

Legal Department

Exelon Business Services Company
2301 Market Street/S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699

Telephone 215.841.4000
Fax 215.568.3389
www.exeloncorp.com

Direct Dial: 215.841.6841

January 10, 2012

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

RECEIVED

JAN 10 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: John Starzmann v. PECO Energy Company
PUC Docket No. C-2010-2192759

Dear Ms. Chiavetta:

Enclosed for filing with the Commission are the following documents and copies in the matter referenced above.

___	Answer (Original)
___	Answer & New Matter (original)
<u>X</u>	Motion to Strike (original)
___	Motion for Judgment on the Pleadings (original)
___	Preliminary Objection (original)
___	Exceptions (original)
___	Reply Exceptions (original)
<u>X</u>	Main Brief (original)
___	Reply Brief (original)

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Also enclosed is an extra copy of this letter, which I request that you date stamp and return to me in the envelope provided as proof of filing. Thank you for your time and attention on this matter.

Very truly yours,



Tishekia Williams
Counsel for PECO Energy Company
Enc.

Scheduling Recommendation: Call of the Docket __ Non Call of the Docket __

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

John R. Starzmann :
 :
 Complainant :
 : Docket No. C-2010-2192759
 v. :
 :
 PECO Energy Company :
 :
 Respondent :

MAIN BRIEF OF RESPONDENT, PECO ENERGY COMPANY

RECEIVED

JAN 10 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Tishekia E. Williams, Esq.
Counsel for PECO Energy Company
2301 Market Street, S-23-1
Philadelphia, PA 19103
Direct: 215-841-6841
Email: Tishekia.Williams@exeloncorp.com

Table of Contents

II.	STATEMENT OF THE CASE	3
II.	SUMMARY OF THE ARGUMENT	7
III.	ARGUMENT	6
	THE COMPLAINANT FAILED TO SUSTAIN HIS BURDEN OF PROOF TO DEMONSTRATE BY THE PREPONDERANCE OF EVIDENCE THAT PECO ENERGY FAILED TO PROVIDE REASONABLE AND ADEQUATE SERVICE	
IV.	CONCLUSION /REQUEST FOR RELIEF	11
V.	APPENDIX ATTACHING CASES CITED	12

RECEIVED
JAN 10 2012
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

STATEMENT OF THE CASE

On or about August 11, 2010, the Complainant filed a Formal Complaint (“Complaint”) against PECO. The Complaint alleged that the Complainant had been experiencing low voltage at his residence on occasion for over 25 years and requested that various remedial measures be ordered against PECO.

On September 1, 2010, PECO filed its Answer and New Matter to the Complaint. PECO’s Answer and New Matter denied the allegations in the Complaint, and stated that the low voltage situations experienced by the Complainant were the result of temporary equipment issues that were quickly repaired. PECO’s New Matter also objected to the Complainant’s claims regarding events that happened beyond the three-year statute of limitations set forth 66 Pa. C.S. § 3314.

On December 6, 2011, the evidentiary hearing in his matter was held, with Administrative Law Judge Joel Cheskis (“ALJ Cheskis”) presiding. At the hearing, the Complainant testified on his own behalf, called no other witnesses to testify, and offered no exhibits into evidence. The Complainant’s case in chief consisted of the following direct testimony:¹

My complaint is that on various occasions, starting back in the 1980's, I have experienced one half voltage at my residence. Sustained half voltage that will go on for a period of time, perhaps an hour, perhaps two hours. My complaint is that PECO should have a system in place to sense these disturbances, these low voltage conditions, and trip the line so that I will not have one half voltage coming into my house. That's the essential issue. This has gone on since the late '80s. The first time I experienced it, I spoke to a PECO... (*discussion of evidentiary objection omitted*) Well, to me, what this means is there are -- there can be disturbances on the system or malfunctions of equipment that can cause this incident of half voltage. It has gone on for a period of time. My request to PECO is for them to

¹ There was also several pages of cross-examination testimony:

analyze the system -- and I have suggested how they can do this -- to find out how this half voltage exists. It can be done -- it could happen from a number of situations. But they need to this. And there's means to do this. And so I wanted them to analyze it to find out why it happens, then to install protective equipment in place to prevent it in the future. That's essentially my complaint.

The Complainant's electric service is fed from the Landenberg 000 circuit, which is a 34 KV system. Tr. at 40. Based on the Complainant's service characteristics, PECO Energy strives to provide 120/240 volts (+/- 5%) to the meter under normal circumstances. Tr. at 31. On May 24, 2010, the Complainant experienced a voltage sag (Tr. at 9-10) resulting from a rare and isolated incident. Tr. at 16-17, 35-37. Specifically, PECO's investigation revealed that a lightning strike broke the insulators and severed a tap or connection. Tr. at 36. A burnt C phase tap was found at the location. Tr. at 36. This event caused Mr. Starzmann to experience a voltage sag. Tr. at 36. A senior reliability engineer for PECO Energy testified:

“[t]his particular incident is very rare because the 34,000 system is a wire horizontal entanglement on the pole and its conductors aren't terribly far apart from one another. [To] sustain damaging amount of energy to break insulators, to severe pretty substantial aluminum taps. It takes a lot of energy for that not to flash over to one of the other phases for something grounded and tripped off the many devices that we have. **It is extremely unusual to have a phase part in such a way that it just prevents voltage from flowing through but doesn't create an arc and doesn't trip something ..., especially in a 34 KV system.**” [Emphasis added] Tr. at 37, 44.

PECO Energy has no record of any other voltage sag impacting the Complainant's service. Tr. at 47. It is undisputed that PECO Energy is not able to prevent every possible occurrence of low voltage to the Complainant's meter. Tr. at 22, 40-41.

While the Complainant denies contacting PECO Energy (Tr. at 10 wherein the Complainant testified that the last reported voltage sag was May 24, 2010) PECO Energy

records indicate that the Complainant contacted PECO Energy to report low voltage on June 11, 2010. Tr. at 38, PECO Exhibit 2. Based on all the information available to PECO Energy, including the evidence provided at hearing, it is highly unlikely that the Complainant experienced any substantial voltage sag on June 11, 2010. Tr. at 37-38. The Complainant does, however, alleged that on unspecified dates and unspecified times over the past three decades he experienced "four or five or six very unusual circumstances where I have half voltage for a long period of time." Tr. at 23. The Complainant admits that a utility distribution system is dynamic in that circuits are reconfigured, and load and equipment frequently changes. (Tr. at 20-21). Nevertheless, based on a single substantiated and rare event that occurred on May 24, 2010, the Complainant alleges that PECO Energy provided inadequate service, and asks that PECO Energy be ordered to replace its equipment and perform various studies.

PECO Energy's distribution system includes substantial over current protection both at the circuit breakers, substations and pole top reclosers, which also have over current relaying. Tr. at 38. PECO Energy's Electric Service Requirements, section 5.6.12, provides that it is the customers responsibility to protect his equipment from possible under voltage. Tr. at 46.² PECO Energy does, however, have a number of maintenance programs in place to ensure adequate reliability and power quality. Tr. at 41. PECO Energy performs periodic tree trimming on all the circuits on a five year basis. Tr. at 41. PECO Energy conducts circuit patrols that include patrolling with

² PECO's Electric Service Requirements, also known as the "Blue Book" is a public document available on PECO Energy's website. <https://www.peco.com/PartnersinBusiness/BuildersandContractors/Pages/Guidelines.aspx>. The Electric Service Requirements are also incorporated into PECO Energy's Commission approved tariff by reference including, Rule 3.4 which provides "All equipment beyond the point of delivery, except the meter, shall be installed by the customer. Installation shall be in conformity with the National Electrical Code and the Company's published "Electric Service Requirements," among other places.

infrared cameras to identify broken hardware, loose connections, and hot spot. Tr. at 41. Additionally, capacitors, regulators, reclosers and circuit breakers all have their own form of periodic maintenance relative to that class of equipment. Tr. at 42. PECO Energy monitors the reliability on a circuit and smaller areas to review how often service has an interruption and the duration of the interruptions. Tr. at 42. PECO Energy also monitors common causes of equipment failures. If a pattern is found, PECO Energy would take steps to replace or repair equipment with substandard performance. Tr. 41-42. The instant case does not warrant replacing the equipment serving the Complainant's property because there is no indication that it is not functioning as designed under normal circumstances and the service provided to the Complainant has been reasonable and adequate.

Summary of the Argument

The Complainant failed to meet his burden of proof. By the Complainant's own testimony, PECO Energy does provide 120 volts under normal circumstances. However, on May 24, 2010, the Complainant experienced a voltage sag resulting from a rare and isolated incident. PECO's investigation revealed that a lightning strike broke the insulators and severed a tap or connection. The law does not require PECO Energy to provide perfect service; rather the service must be reasonable based on available technology and the totality of the circumstances. PECO Energy can not be charged with providing inadequate service or unreasonable service because it failed to anticipate unforeseen or unusual combination of circumstances or occurrences. The totality of the circumstances does not demonstrate that the voltage sag that occurred on May 24, 2010 rises to the level of unreasonable service. As there is no basis to conclude that there is systemic problem with PECO Energy's equipment or service provided to the Complainant, the complaint must be dismissed.

ARGUMENT

A. THE COMPLAINANT FAILED TO SUSTAIN HIS BURDEN OF PROOF TO DEMONSTRATE BY THE PREPONDERANCE OF EVIDENCE THAT PECO ENERGY FAILED TO PROVIDE REASONABLE AND ADEQUATE SERVICE.

The Complainant failed to meet his burden of proof. A person seeking affirmative relief from the Commission has the burden of proof. 66 Pa. C.S. §332(a). To satisfy his burden, the Complainant must demonstrate by a preponderance of the evidence that PECO Energy is responsible and accountable for the problem described in the complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). It is well established that mere bald assertions, personal opinions or perceptions do not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 516 Pa. 75, 532 A.2d 12 (1987). While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

By the Complainant's own testimony, PECO Energy provides 120 volts under normal circumstances. Tr. at 13, 23.³ Commission regulations, 52 Pa. Code §57.14 (a) provides "[a] public utility shall adopt a standard nominal service voltage for the entire territory served by the public utility, and shall file with the Commission data on such standard service voltage or voltages as part of its officially filed tariff." PECO Energy's Commission approved tariff provides that standard single-phase secondary voltage will be nominally 120/240 volts for 3 wires. PECO Energy's Commission approved tariff is

³ The Complainant testifies regarding his voltage reading under "normal circumstances" and "unusual circumstances."

prima facie reasonable and has the full force and effect of law. 66 Pa.C.S. § 316; *Kossman v. PA PUC*, 694 A.2d 1147 (Pa Cmwlft 1997); *Brockway Glass Co. v. PA. PUC*, 437 A.2d 1067 (Pa. Cmwlft 1981). For service rendered primarily for power purposes, the allowable variation in voltage measured at the service terminals of the customer may not exceed, for a longer period than 1 minute in each instance, 10% above or below the standard nominal service voltage **during normal system operation. [Emphasis added]**. 52 Pa. Code §57.14 (c).

