arrived to investigate, all of the neighbors had power and there were no observable problems with any of Respondent's equipment. Even so, Mr. Paul stayed to review the entire area and spent time talking to bystanders. He also ordered a replacement of a transformer out of an abundance of caution. It was the outage taken to replace the transformer that Complainant noticed when she returned home from work. Therefore, the bulk of the investigation and work was done before Complainant even noticed a problem.

CONCLUSION

Duquesne Light respectfully submits the Exceptions enumerated above. The Commission lacks jurisdiction to consider claims for monetary damages and Complainant has not met her burden of proof by introducing substantial evidence that Respondent's investigation was unreasonable. For these reasons, the penalties against Respondent were assessed in error. Respectfully requests that the Initial Decision be reversed insofar as it concludes that Respondent's claims process and investigation amounted to unreasonable service.

Respectfully submitted,

A handwritten signature in black ink that reads "Krysia Kubiak". The signature is written in a cursive style with a large, prominent 'K' at the beginning.

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