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July 19, 2011

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Barbara Gallagher v. PECO Energy Company
Docket No. C-2010-2201568

Dear Secretary Chiavetta:

Enclosed for filing please find the Exceptions of PECO Energy Company to the Initial Decision issued in the above-captioned mater. These Exceptions were filed electronically via the Commission's e-filing system today. A copy the Exceptions have been served in accordance with the enclosed Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

STEVENS & LEE



Michael A. Gruff, Esq.

Enclosure

cc: Cheryl Walker-Davis, Director, Office of Special Assistants
Certificate of Service

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A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BARBARA GALLAGHER

Complainant

v.

PECO ENERGY COMPANY

Respondent

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Docket No. C-2010-2201568

**EXCEPTIONS OF
OF PECO ENERGY COMPANY**

Pursuant to 52 Pa Code § 5.533, PECO Energy Company (PECO) hereby files its Exceptions to the June 30, 2011 Initial Decision (“I.D.”) of the Administrative Law Judge (“ALJ”) in the above-referenced matter. The I.D. mistakenly recommends a violation against PECO for improper inspection and maintenance of a private utility pole on a customer’s property. The I.D. should be rejected by the Commission, because it is well-settled that the Commission’s pole inspection and maintenance regulations do not apply to private customer facilities that are not-owned by a utility. The I.D.’s recommendation is improper because the record in this case reflects that:

- PECO does not own or control the pole in question, and therefore is not responsible for maintaining the pole,
- The pole is not in an unsafe condition (a point the Complainants and ALJ acknowledge);
- The service lines of a telephone company and a cable company are also affixed to the pole;

- PECO repeatedly sought to take ownership of the pole from the Complainants but the Complainants refused PECO's requests, and
- PECO has diligently attempted to work with all affected parties to devise a workable solution for relocation of its service lines that would satisfy the Complainants and other affected customers

Because the I.D. is premised on multiple erroneous findings of fact and conclusions of law, the I.D. should not be adopted by the Pennsylvania Public Utility Commission ("Commission"). For the reasons set forth more fully below, the I.D. should be rejected and the Commission should dismiss the Complaint in its entirety with no finding of a violation against PECO.

BACKGROUND AND PROCEDURAL HISTORY

Barbara Gallagher initiated this proceeding on behalf of herself and her husband by filing a Formal Complaint ("Complaint") against PECO on or about September 27, 2011 (Mr. and Mrs. Gallagher will be referred to herein as "Complainants"). The Complaint alleges that PECO does not have a valid easement to run service lines over the Complainants' property, and requests that PECO be ordered to remove its service lines from the Complainants' property so that the Complainants could remove the private pole to which those service lines are affixed.

PECO filed an Answer to the Complaint on October 19, 2010. PECO's Answer confirmed that the pole referenced in the Complaint was neither owned nor installed by PECO. PECO's Answer also explained that PECO has a valid easement which permits it to place its facilities on the Complainant's property, and attached a copy of the easement document. PECO's Answer also reiterated that PECO was willing to work with the affected parties to design new service configurations to serve all of the affected properties.

The evidentiary hearing was held in this matter on April 22, 2011. The Complainants presented the testimony of Mrs. Gallagher, and introduced no exhibits into the record. PECO presented the testimony of three witnesses, and introduced seven exhibits into the record. PECO's first witness explained that PECO had a valid easement dating from 1958 to place electric facilities on the property which is now owned by the Complainants.¹ PECO's second and third witnesses explained the configuration of the facilities that are present on the Complainant's property and how those facilities are in place not only to serve the Complainants' property, but also to serve their neighbors' property at 103 Deepdale Road as well.² PECO's witnesses described the extensive history of discussions with the Complainants and their neighbors to try to accommodate the wishes of all of parties involved,³ and also explained the alternative service configurations that PECO designed in order to relocate the service lines in question.⁴ PECO's witness explained the difficulties presented by the properties in question when trying to identify an alternative service configuration that would allow for the removal of service lines from the Complainants' property, including difficulties presented by existing vegetation and underground gas lines.⁵ Despite these challenges, PECO presented the Complainants with two alternative service configurations for their consideration, even though PECO's witness confirmed that the existing configuration was the best and most feasible way to serve both the Complainants and their neighbor's property.⁶ Ultimately, the Complainants rejected the alternative configurations presented by PECO because they required the

¹ See Tr., pp. 30-33 and PECO Exhibits 1 and 2

² Tr., pp. 35-49 and PECO Exhibits 3 and 4

³ Id.