PECO Energy is not required to provide the Complainant with perfect service but instead, it must be reasonable. The Pennsylvania Public Utility Code, 66 Pa. C.S. §1501, provides:

“[e]very public utility shall furnish and maintain **adequate, efficient, safe, and reasonable service** and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay.” **[Emphasis Added]**

A public utility can not be charged with providing inadequate service or unreasonable service because it failed to anticipate unforeseen or unusual combination of circumstances or occurrences. *Johnston v. Pennsylvania R.Co.* 135 Pa. Superior Ct., 45; 4 A. 2d 539. Reasonableness has to be viewed in light of the present technology and the circumstances of each case. *Charles White v. PECO Energy Company*, Docket No. C-2010-2187466 (Final Order entered May 27, 2011) citing, *Instant Car Wash v. Duquesne Light Company*, C-00924611.

In the instant case, the Complainant failed to provide sufficient evidence to conclude that there is a systemic problem with the quality of service provided by PECO Energy, or its equipment that warrants his requested relief. Instead, the record evidence demonstrates that the Complainant experienced a single incident of low voltage on May 24, 2010. The incident was a very rare occurrence and most likely caused by a lightning strike. PECO Energy responded to, and repaired the equipment the same day. Accordingly, there was no violation of applicable law.

The Complainant claims that on unspecified times and dates since 1984, he experienced similar voltage sags. Obviously, these alleged incidents are stale and can not form the basis of a violation in and of itself. However, the Complainant argues that these incidents are evidence of a systemic problem because they were “too similar” to the incident that occurred on May 24, 2010. Unfortunately, this argument must also fail for two reasons. First, the Complainant failed to provide sufficient evidence to conclude that the alleged incidents actually occurred. The evidence provided consists solely of the Complainant’s vague testimony. The alleged incidents are not substantiated by PECO Energy records. As explained during hearing, based on current technology, PECO Energy must rely on information from customers to determine whether the voltage entering a customer’s home is appropriate. Other than May 24, 2010 and June 11, 2010,⁴ PECO Energy has no record of contact from the Complainant regarding low voltage.

Second, even if the incidents occurred, there is insufficient evidence to determine that the events were at all similar. For example, the record is entirely void of any evidence regarding the date, time, cause, season, weather conditions, demand on the

⁴ Although June 11, 2010 call appears to be denied by the Complainant.

circuit, or equipment on the circuit that would enable a person to conclude that the incidents are related.

Conclusion/ Request for Relief

PECO Energy respectfully requests that the complaint filed by John Starzmann be dismissed as the Complainant has failed to demonstrate that PECO Energy violated the Public Utility Code, Commission regulations or its tariff.

Dated: January 10, 2012

Appendix of Cases Cited

1. *Charles White v. PECO Energy Company*, Docket No. C-2010-2187466 (Final Order entered May 27, 2011) citing, *Instant Car Wash v. Duquesne Light Company*, C-00924611.
2. *Johnston v. Pennsylvania R.Co.* 135 Pa. Superior Ct., 45; 4 A. 2d 539
3. *Kossman v. PA PUC*, 694 A.2d 1147 (Pa Cmwlth 1997)
4. *Brockway Glass Co. v. PA. PUC*, 437 A.2d 1067 (Pa. Cmwlth 1981)
5. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).
6. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 516 Pa. 75, 532 A.2d 12 (1987)
7. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990).

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Charles White

v.

PECO Energy Company

:
:
:
:
:

C-2010-2187466

INITIAL DECISION

Before
Ky Van Nguyen
Administrative Law Judge

RECEIVED

JAN 10 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

HISTORY OF THE PROCEEDINGS

On July 12, 2010, Charles White (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (Respondent). In the complaint, the Complainant essentially alleged that he had several outages between 2006 and 2010 when he lived in Circuit Davisville 003, that his voltage reading was below the accepted standard of 5% above or below 120V/240V (amended complaint dated August 8, 2010), and that the Respondent's representatives were rude and provided inaccurate and unhelpful information about the outages. He asked that the Commission investigate the Respondent's practice and impose a fine on it.

On July 30, 2010, the Respondent filed an answer to the complaint. The Respondent stated that the outages were caused by inclement weather and excessive heat, and that it had improved its system so that its ratepayers would receive in writing information about the work to be performed and the scheduled timeframe.

On September 22, 2010, a hearing on the complaint was scheduled. On September 14, 2010, the Complainant filed a request for a continuance of the September 22,

2010 hearing on the grounds that his wife was about to give birth to a child. The request was granted.

Another hearing was scheduled for January 7, 2011. At this hearing, the Complainant proceeded unrepresented. He testified on his own behalf and introduced one exhibit into the record. The Respondent was represented by Tishekia Williams, Esquire, who presented the testimony of two witnesses and introduced six exhibits.

The record closed at the conclusion of the hearing on January 7, 2011.

FINDINGS OF FACT

1. The Complainant is a Respondent ratepayer and takes service at 1855 Edge Hill Road, Abington, Pennsylvania. His electric service is provided by the Respondent's Circuit Davisville 003 (N.T. 4; Formal Complaint Form).

2. Between 2006 and 2010, there were 29 outages to Circuit Davisville 003. Most of them were sustained outages which lasted five minutes or more. The longest outages occurred on June 10, 2008, which lasted three or four days, and July 6, 2010, which lasted about 30 hours¹ (N.T. 6-16; C-1).

3. On July 6, 2010, the Complainant's power was interrupted for about 30 hours and was restored on July 7 or 8, 2010. The 30-hour interruption was caused by excessive power demand (N.T. 15, 16).

4. When the Complainant's power was restored, the voltage read 100 volts in the house. He noticed that appliances were droning, that lights were dimming, and that some of his electronic devices did not operate (N.T. 16).

¹ The outage, which occurred on July 6, 2010 and was caused by excessive power demand, lasted about 30 hours. I relied on the Respondent's testimony because the Complainant had a vague memory of all outages and testified according to the Respondent's records (N.T. 9, 12, 13).

5. From July 7 or 8, 2010 to August 5, 2010, the Complainant made several calls to the Respondent's Call Center, complaining about his low voltage, but his calls were to no avail (N.T. 17-21).

6. Voltage is an energy flow from two different potentials. The nominal voltage is 120 volts and it could be 5 percent above or below that measurement. To ensure the voltage entering a customer's house properly, the Respondent's substations or circuits are checked and inspected monthly, and maintained daily. The voltage problem could be in a house or on a line. If voltage is running low in a house, the Respondent would check a transformer near the house and a voltage recorder at the house (N.T. 28, 29; PECO Exhibit 1).

7. On August 5, 2010, a Respondent quality technician, Mr. Robert Ault, visited the Complainant's house. He set up a voltage recorder to check the voltage and programmed a capacitor bank (or a cap bank) to raise the voltage on the substation or Circuit Davisville 003 (N.T. 29, 37).

8. On August 6, 2010, Mr. Ault checked the voltage recorder. The Complainant's voltage was low and was between 110 and 114. He then set up a voltage recorder at the substation or Circuit Davisville 003, and a voltage recorder between the Complainant's house and the substation. He also checked the cap banks at three nearby locations to make sure that they were working properly. The voltage at the substation and that between the Complainant's house and the substation were good, except the voltage in the Complainant's house (N.T. 31-32).

9. On August 10, 2010, Mr. Ault set up a voltage recorder at the Complainant's transformer, and on the next day, August 11, 2010, the technician found that the transformer was overloaded. He asked a regional engineer for installing an additional transformer behind the Complainant's house. After the installation of a transformer, the Complainant's voltage was within the tariff limits (N.T. 32, 33).

10. Mr. Ault received the first call on August 5, 2010 from his supervisor about the Complainant's voltage problem (N.T. 33, 34).

11. On July 7, 2010, the Respondent's Manager of Regional Engineering and Design, Mr. John Hartenstein, learned that the extreme heat at the time caused the system to be out of its normal configuration and a voltage problem on the system (N.T. 41, 42).

12. The Respondent performs standard and routine maintenance on the system to maintain reliability, such as a vegetation management, a preventive maintenance, an infrared camera program, and an inspection of poles, manholes and substations (N.T. 42-44).

13. The Respondent evaluates the performance of the system according to the number and the duration of interruptions, using the two primary measures of SAIFI (the Sustained Average Interruption Frequency Index) and CAIDI (the Customer Average Interruption Duration Index). For the past three years, the Respondent's system exceeded the standards it submitted to the Commission (N.T. 45, 46).

14. The Respondent also evaluates the performance of individual circuits (or substations) under the measures of SAIFI and CAIDI, reports the Commission those 5 percent worst-performing circuits, and takes action to address the circuits' problems (N.T. 46).

15. Circuit Davisville 003 serves the Complainant and other 580 customers and is among the 5 percent worst-performing circuits. The causes of this poor performance are vegetation, equipment, and other outside factors such as poles being hit by vehicles (N.T. 46, 47).

16. Both before and after the July 2010 heat wave, the Respondent did extensive trimming in select areas, inspected its equipment, patrolled its circuits, and compiled a comprehensive list of repairs, such as broken crossarms and leaning poles (N.T. 47-50; PECO Exhibits 3 and 5).

17. In 2008, a major storm occurred on June 10, causing power interruption which lasted about four days and affected 199,000 customers living in the counties of Philadelphia, Montgomery, Delaware, and Chester. This included Circuit Davisville 003 (N.T. 51-55; PECO Exhibit 4).

18. The wind of the June 10, 2008 storm had a speed of 60 miles an hour, causing extensive damage in Chester and Montgomery Counties (N.T. 52).

19. At Circuit Davisville 003, a tree came down on Terwood Road, causing the outage and affecting all customers on the circuit. Electric wires were found in customers' backyards and behind their fences (N.T. 52, 53).

20. Service was restored on Circuit Davisville 003 after the Respondent replaced four spans of cable-type wire, several poles and equipment (N.T. 53, 54).

21. The magnitude of the June 10, 2008 storm brought in crews from Kentucky, Illinois and Tennessee for the cleanup (N.T. 54-56).

22. In the summer of 2010, a major power interruption occurred on July 6, 2010, which lasted about 30 hours. Unlike the June 10, 2008 outage, which was caused by a storm, the July 6, 2010 outage was caused by extreme heat (N.T. 56-61; PECO Exhibit 4).

23. The July 6, 2010 outage caused cables to fall on the ground and voltage to be out of normal. To restore the service, the Respondent had to switch the circuit around to pick up load on adjacent circuits, to install a mobile transformer on the system to bring in additional capacity from other subtransmission lines (N.T. 57-61).

24. On July 18, 2010, Mr. Hartenstein started investigating the voltage problem on Circuit Davisville 003 (N.T. 62).

25. On July 20, 2010, Mr. Hartenstein performed a load switching and found that voltage was good at a nearby transformer. On July 22 or 23, 2010, he still received a report on an on-going voltage problem (N.T. 62-64).

26. When an outage occurs, the Respondent stores updating remarks in its outage management system and its call-takers look at the updating remarks to provide updated

information to its customers. The update is only as good as the information of what is reported and what its employees know at the time (N.T. 66-68).

27. The Respondent's power quality office is charged with the voltage problems. The Complainant's low voltage was not taken care of until August 5, 2010 when this office was involved (N.T. 101, 102).

28. The Respondent's outage management system helps the Respondent determine the extent of an outage and the expected duration of the restoration effort. The Respondent also provides its ratepayers with this determination through media and other communication channels. When information involving a small number of customers, the customers are notified of this information by phone, in person, or by delivery of the information itself. This customer outreach is considered an important part of the Respondent's business to keep its customer satisfied (N.T. 82-86, 97, 98).

29. The Respondent acknowledged that the Complainant made 30 calls between July 7 or 8 and August 5, 2010 to the Respondent, complaining about his low voltage problem, but that it listed 18 calls about this problem. The calls ranged from one to four calls a day, made either by the Complainant's wife or the Complainant from home, work, or an airport (N.T. 89, 90, 93, 95; PECO Exhibit 6).

DISCUSSION

Section 332(a) of the Public Utility Code, 66 Pa. C.S. §332(a),² provides that the party seeking relief from the Commission has the "burden of proof." "Burden of proof" is a duty to establish a fact by a preponderance of the evidence. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the

² Section 332(a) of the Public Utility Code provides:

(a) Burden of Proof. - Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.

smallest amount, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950). In other words, “preponderance” is not dependent on the number of witnesses testifying on either side but rather on the credibility of the testimony in the light of all the evidence in a case. Burch v. Reading Co., 240 F.2d 574 (3d Cir. 1957) cert. denied, 353 U.S. 965 (1957). The Pennsylvania Supreme Court has characterized a preponderance of the evidence as tantamount to a “more likely than not” inquiry. Commonwealth v. \$6,425 Seized From Esquilin, 583 Pa. 544, 555, 880 A.2d 523, 529 (2005).

Under these principles the Complainant, as the party seeking relief, has the burden of proof. In this case, the Complainant has the burden of proving that it is more likely than not that the Respondent has provided him with unreasonable service in that it has failed to prevent outages in that it has failed to give him reasonable information about them, and in that it has failed to respond to his voltage problem appropriately.

The outage problem

The Complainant testified that between 2006 and 2010, there were 29 outages in his Circuit Davisville 003. Most of them were sustained outages which lasted five minutes or more. The longest outages occurred on June 10, 2008, which lasted four or five days (N.T. 13, 14), and on July 6, 2010, which lasted about 30 hours. The Complainant had no specific memory and was not sure about the Respondent’s responses to these outages. In general, the responses were unsatisfactory (N.T. 8-11).

The Respondent added that on June 10, 2008, a major storm occurred in the counties of Philadelphia, Montgomery, Delaware, and Chester, affecting the service to 119,000 customers. The wind of the storm reached a speed of 60 miles an hour and caused extensive damage in Chester and Montgomery Counties. Electric wires were seen in customers’ backyards and behind their fences. At the Complainant’s circuit, a tree came down causing the outage. The power was restored on the circuit after the Respondent had replaced four spans of cable-type wire, and several poles and equipment. The magnitude of the storm brought in crews from Kentucky, Illinois, and Tennessee for the cleanup.

The Respondent also added that another major outage occurred on July 6, 2010. The outage was caused, not by a storm, but by extreme heat, and lasted about 30 hours. The outage caused cables to fall and voltage to be out of normal. To restore the service the Respondent had to switch the circuit around to pick up load on adjacent circuits, and to install a mobile transformer to bring in capacity from other subtransmission lines.

Section 1501 of the Code, 66 Pa. C.S. §1501, provides, in part, that:

Every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public . . .

These provisions do not require that the service provided by a public utility be perfect but only that the service be reasonable.

The length of an outage is not by itself reasonable or unreasonable. A quick response is an indication of reasonableness. The reasonableness or unreasonableness must be considered in the light of the present state of technology, and the circumstances of each case. Instant Car Wash v. Duquesne Light Company, Docket No. C-00924611 (Pa. PUC December 3, 1993). To be reasonable, a utility's response must be one which would not be objectionable to a reasonable man.

From the testimony above, because of the magnitude of the June 10, 2008 storm, it appears that not only the Respondent but also crews from other states worked around the clock in order to restore the service. The Complainant did not challenge that any of the steps taken by the Respondent, such as trimming, inspecting its equipment, patrolling its circuits, or compiling a list of repairs, was unreasonable or that there was a new method which would make an outage more preventable. Nor did the Complainant challenge that the Respondent did not have enough manpower to take care of the outage. When a storm comes, it comes with destructive forces, such as heavy rain, strong wind, lightning and thunder, which are the causes of outages.

About the July 6, 2010 outage, the Respondent was also diligent to respond to the interruption. Further, to restore the service, it had to switch the circuit around to pick up load on adjacent circuits and to install a mobile transformer on the system to bring in additional capacity. The Complainant was also silent on the Respondent's responses. In general, the Complainant just said he was not satisfied with these responses.

A utility cannot be charged with providing inadequate or unreasonable service because it failed to anticipate unforeseen or unusual combination of circumstances or occurrences. Johnston v. Pennsylvania R. Co., 135 Pa. Superior Ct. 45, 4 A.2d 539 (1939). The circumstances, which would absolve a public utility from the duty to provide reasonable service, include abnormal weather conditions or conditions which are beyond a utility's control:

We are of the opinion that under these circumstances - abnormal weather conditions, wartime controls and wartime scarcity - it cannot be said that the company failed to furnish and maintain adequate, efficient and reasonable service and facilities. The qualifying adjectives must be construed to have their meaning and connotative value in the light of the times, and what is not adequate, or not efficient, or not reasonable in normal, ordinary times might well be considered so to be in war time. The Commission should have taken cognizance of the conditions existing in this case and rendered its judgment in the light of circumstances which were beyond appellant's control. (Emphasis added).

In re Shenandoah Suburban Bus Lines, Inc., 355 Pa. 521, 50 A.2d 301 (1947).

The communication problem

The Complainant also complained about the Respondent's communication to its customers. As an ordinary ratepayer, what the Complainant wanted to know about an outage was the cause of the outage and when the outage was ending. The Respondent's was always speculative. It provided no information about the causes of an outage or inconsistent information about restoring times. Usually, the Respondent's employees answered that they had no further information. Even when the Complainant spoke to a Respondent supervisor about the restoring

time, the answer from this supervisor would be a few hours from the calling time. But in fact the outage lasted four or five days. No specific information was ever provided (N.T. 6, 8, 9-12, 14, 24).

About the July 6, 2010 outage, the Complainant received information that the outage was caused by excessive demand, and probably, the outage was extended because a truck hit its pole. The Complainant was not at liberty to know how the truck accident and the excessive demand were interrelated (N.T. 15, 16). Again, the restoring times were a few hours from the time he was calling. In fact the outage lasted about 30 hours.

The Respondent explained that it has an outage management system to deal with customer calls about outages. Updating remarks about a particular outage are stored in the outage management system, detailing what occurs in the field and the Respondent's call-takers should be able to look at the remarks and to provide an update to a caller. The information is only as good as what is reported and what the call-takers know at the time.

The outage management system also helps the Respondent to determine the extent of an outage and the expected duration of the restoration effort. The Respondent tries to disseminate this determination through media and other communication channels. When information involving a pocket of customers, the customers could be notified of it by phone, in person, or by delivery of information itself. This customer outreach is an important part of the Respondent's business to keep its customers' satisfaction.

From the testimony above and because of the unpredictable and speculative nature of an outage, I do not believe that the Respondent's answers to the Complainant's outage calls were unreasonable.

Further, the policy on communications between a utility and its ratepayers is the utility's business management. The Pennsylvania Superior Court has ruled that a public utility has the right to manage its own affairs to the full extent consistent with the public interest and that the Commission interferes with this management only when an abuse of discretion or

arbitrary action is established.³ Pennsylvania Railroad Company v. Pennsylvania Public Utility Commission, 187 Pa. Superior Ct. 590, 146 A.2d 352 (1958). There is no indication in this record that the Respondent's management of its own affairs adversely affects the public interest or that this management constitutes an abuse of the Respondent's exercise of discretion or an arbitrary action.

The voltage problem

The Complainant testified that from July 7 or 8, 2010 to August 5, 2010, the Complainant made several calls a day to the Respondent's Call Center, complaining about his low voltage, but his calls were to no avail. He made so many calls that he would know the names of the Respondent's employees in its Call Center (N.T. 17).

The Respondent testified that it dispatched a quality technician, Mr. Ault, to the Complainant's house on August 5, 2010. He set up a voltage recorder to check the voltage and programmed a capacitor bank (or a cap bank) to raise the voltage on Circuit Davisville 003. On August 6, 2010, he found that the Complainant's voltage was still low, fluctuating between 110 and 114. He then set up a voltage recorder at the circuit and a voltage recorder between the Complainant's house and the circuit. He also checked the cap banks at three nearby locations to make sure that they were working properly. The voltage at the circuit and that between the Complainant's house and the substation were good, except the voltage in the Complainant's house.

On August 10, 2010, Mr. Ault set up a voltage recorder at the Complainant's transformer, and on the next day, August 11, 2010, he found that the transformer was overloaded. He asked a regional engineer to install an additional transformer behind the Complainant's house. After this installation, the Complainant's voltage problem was solved.

The Respondent's Manager of Regional Engineering and Design, Mr. Hartenstein, testified that following the July 6, 2010 outage (N.T. 42), he started investigating the voltage

³ The complaint alleged that the Respondent's representatives were rude but the Complainant did not address this allegation at the hearing.

problem at Circuit Davisville 003 on July 18, 2010. On July 20, 2010, he found that the voltage was good at a nearby transformer. Still, on July 22 or 23, 2010, he received a report on an on-going voltage problem.