⁴ Tr. pp. 50-65 and PECO Exhibits 6 and 8

⁵ Tr. pp. 56-62

⁶ Tr. p. 57

Complainants to share in the expense of the relocation of the facilities.⁷

The Initial Decision in this matter was issued on June 29, 2011. The Initial Decision recommended sustaining the Complaint, in part. The ALJ correctly determined that “there is no indication that the pole or the service lines posed a harm, risk, or danger to the Complainant”⁸. The ALJ also correctly concluded that the Complainants must pursue a civil action in a court of general jurisdiction if they sought to determine whether PECO’s right-of-way on their property is valid and whether the PECO can use this right-of-way to serve other customers.⁹ However, despite the fact that the Complainants made no allegations whatsoever regarding PECO’s inspection and maintenance practices, the ALJ determined that PECO “has failed to maintain the utility pole in its right of way on Ms. Gallagher’s property in violation of the Commission’s inspection and maintenance standards. 52 Pa. Code §57.198.”¹⁰ As a remedy for the violation, the ALJ recommended no civil penalty because he acknowledged that PECO was willing to assume control of the pole.¹¹ He did, however, recommend that PECO be required to “submit a report on the conditions of the disputed pole to the Commission’s Bureau of Fixed Utility Services which is directed to examine the report and take whatever further action may be warranted” prior to April 22, 2011.¹²

The ALJ correctly denied the Complainant’s request to order PECO to remove its facilities from the easement on their property. However, the I.D.’s findings regarding PECO’s inspection and maintenance duties for the private pole are based on clear errors of fact and law

⁷ Tr., pp.16-18

⁸ I.D., at p. 6

⁹ Id.

¹⁰ I.D., at p. 10

¹¹ I.D., at p. 9

¹² I.D., at p. 10

and should be rejected by the Commission.

EXCEPTION NO. 1

The I.D. improperly concludes that PECO owns and/or controls the private pole on the Complainants' property.

The I.D. contains several incorrect findings of fact regarding the ownership of the pole on Complainant's property. Despite clear evidence to the contrary, the I.D. finds that PECO is the "de facto" owner of the pole in question. This finding is not supported by the record evidence and is contrary to Commission regulations and holdings regarding the delineation between the facilities of an Electric Distribution Company ("EDC") and a customer. The improper conclusion that PECO owns the pole in question is a fundamental flaw in the I.D. that lays the foundation for the subsequent erroneous finding of a violation by PECO.

There can be no question that PECO does not own the private pole that is located on the Complainant's property. Neither the Complainant, nor PECO alleged that the pole is owned by PECO Energy. Not only did the Complainants admit that the pole is privately owned in their Complaint *and* at hearing,¹³ the Complainants refused to transfer ownership of the pole to PECO. Accordingly, there is no record evidence to support a finding that PECO is the actual or practical owner of the pole.

The record is clear that PECO does not own the pole. PECO Exhibit 4 recounts in detail the parties' various discussions regarding ownership of the pole, and the testimony of Kedrick Francis, PECO Manager of New Business (pages 35-42) confirms that PECO does not own the pole in question. PECO witness Eugene Brown also confirmed that the pole in question was not owned by PECO, and he explained that service configurations, such as the one at issue in the present case, sometimes require private poles. By contrast, there is no evidence whatsoever in

the record which would allow for a conclusion that PECO owns the pole in question.¹⁴

Despite the evidence referenced above, and the lack of any evidence to the contrary, the Initial Decision incorrectly determines that PECO owns and controls the pole on the Complainant's property. First, on page 6 of the I.D., the ALJ states that PECO "allows other utilities to use the pole to carry their lines." This statement implies that PECO has some ownership or control over the private pole, such that PECO can grant or deny permission to other utilities to place their lines on the pole. This statement is simply factually incorrect, and there is no support in the record for this statement. PECO witness Brown testified that "PECO has no control over the other utilities on the pole. And basically we're providing services on that private property just like the other two utilities are." See hearing transcript, pages 72-73. PECO does not "allow" other utilities to place their lines on the pole, just as the other utilities do not "allow" PECO to place its lines on the pole. PECO's interest in the poles is no different than the other utilities'.