Mr. Ault explained why it took so long, from July 2010 (the Complainant called the Respondent's Call Center) to August 2010 (the Complainant's low voltage), to solve the Complainant's voltage, was that he did not know about his voltage problem until August 5, 2010 (N.T. 33, 34).

Mr. Hartenstein testified that several offices of the Respondent were addressing the Complainant's voltage problem at different levels, that an engineer, who spoke with the Complainant about his problem, did a study of the transformer loading, and that the engineer identified the need for installing an additional transformer (N.T. 62-64).

But, Mr. Ault found that the need for installing a transformer was independent of any engineering study. Mr. Hartenstein also testified the transformer loading was a matter within the territory of the Respondent's specific office: the power quality office (N.T. 63, 101, 102). Had Mr. Hartenstein referred the Complainant's complaint to the Respondent's power quality office on July 22 or 23, 2010, when he still received information about an on-going voltage problem, instead of performing an engineering study, the Complainant's low voltage would have been resolved sometime in July 2010.

Therefore, the delay between July 23, 2010 and August 5, 2010 is reprehensible and its inaction during this period deserves a civil penalty.

Civil penalty

Section 3301 of the Public Utility Code, 66 Pa. Code §3301, authorizes the Commission to impose a maximum civil penalty of \$1,000.00 a day for violations of the Code, regulations and orders. Section 3301 is silent on the factors that should be considered in determining an appropriate penalty. The Commission has established guidelines for such a

determination in Rosi v. Bell-Atlantic Pennsylvania, Inc. and Sprint Communications Company, L.P., Docket No. C-0099409 (Pa. PUC March 16, 2000). The Rosi guidelines codified in 52 Pa. Code §69.1201, on imposing a civil penalty are as follows:

1. Whether the violation was intentional or negligent. If the violation is intentional, the Commission should start with the presumption that the penalty will be in the range of \$500 to \$1,000 per day. If the violation is negligent, the Commission should start with the presumption that the penalty will be in the range of zero dollars to \$500 per day. The precise penalty amount per day will be arrived at by applying the following additional standards, while recognizing that the Commission retains broad discretion in determining a total civil penalty amount that is reasonable on an individual case basis.
2. Whether the regulated entity promptly and voluntarily took steps to return the customer to the appropriate carrier and credited the customer's account.
3. Whether the regulated entity initiated procedures to prevent future slamming.
4. The number of customers affected and the duration of the violation.
5. Whether the penalty arises from a settlement or a litigated proceeding.
6. The compliance history of the regulated entity which committed the violation.
7. Whether the regulated entity cooperated with the Commission.
8. The amount necessary to deter future violations.
9. Past Commission decisions in similar situations.
10. Other relevant factors.

Later, the Commission determined that all violations of the Public Utility Code and its regulations would be subject to review under the guidelines set forth in Rosi.

Pennsylvania Public Utility Comm'n. v. NCIC Operator Serv., Docket No. M-00001440 (Order entered Dec. 21, 2000). The NCIC Operator Services case stated:

This review is conducted with the purpose of developing or, in cases of settlement agreements, reviewing the appropriate penalty to be applied for all types of violations for all categories of public utilities. Clearly, the factors we consider pursuant to our decision in Rosi are generic in nature and can be applied in all cases. The nature of the violation (intentional or negligent), impact (customer affected and duration), extent of cooperation by the regulated entity, and compliance history are, *inter alia*, examples of factors that can be reviewed for all types of violations for all types of utilities.

These factors, particularly the extent of cooperation by a utility and its compliance history, have been viewed as mitigating factors under Rosi.

Applying the above guidelines to this case, I find:

First, there is no evidence to indicate that the Respondent intended to violate Section 1501. The Respondent's violation was not intentional and therefore, the penalty ranges from zero to \$500 a day.

Second, the Respondent was not rational in dealing with the Complainant's low voltage problem. The path toward resolving this problem was tortuous.

Third, the Respondent knew the transformer loading problem on July 23, 2010 and which of its offices is dealing with the problem, but did not refer to this office for any action until August 5, 2010 (12 days). Instead, it continued to perform an engineering study of transformer loading. As Mr. Hartenstein testified the voltage problem was a matter for the office of power quality to do, not that for engineering study. This delay is inexcusable and intolerable.

Fourth, the Complainant was suffering from frequent outages as a result of the Respondent's failure to act. The Respondent's inaction indicated a low level of care being exercised by the Respondent and its concern for the Complainant's convenience and safety.

Fifth, this penalty arises from a litigated complaint.

Sixth, I cannot address the Respondent's compliance history because I do not have such a record.

Seventh, there is no evidence that the Respondent failed to cooperate in any way.

Eighth, the penalty will deter future violations and enhance the Respondent's incentive to be careful in the future.

Ninth, the penalty is consistent with the Commission's precedent. The Commission has consistently held a utility accountable and fined a utility for failure to provide its customers with reasonable service.

Tenth, other relevant factors were considered in the course of assessing the civil penalty.

Under these guidelines, a maximum civil penalty of \$200 for each day of inaction by the Respondent is appropriate. Therefore, I will impose a penalty of \$2,400 (\$200 x 12 days) on the Respondent.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this complaint.
2. The Complainant failed to carry his burden of proof that the Respondent's outages and communication policy were unreasonable.
3. The Complainant has carried his burden of proof that the Respondent has failed to furnish adequate, safe and reasonable service in dealing with the Complainant's low voltage problem.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of Charles White against PECO Energy Company at Docket No. C-2010-2187466 is denied in part and sustained in part.
2. That the Complainant has failed to carry his burden of proof that the Respondent's outages and communication policy were unreasonable.
3. That the Complainant has carried his burden of proof that the Respondent did not provide him with reasonable service in dealing with his low voltage problem.
4. That the Respondent shall pay a civil penalty of two thousand four hundred dollars (\$2,400) as provided for in Sections 2404 and 3301 of the Public Utility Code, 66 Pa. C.S. §§2404 and 3301, by certified check or money order within twenty (20) days after service of the Commission's Order, to:

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

5. That the Respondent cease and desist from further violations of the Public Utility Code, 66 Pa. C.S. §1501.

Date: February 16, 2011

Ky Van Nguyen
Administrative Law Judge

 [West Reporter Image \(PDF\)](#)

135 Pa.Super. 45, 4 A.2d 539

Superior Court of Pennsylvania.
JOHNSTON
v.
PENNSYLVANIA R. CO. ET AL.

March 3, 1939.

Appeal No. 232, October term, 1938, from judgment of Court of Common Pleas No. 3, Philadelphia County, No. 145, March term, 1935; Gerald F. Flood, Judge.

Action in trespass by Margaret Johnston against the Pennsylvania Railroad Company for death of the plaintiff's son allegedly resulting from negligence of the defendant, wherein the McCormick Steamship Company was brought upon the record as an additional defendant. Binding instructions were given in favor of the McCormick Steamship Company. Verdict was for the plaintiff against the defendant Pennsylvania Railroad Company for \$2,500, and from a judgment non obstante veredicto, the plaintiff appeals.

Affirmed.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↳ [408 Wharves](#)

↳ [408k21](#) k. Personal Injuries. [Most Cited Cases](#)

In action against railroad which owned pier for death of seaman who fell off pier while going ashore, plaintiff had burden of establishing negligence of railroad and of showing that the negligence was cause of seaman's death.

[3]  [KeyCite Citing References for this Headnote](#)

↳ [272 Negligence](#)

↳ [272IV](#) Breach of Duty

↳ [272k250](#) k. In General. [Most Cited Cases](#)
(Formerly 272k2)

To establish negligence, it must be shown that some duty has been unperformed.

[4]  [KeyCite Citing References for this Headnote](#)

↳ [408 Wharves](#)

↳ [408k21](#) k. Personal Injuries. [Most Cited Cases](#)

Railroad which owned pier furnished by railroad for unloading of vessels, but which had nothing to do with mooring of vessels, was not liable for death of seaman who was drowned at night when he fell into water from loading platform extending from pier, at point near an open door where there was a change in level of the platform which member of crew failed to observe, where platform was properly constructed and in good repair.

[5] KeyCite Citing References for this Headnote

↳408 Wharves

↳408k21 k. Personal Injuries. Most Cited Cases

As respects liability of railroad which owned pier, for death of seaman who was drowned at night when he fell into water from loading platform extending from pier, at point near an open door where there was a change in level of the platform, railroad had no duty to furnish lighting facilities on outside of pier to facilitate entry to pier by a route which railroad could not reasonably be expected to anticipate the seaman would attempt to use, or to erect barrier to prevent such entry.

[6] KeyCite Citing References for this Headnote

↳272 Negligence

↳272II Necessity and Existence of Duty

↳272k213 k. Foreseeability. Most Cited Cases
(Formerly 272k10)

A defendant cannot be charged with negligence because it has failed to anticipate an unforeseen or unusual combination of circumstances or occurrences.

[7] KeyCite Citing References for this Headnote

↳408 Wharves

↳408k21 k. Personal Injuries. Most Cited Cases

Railroad which owned pier was not obliged to take precaution against an unusual and negligent use of the pier by seaman who fell from loading platform at pier and was drowned.

KeyCite Citing References for this Headnote

↳30 Appeal and Error

↳30XVI Review

↳30XVI(G) Presumptions

↳30k934 Judgment

↳30k934(1) k. In General. Most Cited Cases

On appeal from judgment for defendant notwithstanding the verdict, the testimony must not only be read in the light most advantageous to plaintiff, all conflicts therein being resolved in her favor, but she must be give the benefit of every fact and inference of fact pertaining to issues involved which may be reasonably deduced from the testimony.

****539 *46** Fred C. Gartner and Herbert Welty, both of Philadelphia, for appellant.

Theodore Voorhees and Barnes, Biddle & Myers, all of Philadelphia, for appellee.

Argued before KELLER, P. J., and CUNNINGHAM, BALDRIGE, STADTFELD, PARKER, and RHODES, JJ.

****540** RHODES, Judge.

Plaintiff instituted this action in trespass against defendant railroad company to recover damages for the death of her son. The McCormick Steamship Company was brought upon the record as an additional defendant, and at the conclusion of the trial binding instructions were given in its favor. The jury rendered a verdict for plaintiff against the railroad company; its motion for judgment n.o.v. was granted; plaintiff has appealed, assigning as error the granting of this motion.

[1] *47 The court below held that the evidence showed as a matter of law that appellee was not negligent and that deceased was contributorily negligent. In determining the validity of appellant's assignment we are required to apply the familiar rule that the testimony must not only be viewed in a light most favorable to her, all conflicts therein being resolved in her favor, but she must also be given the benefit of every fact and inference of fact pertaining to the issues involved which may reasonably be deduced from the evidence. Muehlhof v. Reading Company, 309 Pa. 17, 162 A. 827.

Appellee is the owner of Pier 56, South Wharves, which extends eastwardly from Delaware Avenue in the City of Philadelphia into the Delaware River. The photographs in evidence indicate that it is the usual type of water front structure, consisting of a platform extending out over the water enclosed by four walls and a roof. It is more than 400 feet long. Forming a part of the south wall is a series of sliding doors. Along the south wall of the pier, and at the same level as the floor, a platform about 3 or 4 feet wide extends from the land or west end of the pier to a point about 100 feet from the river end of the pier. At that point there was an offset so that the platform continued with a much narrower width to the river end of the pier. From the photographs it would appear that beyond the offset the platform consisted of a single plank less than half the width of the other portion of the platform. Also beginning at the offset but at a lower level was another line of planking, which also extended to the river end of the pier, much narrower than the platform west of the offset.

On March 5, 1934, at about 10:15 p. m., the McCormick steamship "West Cape" arrived at the pier, and was docked bow in toward the land with its starboard side against the south side of the pier. A gangplank was lowered from the starboard side of the vessel about midships to the 3 or 4-foot wide platform, and as *48 soon as it was landed deceased, preceded by one companion named Marceaux and followed by two others, went ashore. Arriving on the platform they turned right and walked toward the river end of the pier, in which direction they saw light coming through an open door, about 40 to 50 feet from the gangplank. The opening through which the light was coming was estimated to be between 1 1/2 feet and 3 feet, and was 4 or 5 feet beyond the point where the platform narrowed. The only other light was on the gangplank which illuminated a space of about 20 feet on either side of it. Beyond that it was dark for approximately one-half of the distance, or a little more, between the gangplank and the open door. In walking toward the opening they passed one or two doors which were closed, and appellant's witnesses were unable to state whether any one of their party attempted to open them. Marceaux saw the offset and shouted a warning. However, his shadow had prevented deceased from seeing it, and he fell off the platform just as the warning was uttered, and was drowned.

One of appellant's witnesses testified that, although it was dark beyond the limit of the light shed by the illumination at the gangplank, he could see the outline of the platform over the water. As conditions existed when they arrived on the platform, the opening referred to appeared to be the only way to shore. The platform was closed at the land end of the pier by a fence. There were no lighting facilities on the outside of the pier.

Appellant's evidence fails to show that appellee had any employees on the pier at the time this accident occurred. It appears that the lines were made fast by employees of an independent mooring company under contract with the steamship company. In addition to them, the only other person on the pier, identified by the evidence, was a watchman, employed by the steamship company, who testified for appellee. He did not know who opened the door near the offset, but he had lit all the lights inside the pier that he "was supposed to have *49 lit," one at each end of the pier and one in the center.

The steamship company was using the pier pursuant to an agreement between it and appellee, dated January 12, 1932, the **541 material portions of which appear in the margin.^{FN1}

^{FN1} "1. Effective January 15, 1932, the Pennsylvania Railroad Company hereby grants permission to the McCormick Steamship Company, in conjunction with the use thereof by the Pennsylvania Railroad Company and such other steamship lines as from time to time may be granted the use of the said pier, to use Pier 56, South Delaware Wharves for the

purpose of conducting its steamship business at the Port of Philadelphia."2. No portion of the pier is to be used for storage except by special permission from the Superintendent of the Philadelphia Terminal Division and any and all revenue from such storage shall accrue to the Railroad Company. On freight stored on the pier, the McCormick Steamship Company hereby agrees to assess and collect storage charges and remit amounts so collected to the Railroad Company and directed by the said Superintendent of the Philadelphia Terminal Division."3. Lighters and car floats may deliver or receive freight alongside steamships docked at the pier provided the same facilities are accorded the Pennsylvania Railroad at the piers of the other railroads at the Port of Philadelphia, but it is understood and agreed that the said lighter and car float service will be used to a very limited extent and only where absolutely necessary in connection with the conduct of its business by the McCormick Steamship Company and will not be used to the detriment of the Pennsylvania Railroad from a competitive standpoint."4. The Railroad Company reserves the right to at any time use the pier for docking vessels of other steamship companies provided they do not interfere with the proper handling and working of the McCormick Steamship Company."5. The Railroad Company will at its own expense make all repairs and do the dredging in the dock at Pier 56."6. The Railroad Company will at its own expense insure the pier, pier superstructure, etc."7. The McCormick Steamship Company will assume all cost for the necessary lighting, including the renewal and replacement of electric light bulbs, heating and policing on the pier."8. For supplying water to vessels through the water lines of the Railroad Company on the pier, a charge of \$10 will be assessed for water supplied to each vessel or, if you prefer to pay for the water on the basis of the amount taken, we will arrange for the installation of a meter and bill you for water supplied to vessels at a rate to be agreed upon, the rate of course to be sufficient to cover the cost of the water, and the maintenance of the meter, water lines, etc."9. It is understood and agreed that this arrangement may be terminated by either party on ninety (90) days' written notice to the other."

***50** Appellant contends that the entry of judgment for defendant notwithstanding the verdict was error because "the Pennsylvania Railroad Company, which admitted that it owned, controlled, managed and maintained the pier, owed certain duties to Johnston, who was an invitee on the premises, which it disregarded and neglected, viz., that it failed and neglected to properly and adequately light the outside of the pier so that the condition of the foot walk could be observed and avoided; in that it failed to place guard rails or warnings of any kind at or near the end of the footwalk; in that it negligently opened, or permitted to be opened, the third door from the land end of the pier when it knew, or should have known that this door was beyond the end of the footwalk, and in that it failed and neglected to open the first or second door from the land end of the pier, through which these men could have safely proceeded."

While it is undisputed that appellee owned the pier, there is no evidence that it controlled, managed, and maintained it to the extent argued by appellant. Paragraph 4 of her statement of claim reads as follows: "4. In the conducting of its said business, the defendant corporation owned, maintained, operated and controlled a certain wharf or pier in the City and County of Philadelphia, State of Pennsylvania, known as Pier #56, South Wharves, which pier extended from Delaware Avenue in the City of Philadelphia, into the Delaware River." At the beginning of the trial the court admitted that paragraph in evidence over appellee's objection, because it had filed no affidavit of defense, but later, ***51** on motion of appellee's counsel, the court struck out the admission of everything but ownership. To this ruling appellant took no exception, nor is it assigned as error here. Consequently, whatever duties appellee owed to deceased must arise from its ownership of the pier, and the agreement with the steamship company for its use by the latter.

****542** Reference is made in the briefs on both sides to the status of deceased, but we agree with the court below that it makes no difference, under the facts of this case, whether he was a licensee or business visitor. See Restatement, Torts, vol. 2, § 342, quoted in Musto v. Lehigh Valley Railroad, Pa. 35, 39, 192 A. 888, 890, 112 A.L.R. 842; Restatement, Torts, vol. 2, § 343; Vetter v. Great Atlantic & Pacific Tea Co., 322 Pa. 449, 185 A. 613; Weir v. Bond Clothes, Inc., 131 Pa. Super. 54, 196. Under either view appellant cannot prevail.

[2] The burden was on appellant not only to establish the negligence of appellee by competent evidence, but to show that it was the cause of the death of her son. Kepner v. Harrisburg Traction Co., 183 Pa. 24, 30, 38 A. 416; Rose v. Adelphia Hotel, 300 Pa. 1, 4, 149 A. 644; see Restatement, Torts, vol. 2, § 430.

[3] [4] It is fundamental that "to establish negligence, it must appear that some duty had been unperformed, and without the violation of the duty there can be no negligence." Fitzpatrick v. Penfield, 267 Pa. 564, at page 569, 109 A. 653, at page 655. Ownership of the pier did not charge appellee with the duty to have it prepared at all times for the mooring of vessels, nor did it assume such burden under its agreement with the steamship company. As a matter of fact, the mooring was handled by the employees of an independent agent employed by the steamship company, and an employee of the steamship company was the only one on the pier and in charge of it at the time. Appellant merely furnished the pier for the unloading of the vessel of the steamship company; it had nothing to do with the mooring of the *52 vessel; and it was not responsible for the failure to open the proper door for deceased to enter the pier. Cf. Dively v. Penn-Pittsburgh Corp. et al., 332 Pa. 65, 2 A.2d 831.

There is no proof that the platform in question was intended to be used, or was used, as a footwalk in the manner in which deceased was using it at the time of his fatal accident. Cf. John v. Reick-McJunkin Dairy Co., 281 Pa. 543, pp. 546, 547, 127 A. 143. It is admitted that the offset was not a defective condition; there is no evidence that its construction was unusual (see Coxey v. Guala et al., 112 Pa. Super. 460, 171 A. 484), unnecessary to the operation of the pier, or constituted an unusual danger under ordinary circumstances (see Hagan v. Delaware River Steel Co., 240 Pa. 222, 87 A. 574). The purpose of the platform was to provide a place for landing the gangplank and the transfer of cargo. For such use it was not intrinsically dangerous. See Sieqler v. Mellinger, 203 Pa. 256, 52 A. 175, 93 Am.St.Rep. 767. It appears that the varying width and height of the platform was necessary in order to unload vessels of different types and tonnages.

[5] The photographs and the testimony clearly indicate that there were at least two doors leading into the pier from the platform where the vessel was moored, and appellee could not reasonably be expected to anticipate that deceased would attempt to enter the pier by the open door beyond the offset. Hence it was not required to furnish lighting facilities on the outside of the pier to facilitate entry to the pier by that route, or to erect a barrier to prevent it.

[6] It is argued that the combination of the open door and the offset created a trap. If so, it was not of appellee's making. The evidence does not disclose the identity of the person who opened the door, but the only persons on the pier at the time were the steamship company's watchman, who turned on the lights inside the pier, and the employees of the mooring concern. Nothing *53 in the record demonstrates that appellee could or did have anything to do with it. There was no attempt to prove circumstances that would charge appellee with knowledge of the condition. Appellee cannot be charged with negligence because it failed to anticipate an unforeseen or unusual combination of circumstances or occurrences. Gerdes v. Booth & Flinn, Ltd., 300 Pa. 586, 589, 150 A. 483.