The I.D. goes on to mistakenly conclude that PECO is the "de facto" owner of the private pole who "uses the right-of-way and pole for free." On page 9 of the I.D., the ALJ states that PECO

"has the rights to use and enjoy the pole and allows other utilities to attach their lines to that pole. It has these rights in the pole against all persons but the one who is unknown. Therefore, the Respondent is a de facto owner of the pole."

There are no citations to the record, to the Commission's regulations, or to any legal

¹³ See Complaint, paragraph 4B

¹⁴ The I.D. contains multiple inconsistencies regarding the ownership of the private pole on the Complainant's property. For instance, in Finding of Fact 11, the I.D. correctly states that a customer is responsible for replacing a private pole that collapses. However, the I.D. goes on to make the contradictory conclusion that PECO is the "de facto" owner of the pole and is responsible for maintaining the pole. Similarly, Finding of Fact 14 correct states that when a private pole collapse, the pole owner or customer would hire a contractor to plant a new pole and install the lines at the owner or customer's expense and according to the utility's standards. Yet, the I.D. goes on to hold that PECO is the owner of the pole and is responsible for maintaining it. These discrepancies illustrate the arbitrariness of the conclusion that PECO is the "de facto" owner of the pole and that the Commission should "require the

precedent to support this “de facto ownership” conclusion, or that PECO granted other utilities permission to use the pole. The ALJ appears to attribute “de facto” ownership of the pole to PECO based solely on the fact that PECO’s service lines are affixed to the private pole. This attribution of “de facto” ownership of a privately owned pole is a fundamental flaw in the I.D. that is directly contrary to the clear record evidence, the Commission’s regulations, and prior Commission rulings. The mere fact that PECO, *and other utility facilities* are affixed to the private pole does not support a finding that PECO is the “de facto” owner of the pole. And, as set forth below in the subsequent Exceptions, this initial finding that PECO was the “de facto owner” of the pole lays the foundation for further errors regarding PECO maintenance and inspection duties.

The Commission’s regulations explicitly recognize that at times it is necessary for EDC service lines to be affixed to poles or supports which are owned by customers. The definition of an EDC “service line” at 52 Pa. Code 57.1 recognizes EDCs’ obligation to extend aerial service lines “100 feet, *to a suitable support provided by the customer*” (Emphasis added). See also the Commission’s decision in *John Norbeck, Director, Bureau of State Parks v. PECO*, Docket No. C-2008-2051267 (Order entered August 23, 2010), wherein the Commission acknowledged the delineation between PECO’s service line and a customer’s facilities at a point 100 feet within the customer’s property line. Private poles exist because some customers’ homes are more than 100 feet from their property line, and therefore, the customer needs a suitable support to which the EDC can affix its service supply line. The Commission’s regulations and prior holdings clearly recognize that it is acceptable for EDCs to affix service lines to customer-owned private poles, and the affixation of service lines to those poles does not convert the EDC into the owner of those poles. There is no evidence to suggest that PECO controlled the pole in question, and

Respondent to assume its responsibility for the pole.”

there is no legal basis for assigning ownership of the pole to PECO.

The I.D. appears to be proposing that the Commission should either order a private pole to become the physical property of the utility, or order the pole to remain the property of a customer while making the utility responsible for the maintenance of that customer's property. Neither proposal is legally justifiable or tenable. As such, the I.D.'s finding that PECO was the de facto owner of the private pole must be rejected by the Commission.

EXCEPTION NO. 2

The I.D. erroneously holds that the Commission's pole inspection and maintenance regulations apply to private poles that are not owned by a utility.

Even if the Commission determines that the issue of PECO's compliance with pole maintenance and inspection standards is appropriate for disposition in this case, the ALJ's finding of a violation by PECO is without legal basis and should be rejected. It is well-settled that an EDC such as PECO has no inspection or maintenance responsibilities for facilities which it does not own. Therefore, it was improper for the ALJ to find that PECO violated the Commission's regulations by not maintaining or inspecting the private pole on the Complainant's property.

The ALJ held that PECO violated 52 Pa. Code § 57.198, which sets forth inspection and maintenance standards for EDCs. This regulation requires that "Every 2 years, by October 1, an EDC shall prepare and file with the Commission a biennial plan for the periodic inspection, maintenance, repair and replacement of its facilities that is designed to meet its performance benchmarks and standards under this subchapter." (Emphasis added). The regulation goes on to provide minimum standards that the biennial inspection/maintenance plans must meet. The regulation outlines specific requirements for distribution pole inspections, and requires an EDC

to replace any pole that fails the inspection and shows a dangerous condition.