[7] In our opinion, the evidence, as a matter of law, portrays a structure that was safe when used in the way it was intended to be used, with no fault in construction or in such maintenance as it was appellee's duty to provide. Appellee was not obliged to take precaution against an unusual and negligent use of it by deceased. Cochran v. Pennsylvania Railroad Co., 244 Pa. 307, 90 A. 654.

While we affirm the judgment of the court below solely on the ground that appellant failed to prove that appellee was negligent, we are constrained to say that the haste of deceased and his companions to go ashore as soon as the gangplank was landed appears from the evidence to have been a large factor in the ensuing tragedy. **543 There is reasonable ground upon which to assume that, had deceased used restraint for but a few moments, the proper doors would have been opened and the necessary lights rigged on the vessel, and he would have safely reached shore.

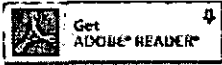
Judgment is affirmed.

Pa.Super. 1939.
JOHNSTON v. PENNSYLVANIA R. CO. ET AL.
135 Pa.Super. 45, 4 A.2d 539

END OF DOCUMENT

 [West Reporter Image \(PDF\)](#)

Adobe Reader is required to view PDF images.



(c) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

 [West Reporter Image \(PDF\)](#)

694 A.2d 1147, Util. L. Rep. P 26,635

Judges and Attorneys

Commonwealth Court of Pennsylvania.
Paul KOSSMAN t/a Kossman Development Company, Petitioner,
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent.

Argued March 13, 1997.
Decided May 19, 1997.

Commercial real estate developer sought review of order of Public Utility Commission (PUC), C-00945802, dismissing exceptions and adopting decision of administrative law judge (ALJ), which concluded that developer was not entitled to refund for "contributions-in-aid-of construction" (CIAC) that electric utility charged developer for service line extensions to commercial developments and that utility properly charged developer an "income tax gross-up." The Commonwealth Court, No. 2314 C.D. 1996, Flaherty, J., held that: (1) developer was not entitled to refund of CIAC payments, and (2) procedure which permitted utility to add tax liability to individual CIAC payments received was not discriminatory.

Affirmed.


West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

 [317A Public Utilities](#)

 [317AIII Public Service Commissions or Boards](#)


 [317AIII\(C\) Judicial Review or Intervention](#)

 [317Ak188 Appeal from Orders of Commission](#)

 [317Ak194 k. Review and Determination in General. Most Cited Cases](#)

Commonwealth Court's scope of review of Public Utility Commission's (PUC) decision is limited to determining whether Commission's findings of fact are supported by substantial evidence, an error has been committed, or constitutional rights have been violated.

[2]  [KeyCite Citing References for this Headnote](#)

 [145 Electricity](#)

 [145k11.3 Regulation of Charges](#)


 [145k11.3\(4\) k. Operating Expenses. Most Cited Cases](#)

Though electric utility generally had burden of supplying and maintaining electrical service to its customers, it could develop rules that required developers to bear burden of constructing facilities that extended service to their developments. 66 Pa.C.S.A. § 1501.

[3]  [KeyCite Citing References for this Headnote](#)

 [145 Electricity](#)

 [145k11 Supply of Electricity in General](#)

 [145k11\(1\) k. In General. Most Cited Cases](#)

Electric "service line" is that line extension that exists between supply line and customer's individual facilities which include all equipment and materials on customer's individual premises that facilitate the receiving and consumption of electrical energy throughout premises for all consumers of electrical energy on those premises, whereas a "supply line," for which electric utility would refund advance "contributions-in-aid-of construction" (CIAC) payments for line extension if certain conditions were met, never connects to buildings, structures, or facilities that use or otherwise consume electrical energy; only service lines perform such a function. 52 Pa. Code § 57.1.

[4] KeyCite Citing References for this Headnote

- ↳ 317A Public Utilities
 - ↳ 317AII Regulation
 - ↳ 317Ak119 Regulation of Charges
 - ↳ 317Ak119.1 k. In General. Most Cited Cases

Once approved, utility's tariff provisions are legally binding on utility and its customers.

[5] KeyCite Citing References for this Headnote

- ↳ 145 Electricity
 - ↳ 145k11.5 Discrimination and Overcharge
 - ↳ 145k11.5(2) k. Actions by Consumers. Most Cited Cases

Commercial real estate developer that sought refund, from electric utility, of "contributions-in-aid-of construction" (CIAC) that utility charged for service line extensions to commercial developments had very heavy burden of showing utility's tariff was unreasonable or discriminatory.

[6] KeyCite Citing References for this Headnote

- ↳ 317A Public Utilities
 - ↳ 317AII Regulation
 - ↳ 317Ak119 Regulation of Charges
 - ↳ 317Ak119.1 k. In General. Most Cited Cases

Utility's tariff provisions that have been properly submitted to and approved by Public Utility Commission (PUC) are prima facie reasonable.

[7] KeyCite Citing References for this Headnote

- ↳ 145 Electricity
 - ↳ 145k11.5 Discrimination and Overcharge
 - ↳ 145k11.5(1) k. In General. Most Cited Cases

Electric utility's tariff provision, which permitted utility to exercise discretion in area of refunds for "contributions-in-aid-of construction" (CIAC) payments, was not unreasonable or discriminatory, even if tariff was unfavorable to commercial real estate developer who made, but received no refund for, CIAC payments for service line extensions to commercial developments.

[8] KeyCite Citing References for this Headnote

- ↳ 145 Electricity
 - ↳ 145k11.5 Discrimination and Overcharge
 - ↳ 145k11.5(1) k. In General. Most Cited Cases

Fact that many customers will receive electricity from service line connection to building, which will generate large amount of revenue for electric utility, does not change inherent nature of line extension from service line to that of supply line, such that it justifies giving a refund for "contributions-in-aid-of construction" (CIAC) payments for line extension and making cost of service line installation part of rate base for all utility customers.

[9] [KeyCite Citing References for this Headnote](#)

- ↳ [145 Electricity](#)
- ↳ [145k11.5 Discrimination and Overcharge](#)
- ↳ [145k11.5\(1\) k. In General. Most Cited Cases](#)

Commercial real estate developer was not entitled to refund of "contributions-in-aid-of construction" (CIAC) payments that electric utility charged developer for service line extensions to commercial developments, despite claim that extensions were functional equivalent of supply line, for which utility refunded CIAC payments. [52 Pa. Code § 57.1](#).

[10] [KeyCite Citing References for this Headnote](#)

- ↳ [145 Electricity](#)
- ↳ [145k11.5 Discrimination and Overcharge](#)
- ↳ [145k11.5\(1\) k. In General. Most Cited Cases](#)

Electric utility's policy of consistently treating supply lines and service lines differently for purposes of refunding "contributions-in-aid-of construction" (CIAC) payments by customers was reasonable and non-discriminatory; service line extensions were not the functional equivalent of supply line extensions, and thus could never be part of "general supply system" that benefitted all utility customers, as required by utility's tariff for refunding CIAC payments for supply lines. [52 Pa. Code § 57.1](#).

[11] [KeyCite Citing References for this Headnote](#)

- ↳ [317A Public Utilities](#)
- ↳ [317AII Regulation](#)
- ↳ [317Ak119 Regulation of Charges](#)
- ↳ [317Ak128 k. Operating Expenses. Most Cited Cases](#)

Public Utility Commission (PUC) has broad discretion and authority in determining what expenses incurred by utility may be charged to ratepayers as long as expenses are not hypothetical.

[12] [KeyCite Citing References for this Headnote](#)

- ↳ [15A Administrative Law and Procedure](#)
- ↳ [15AIII Judicial Remedies Prior to or Pending Administrative Proceedings](#)
- ↳ [15Ak228.1 k. Primary Jurisdiction. Most Cited Cases](#)


Doctrine of primary jurisdiction requires judicial abstention in cases where protection of integrity of regulatory scheme dictates preliminary resort to agency which administers the scheme.

[13] [KeyCite Citing References for this Headnote](#)

- ↳ [317A Public Utilities](#)
- ↳ [317AIII Public Service Commissions or Boards](#)
- ↳ [317AIII\(C\) Judicial Review or Intervention](#)
- ↳ [317Ak188 Appeal from Orders of Commission](#)

↪ 317Ak194 k. Review and Determination in General. Most Cited Cases

Where Public Utility Commission's (PUC) decision concerns complex subject matter that is within Commission's jurisdiction and expertise, proper approach for Commonwealth Court is to defer to Commission and stay within Court's limited scope of review.

[14]  KeyCite Citing References for this Headnote

↪ 145 Electricity

↪ 145k11.3 Regulation of Charges

↪ 145k11.3(4) k. Operating Expenses. Most Cited Cases

Public Utility Commission's (PUC) decision to permit certain electric utilities to continue adding tax liability to individual "contributions-in-aid-of construction" (CIAC) payments received for electric line extensions, thus placing tax burden on individual developers who were responsible for CIAC charges, while requiring other utilities which were not currently employing first method to use second method to recuperate tax liability, did not unreasonably discriminate against developers in service area of utility which was entitled to use first method; there were several reasons which may have affected Commission's decision to grandfather certain utilities, any one of which provided rational basis for decision to allow utility at issue to use first method.

***1149** Ronald C. Backer, Pittsburgh, for petitioner.

Susan D. Colwell, Assistant Counsel, Harrisburg, for respondent.

Richard S. Herskovitz, Pittsburgh, for intervenor, Duquesne Light Company.


Before McGINLEY and FLAHERTY, JJ., and NARICK, Senior Judge.

FLAHERTY, Judge.

Paul Kossman (Kossman) petitions for review of an order from the Public Utility Commission (Commission) dismissing his exceptions and adopting the decision of the administrative law judge (ALJ) which concluded that Kossman is not entitled to a refund of the "contributions-in-aid-of-construction" (CIAC) that Duquesne Light Company (Duquesne) charged Kossman for service line extensions to his commercial developments and that Duquesne properly charged Kossman an "income tax gross-up," calculated pursuant to the relevant regulations promulgated by the Commission, Duquesne's Tariff, and the Public Utility Code (Code).^{FN1} We affirm.

FN1. 66 Pa.C.S. §§ 101-3312.

The parties have stipulated to the following facts. Kossman is a commercial real estate developer in Allegheny County. On May 13, 1994, Kossman filed a complaint before the Commission seeking a refund in the amount of \$26,826.28 for CIAC payments that Duquesne required of Kossman prior to extending electrical service to four commercial developments built by Kossman between 1991 and 1994. All of these commercial developments are within Duquesne's electric service area and include the Penn Hills Municipal Shopping Center (Penn Hills), the Pittsburgh Plaza East Shopping Center (Pittsburgh Plaza), the Whitlock Auto Store (Whitlock), and the Taco Bell Restaurant (Taco Bell). Duquesne refunds CIAC payments for supply lines but not for service lines. Under Tariff Rule No. 8, Duquesne is permitted to charge reasonable installation fees in advance, including the income tax liability that accrues to Duquesne by the advancement of those fees, for service lines and equipment installed for the exclusive use of a customer which exceeds Duquesne's standards for free electric service installation.

[1]  On appeal, Kossman raises the following issues: (1) whether the Commission erred by concluding that the service line extensions to the four Kossman properties cannot, by definition, be

the functional equivalent of a supply line for purposes of qualifying for a refund of CIAC payments; (2) whether the Commission erred in concluding that Duquesne's own policy of imposing non-refundable CIAC charges upon service line extensions while imposing refundable CIAC charges for supply line extensions was not unreasonable, unlawful, or discriminatory; and (3) whether the Commission erred in concluding that Duquesne lawfully included "income tax gross-ups" for the CIAC charges imposed upon Kossman.^{FN2}

FN2. Our scope of review is limited to determining whether the Commission's findings of fact are supported by substantial evidence, an error of law has been committed, or constitutional rights have been violated. City of Bethlehem v. Public Utility Commission, 156 Pa.Cmwlth. 292, 627 A.2d 244 (1993).

I

Kossman argues that, although he was properly required to advance CIAC payments to Duquesne for service line extensions to the four commercial properties in the instant case, he should qualify for a refund of that money because there is no significant distinction between the service lines and a supply line under the respective definitions of those terms. In this regard, Kossman maintains that the ALJ's decision, which was adopted by the Commission, places form over substance by relying on the definitional difference between service lines and supply lines, rather than relying on the functional equivalence of the two, when it determined that CIAC for service lines are not refundable. We disagree.

[2] Section 1501 of the Code, 66 Pa.C.S. § 1501, provides, in relevant part, the following:

***1150** Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.

Id. However, this section also provides that "every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service." *Id.* Where one customer receives the benefit and convenience of a utility's improvements, that customer should be expected to contribute to the cost of those improvements. Colonial Products Co. v. Public Utility Commission, 188 Pa. Superior Ct. 163, 172-73, 146 A.2d 657, 663 (1958). Additionally, in Lynch v. Public Utility Commission, 140 Pa.Cmwlth. 599, 594 A.2d 816, 818 (1991), we stated that "[i]t is appropriate for customers to bear the cost of extensions when the extension is sought by a developer." *Id.* Therefore, although Duquesne generally has the burden of supplying and maintaining electrical service to its customers, it may develop rules that require developers to bear the burden of constructing facilities that extend service to their developments. Such a rule is at issue in the case *sub judice*.

The Commission's regulations define an electric supply line as "[t]he 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." 52 Pa.Code § 57.1. This section of the administrative regulations further defines a service line in the following manner:

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.

Id. Duquesne's Electric Service Installation Rules provide similar definitions for these terms. Kossman argues that, although the regulations distinguish between supply lines and service lines, as a practical matter, Kossman's service line extensions are the functional equivalent of a supply line,

and the Commission erred in concluding that the inherent nature of service line extensions disqualified Kossman from a refund of CIAC.

In this regard, Kossman further argues that the only difference between the definition of a supply line and the definition of a service line is that a supply line is "located on a public highway or utility right-of-way." Consequently, argues Kossman, because Duquesne required Kossman to grant a utility right-of-way for the service line extensions to his properties, his service line extensions are equivalent to supply line extensions, and he qualifies for a refund of the CIAC payments that he advanced to Duquesne.

Whether a line extension exists on a utility right of way, however, is not the only definitional difference between a supply line and a service line. As noted above, a service line connects "the electric supply line of the public utility with the customer's installation." The regulations further define the term "customer's installation" as the "[w]iring 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." 52 Pa.Code § 57.1. Because the term "customer's installation" is part of the definition of the term "service line" we must read these two definitions *in pari materia*.

[3] As a result, the meaning of a service line becomes clear. A service line is that line extension that exists between a supply line and a customer's individual facilities which include all equipment and materials on the customer's individual premises that facilitate the receiving and consumption of electrical energy throughout the premises for all consumers of electrical energy on those premises. *1151 Therefore, a supply line, by definition, never connects to buildings, structures, or facilities that use or otherwise consume electrical energy; only service lines perform such a function. This definitional distinction is significant because it justifies consistently treating service lines differently from supply lines with respect to refunding CIAC payments.

II

Kossman argues that neither the Code, the regulations, nor Duquesne's Tariff disqualify service lines from a refund of CIAC payments. Kossman maintains that, although Duquesne's Tariff Rule No. 7 mandates CIAC payments for supply line extensions and also mandates that Duquesne refund those payments if certain conditions are met, the Tariff does not mandate the imposition of CIAC charges for service line extensions nor does the Tariff disqualify the service line customer from a refund of CIAC payments. Tariff Rule No. 8, which is applicable to service lines, states that Duquesne "reserves the right to make a reasonable charge including the related income tax, payable in advance, for service lines and for equipment installed for the exclusive use of a customer which exceed Company established standards described in the Company's 'Electric Service Installation Rules.' " FN3 In other words, whether Duquesne chooses to impose CIAC charges or refund CIAC payments for a service line extension is wholly within its discretion which must be exercised reasonably.

FN3. Rule No. 2.31 of Duquesne's revised Electric Service Installation Rules provides that Duquesne "will extend an overhead service line (primary, secondary, or a combination thereof) for a customer on a single premise up to 100 feet to the point of connection designated by the Company at no cost to the customer." Rule No 2.31 further provides the following: In the event the service line is greater than 100 feet in length, the customer:

a. Pays the total cost of the additional length of service line in excess of 100 feet on the customer's premises for his own service.... Where the Company elects to install facilities for the Company's purposes on the premise, that portion of the installation will not be considered in determining customer service line costs.

[4] A utility compiles its policies, rules, and regulations into its tariff, which it submits to the

Commission for review. Brockway Glass Co. v. Public Utility Commission, 63 Pa.Cmwlt. 238, 437 A.2d 1067, 1070 (1981). Once approved, the tariff provisions are legally binding on both the utility and its customers. *Id.* Therefore, Duquesne could treat a service line the same way as a supply line if circumstances justified such treatment. Kossman argues, however, that Duquesne does not exercise any discretion at all, as claimed in its Tariff. Rather it has instituted a policy to automatically impose a non-refundable CIAC charge for all service line extensions; a practice that was not approved by the Commission. This policy results in the unreasonable and discriminatory denial of refunds of CIAC payments for service line extensions that generate more revenue than the initial cost of installing the service line.

[5] [6] The burden of showing that a tariff is either unreasonable or discriminatory is on Kossman. This burden is very heavy because tariff provisions that have been properly submitted to and approved by the Commission are *prima facie* reasonable. Shenango Township Board of Supervisors v. Public Utility Commission, 686 A.2d 910, 914 (Pa.Cmwlt.1996). Kossman relies on a statement from Erdos v. Western Pennsylvania Water Co., 63 Pa. P.U.C. 453 (1987), stating that a "policy which is uniformly applied, ignoring the facts and circumstances of a particular instance, may be unreasonably discriminatory by ignoring the peculiar facts and circumstances of a particular case." *Id.* at 459. From this premise, Kossman argues that the similarities between a supply line and the service lines in the instant case justify similar treatment for purposes of a refund and would be permitted by the Tariff, the Regulations, and the Code.

[7] To the extent that the Commission's statement in *Erdos* may be a "binding norm," Physician's Insurance Co. v. Callahan, 167 Pa.Cmwlt. 485, 648 A.2d 608, 614 (1994), Kossman still had the burden of proving that Duquesne's policy to consistently refuse refunds*1152 of CIAC payments for service line extensions was unreasonably discriminatory. Duquesne's policy of consistently denying refunds of CIAC payments to developers for service line construction is not amenable to a case-by-case application. The sole purpose of a service line is to provide electrical energy to private commercial, industrial, or residential facilities for consumption, regardless of the number of consumers on that property. Service lines can never be an integral part of Duquesne's system of mass distribution of electrical energy to customers-at-large. Contrary to Kossman's assertion, Duquesne's policy of not refunding CIAC payments for service line extensions is an exercise of discretion within the terms of its Tariff. This discretionary authority retained by Duquesne was approved by the Commission as a Tariff provision and is binding on the customers and Duquesne. Kossman has shown that the Tariff may be unfavorable to him, but he has not shown that the Tariff is unreasonable. After a review of the record, we must agree with the Commission that Kossman failed to meet his burden of proving that the Tariff provision, which permits Duquesne to exercise discretion in this area, was unreasonable or discriminatory.

[8] Kossman argues by analogy that there is no difference between his service lines and the supply lines in a large residential development because both types of lines exist on a utility right-of-way and benefit large numbers of customers. Consequently, Kossman's commercial service lines provide a benefit to the community by providing job opportunities and services to the area. Therefore, argues Kossman, the fact that the service lines are on private property is not a significant difference. Kossman's hypothetical, however, is not analogous. The individual line extensions between the supply line and the individual residential consumers would be service lines and those service lines would be analogous to the service lines provided to Kossman's four commercially developed properties. In essence, the service lines extended to Kossman's properties are no different than service lines extended from a supply line to a large apartment building with, for example, two hundred units. Merely because many customers will receive electricity from the service line connection to the building, which will generate a large amount of revenue for Duquesne, does not change the inherent nature of the line extension from a service line to that of a supply line such that it justifies giving a refund and making the cost of the service line installation part of the rate base for all Duquesne customers. Further, the fact that each of the service lines exist on private property is not in itself significant, but the fact that each service line in the instant case serves only one private parcel is significant.

The reason that Duquesne gives a refund for a supply line that generates sufficient return is that the supply line is part of the mass distribution system of electricity for all Duquesne customers. (Tariff Rule No. 7). The cost of constructing the supply line then becomes part of the rate base for all Duquesne customers. In this manner, the increase in the rate base is in the nature of a tax. As a tax, all Duquesne customers pay for the benefit that they receive from the supply line as a result of directly or indirectly receiving electricity from that supply line. However, a service line, as previously mentioned, supplies an individual private parcel or development. Notwithstanding the number of tenants that exist on the private property or the revenue generated for Duquesne as a result of the service line extension to that property, a service line is not part of the "general supply system" of mass distribution of electricity such that all of Duquesne's customers should be required to pay, in their rate base, for one developer's project. In other words, the amount of revenue received by Duquesne from a service line that provides electrical service to a multitude of customers on a single lot of private property is not cause to require other customers in Duquesne's distribution territory to pay for that service line.