The ALJ's finding of a violation was not based on a review of PECO's biennial reports, or on the substance of PECO's inspection and maintenance plans under the regulation. Rather, the finding of a violation was based on the fact that PECO did not inspect or maintain the single pole on the Complainant's property – a pole which is definitely not owned by PECO. This finding of a violation is clearly erroneous because the Commission regulation cited as the basis for PECO's violation does not apply to private poles that are not owned by an electric distribution company.

On its face the regulation states that each EDC is required to prepare and file plans setting forth inspection and maintenance for its own facilities, not for privately owned facilities. As set forth above in Exception 1, there is a clear distinction between facilities that are owned by and EDC and facilities that are owned by a customer. The Commission has recognized this distinction, and has conclusively held that an EDC is not responsible for maintaining facilities which it does not own. In *John Norbeck, Director, Bureau of State Parks v. PECO*, Docket No. C-2008-2051267 (Order entered August 23, 2010), a utility customer had alleged that PECO had violated Section 1501 of the Public Utility Code for failing to properly maintain an underground cable on the customer's property. After concluding that the customer owned the underground cable in question, the Commission quickly dismissed the customer's allegation of a maintenance violation, stating "consistent with our regulations and PECO's commission-approved tariff, PECO does not own the underground cable, and consequently, has no responsibility to maintain the cable". The same reasoning applies to the present case. Since it has been conclusively established that PECO does not own the private pole on the Complainant's property, PECO has no responsibility to inspect or maintain that pole. And because PECO has no responsibility to

inspect or maintain the pole, PECO lack of inspection or maintenance of the pole cannot be the basis of a violation of the Commission's pole inspection and maintenance regulation.

As an aside, it also should be noted there is nothing in the record to suggest that the private pole on the Complainant's property is unsafe. The written Complaint in this case makes no allegations regarding the safety of the private pole or PECO's inspection and maintenance obligations vis-à-vis the private pole. The words "safety", "maintenance" or "inspection" do not appear anywhere in the Complaint document. Likewise, at the hearing, the Complainant did not make any reference to concerns over safety, maintenance or inspection. Rather, the Complaints were concerned solely with moving PECO's service location to a different location. When asked by her attorney what relief she was seeking, Mrs. Gallagher responded as follows:

"Please unburden our property from these wires that are not necessary to serve us. We can go from a different location to acquire service. We do not need the pole or the wires throughout the property."¹⁵

Later during her testimony, Mrs. Gallagher was asked again to state what relief she was seeking. Again, she clarified that she was strictly seeking relocation of PECO's service facilities. And again, she made no mention of safety, maintenance, or inspection concerns. See pages 16-17 of the Hearing Transcript. In turn, the ALJ correctly concluded that "From the testimony above, there is no indication that the pole or the service lines posed a harm, risk, or danger to the Complainant. There are no allegations that the pole displayed any signs of insect infestation or lightning strikes, or that the service lines were in use for a number of years and had sagged, or that the lines' insulation had worn off."¹⁶ This lack of any evidence that the pole is unsafe make the I.D.'s finding of a violation against PECO all the more puzzling and

¹⁵ Tr., at p. 9

¹⁶ I.D., at p. 6

inappropriate.

EXCEPTION NO. 3

The I.D. mischaracterizes PECO's testimony regarding its maintenance and repair policies for its facilities and private poles

The I.D.'s summary of PECO's policy regarding the maintenance of its facilities that are connected to private poles is incorrect and based on excerpts from the record taken out of context. The I.D. characterizes PECO's policy as follows:

"Further, the Respondent testified that it never climbed or performed an inspection on the pole because it characterized it as a private pole. Apparently, the Respondent waits for the pole to collapse and then asks the Complainant, who is not the owner of the pole but whose property carries the Respondent's right-of-way, to replace it. When the pole collapses, the Respondent separates the lines at the collapsed pole from its lines so it can energize these lines and the pole owner or the Complainant would get a contractor to plant a new pole and install the lines according to the Respondent's standards. Essentially, the Respondent uses the right-of-way and the pole for free."

The above summary presents a distorted view of what PECO's witnesses actually testified to at the hearing. PECO witness Brown did state that "we won't climb a private pole."¹⁷ But he went on to elaborate on what he meant by that statement, and to explain the divisions of responsibility when private poles are at issue. Mr. Brown testified that if service line was knocked from a private pole, a contractor would service the pole. PECO would remove the downed tree from the lines and de-energize them so that the pole could be repaired safely. Then, once pole was re-installed properly, PECO would re-energize the lines.¹⁸ Mr. Brown also explained that in some scenarios, PECO will replace the downed pole themselves, but in such situations, PECO will take ownership of the pole once it is replaced.¹⁹ Furthermore, PECO does

¹⁷ Tr., p. 68

¹⁸ Id.

¹⁹ Tr., p 76

not “wait for private poles to collapse” and then asks their owner to replace them, as the I.D. concludes. When asked by the ALJ whether PECO waited for private poles to collapse, PECO witness unequivocally said “no, we’re not waiting for it to collapse”.²⁰ And while Mr. Brown stated that he did not perform an inspection of the private pole in question, he explained that PECO does not simply turn a blind-eye to the condition of private poles. He explained that if a pole looks unsafe, PECO will not energize it.²¹

Whereas the I.D. characterizes PECO as having a cavalier attitude toward safety in service configurations involving private poles, a fair reading of the record makes it clear that such characterizations are incorrect and should not be adopted by the Commission.

EXCEPTION NO. 4

The I.D. contains findings of fact that are unsupported by the record.

In Finding of Fact 2, the ALJ incorrectly concluded that “The pole and the wires running alongside the Complainant’s driveway burden her property and detract from its value”. There is no evidence in the record to support a finding that the utility facilities on the Complainant’s property “burden” the property, or impact the value of the property. As support for this finding, the I.D. references multiple pages of the hearing transcript which contain the testimony of Mrs. Gallagher. While Mrs. Gallagher does allege that she believes the wires detract from the value of her property, Mrs. Gallagher’s opinion is not probative on the issue of property valuation. A conclusion regarding the valuation of a property would need to be made by a qualified assessor, based on an analysis of relevant factors for valuing property. Mrs. Gallagher was not qualified as an expert on the topic of property valuation, and there is no

²⁰ Tr., p. 50

evidence in the record that a property valuation was performed. Simply put, there is no evidence in the record that would allow for a conclusion that the utility wires on the property detract from the value of the property. Furthermore, the I.D.'s finding that wires "burden" the property is a legal conclusion presented as a factual finding. As support for this conclusion, the ALJ references the easement documents (PECO exhibits 1-2), which demonstrate that PECO and Bell Telephone Company have a valid easement to place utility facilities on the Complainants' property. To the extent that the finding of a burden was intended to confirm that there is a valid easement on the property, the finding is correct. However, to the extent that the finding of a burden is intended to imply some additional impact on the property beyond the existence of any easement, such a finding is not supported by any evidence in the record, for the same reasons that the finding regarding valuation is not supported by the record.

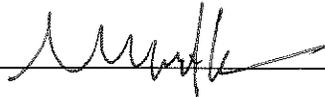
CONCLUSION

In the closing paragraphs of the I.D., the ALJ suggested that PECO's behavior was "arbitrary and does not seem to be fair and reasonable". To the contrary, the record reflects that PECO has gone to great lengths to comply with its service obligations and the applicable law regarding placement of electric facilities and private poles, while also trying to address the Complainants concerns. The totality of the circumstances certainly does not justify a finding of a violation against PECO. As testified to by Mr. Brown and Mr. Francis, PECO has made multiple visits to the Complainants' property in order to evaluate alternative configurations that would allow PECO to remove its facilities from the Complainants' property while maintaining service to the Complainant's neighbors. PECO presented two alternative configurations to the Complainant, but the Complainant rejected the proposals because of the financial obligations

²¹ Tr., p. 72

associated with them. PECO's service to the Complainants is safe and reliable, and as the ALJ noted in the Initial Decision, there is no indication that the pole or service lines posed a harm, risk, or danger to the Complainant. PECO has a valid recorded easement which grants it the right to place its facilities on the property of the Complainant, and there is no legal basis to implement the I.D.'s recommendation to "require the Respondent to assume responsibility for the pole". As set forth above, PECO does not own the private pole, and pursuant to clear Commission precedent, PECO cannot be held responsible for the maintenance and inspection of the pole. There is no evidence in the record to support a conclusion that PECO acted improperly or allowed an unsafe condition to exist. In short, the I.D.'s finding of a violation has no valid basis in fact or law, and it should be rejected by the Commission. PECO respectfully submits that the Commission should dismiss the Complaint in its entirety with no finding of a violation against PECO.

Respectfully submitted,



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