Additionally, the CIAC charges are part of Kossman's construction costs. Kossman can recoup these costs in the same manner that he recoups costs of construction materials, sewer lines, and plumbing, etc. The service line is part of Kossman's investment in his own property rather than his investment in the community. Therefore, we disagree with *1153 Kossman's argument that the relevant inquiry should focus on the number of customers served by a service line and his argument that the private nature of his property is irrelevant. The number of Duquesne customers that are served by Kossman's service lines is irrelevant because that particular service line will not benefit customers-at-large within Duquesne's service territory such that those customers should be taxed for the construction of Kossman's service line. The relevant inquiry is whether the line extension connects a supply line to a private consumer facility not whether many customers are served by the service extension.

Kossman also relies on the standard pronounced in Ridley Township v. Public Utility Commission, 172 Pa. Superior Ct. 472, 94 A.2d 168 (1953), and argues that the focus should be on whether the cost of the extension will materially restrict the utility and whether there is a basis for making the cost of the extension part of the rate base. In Ridley, the township had expanded by almost 100% within a ten-year period. The township and property owners requested that a water utility extend a water supply line to a development within the township for residential water and fire hydrants. However, the utility refused to pay for the extension.

The Superior Court in Ridley stated the following:

Ordinarily, it is not the business of the citizen or consumer to construct any part of a utility's system. There are, doubtless, instances where, under special circumstances, warranted by the evidence, the Commission may, in the exercise of its administrative discretion, withhold exercise of its power unless patrons offer to participate in the cost of construction.

Id. at 478-79, 94 A.2d at 171. The Ridley court held that the residents did not have to advance the cost of extending water service because the service area already contained "residents of suburban Philadelphia ... and of a community whose increase of population during the last decade denotes civic stability and presages continued healthy growth and expansion. Nothing in the record suggests 'over-development or premature development of scattered sections of' the Township 'in advance of its normal growth.'" Id. at 481, 94 A.2d at 172. Therefore, the speculative nature of development projects, which normally justifies charging customers in advance for the investment of a supply line, were not present, and the residents in Ridley that needed a source of water did not have to pay for an extension.

We agree with Commission that Ridley is not applicable to the instant case for two reasons. First, Ridley concerned a supply line extension to a residential district and not a service line to a parcel of private property for the consumption of water by the occupants of that property. Secondly, Ridley is also distinguishable because the public was not required to pay CIAC charges for a water supply line to a fully developed area where the rate of water consumption was not speculative. Therefore, no refund was involved. Even if we were to apply the Ridley standard in the case *sub judice*, we have

already concluded that there is no basis for making the costs of Kossman's extensions part of the rate base.

[9] [10] We, therefore, hold that the Commission properly concluded that the service line extensions provided to Kossman's four commercial developments disqualified Kossman from obtaining a refund of CIAC payments. The Commission also properly concluded that Duquesne's policy of consistently treating supply lines and service lines differently for purposes of refunding CIAC payments was reasonable and non-discriminatory. Service line extensions are not the functional equivalent of supply line extensions and, therefore could never be part of the "general supply system" that benefits all Duquesne customers, as required by the Tariff for refunding CIAC payments for supply lines, and taxing all customers for Kossman's service lines would not be justified.

III

Kossman also maintains that the procedure of adding the income tax that Duquesne will owe as a result of receiving the CIAC payments, called a "gross up," is discriminatory because it only impacts Duquesne's developer***1154** customers. Duquesne is permitted to utilize a "gross-up" calculation while utilities in other areas are not so permitted. Therefore, argues Kossman, Duquesne has a competitive rate advantage over other utilities and developers within Duquesne's territory have a competitive disadvantage by having the burden of carrying extra costs of development.

As a result of the Tax Reform Act of 1986, public utilities became liable for the income tax that accrued to them for receiving CIAC payments. In *Re Contributions in Aid of Construction and Customer Advances*, 70 Pa. P.U.C. 44 (1989), several methods were advanced for making utilities whole by allowing them to recuperate the amount of their tax liability. In *Re Contributions*, the Commission approved the following two methods:

CIAC Method 3-No gross-up of CIAC occurs. The utility pays the tax on the ... contribution and the resulting deferred tax debit is added to rate base. It is removed from the rate base as the utility receives the tax depreciation effects.

CIAC Method 5-CIAC is "grossed-up" by the [net present value] NPV of the tax liability of CIAC, less the tax reductive effects of the tax depreciation that will be received over the plant's life.... There is no effect on current ratepayers' revenue requirement.

Id. at 47-48. Therefore, under method 3, all ratepayers within a utility's service territory pay for the income tax liability that accrues to the utility as a result of receiving payments in advance of construction while method 5 allows the utility to add their tax liability to the individual CIAC payments received, placing the burden for the tax on the individual developers who are responsible for the CIAC charges.

The Commission stated that the CIAC issue necessitates a uniform but flexible policy that "creates neither unreasonable rates nor financial burden, that assigns cost to those who will reap benefits and at the same time helps maintain an environment in the Commonwealth that is conducive to economic development and the growth of commerce." *Id.* at 57. The Commission permitted Duquesne and other utilities that were employing method 5, at time of the *Re Contributions* decision, to continue using that method while other utilities were directed to use method 3 and recuperate their tax liability by increasing the rate base of all customers.

Kossman argues that permitting Duquesne to use method 5 and add an income tax "gross-up" to the CIAC charge, unfairly places the full cost of the tax burden on developers which discourages economic growth in Duquesne's service area. Therefore, Kossman argues that Duquesne has an unfair competitive advantage over other utilities employing method 3 because Duquesne can offer a lower rate base to its customers while developers in Duquesne's service area have a competitive disadvantage. This disparate treatment, argues Kossman, is unreasonable and lacks the uniformity and consistency that the Commission determined was necessary. Permitting Duquesne to use method 5 merely because they were already using that method at the time of the Commission's decision in *Re Contributions* is an unreasonable justification for treating Duquesne, and the developers within

Duquesne's service area, differently.

For the electric and gas industry, the Commission determined that method 3, which added income taxes to the rate base, "fulfills both requirements of promoting competition and economic growth. It requires only the base contribution or advance and shares the burden of taxes with current ratepayers who may also share in the 'public benefits' inherent in the increased economic growth." *Id.* at 57. The Commission recognized that the taxes associated with contributions from a large developer and user of energy are not reasonably assignable to other ratepayers except where an increase in jobs and economic development results from the CIAC charges. *Id.* at 56. However, the Commission sanctioned the use of method 5 for utilities already using that method and permitted other utilities to deviate from method 3 upon filing a petition with proposed tariff adjustments. *Id.* at 57.

Duquesne treats everyone within its service area equally. Clearly, the Commission, in *Re Contributions*, has permitted Duquesne to continue to use method number 5. *1155 Therefore, the Commission correctly applied that decision to the instant case. Additionally, Duquesne's Tariff Rule No. 8, as previously mentioned, expressly states that Duquesne reserves the right to make reasonable charges for service lines *including related income taxes*. This Tariff provision has the force of law and is equally binding on the Duquesne and its customers. *Brockway Glass*, 437 A.2d at 1070.

[11] [12] [13] Kossman does not provide any legal support under Pennsylvania or federal law for his claim that developers in Duquesne's service area are unreasonably discriminated against by the Commission's decision in *Re Contributions*. The Commission has broad discretion and authority "in determining what expenses incurred by a utility may be charged to the ratepayers" as long as the expenses are not hypothetical. *Barasch v. Public Utility Commission*, 507 Pa. 561, 566, 493 A.2d 653, 655 (1985). The doctrine of primary jurisdiction "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." *Weston v. Reading Co.*, 445 Pa. 182, 198-99, 282 A.2d 714, 723 (1971) (citation omitted). The doctrine of primary jurisdiction serves the following purposes: (1) the Commonwealth benefits from the agency's expertise and special experience in complex areas with which judges have little familiarity; (2) the statutory purpose and the intent of the legislature are fulfilled by honoring the powers granted to the agency by the legislature; and (3) the need to promote consistency in administrative policy is also fulfilled. *Elkin v. Bell Telephone Co.*, 491 Pa. 123, 132-33, 420 A.2d 371, 376 (1980). Therefore, where the Commission's decision concerns complex subject matter that is within its jurisdiction and expertise, the proper approach on review is to defer to the Commission and stay within our limited scope of review.

[14] In this regard, Kossman has failed to convince this court that the Commission's decision in *Re Contributions* is unsound. Conceivably, there are several reasons which may have affected the Commission's decision to grandfather certain utilities by allowing those already using method 5 to continue that practice, any one of which provides a rational basis for the Commission's decision to allow Duquesne to use method 5.

The burden on a utility to convert its accounting method to comply with method 3 was a stated concern of the Commission in *Re Contributions*. Also, Kossman fails to recognize that there is no guarantee that consumers of electricity will have the same rate for electrical service throughout the Commonwealth. Although Kossman argues that placing this added burden on developers inhibits economic growth, it is equally true that it encourages economic growth by maintaining low rates and thereby reducing the cost of doing business. As previously mentioned, Kossman could also pass this charge along to the purchasers or tenants of his commercial real estate developments. Also, there is no evidence in the record demonstrating that the Commission's decision to allow Duquesne to use method 5 while other utilities use method 3 fails to fulfill both requirements of promoting competition and economic growth.

Accordingly, the order of the Commission is affirmed.

ORDER

AND NOW, this 19th day of May, 1997, the order of the Pennsylvania Public Utility Commission,

dated July 24, 1996, at No. C-00945802, is hereby affirmed.

Pa.Cmwth.,1997.

Kossman v. Pennsylvania Public Utility Com'n
694 A.2d 1147, Util. L. Rep. P 26,635

Judges and Attorneys ([Back to top](#))

[Judges](#) | [Attorneys](#)

Judges

- **Flaherty, Hon. James J.**

Commonwealth of Pennsylvania Commonwealth Court
Harrisburg, Pennsylvania 17106

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Profiler](#)

- **McGinley, Hon. Bernard L.**

Commonwealth of Pennsylvania Commonwealth Court
Harrisburg, Pennsylvania 17106

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Narick, Hon. Emil E.**

Commonwealth of Pennsylvania Commonwealth Court
Harrisburg, Pennsylvania 17106

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Profiler](#)

Attorneys

Attorneys for Intervenor

- **Herskovitz, Richard S.**

Pittsburgh, Pennsylvania 15219

[Litigation History Report](#) | [Profiler](#)

Attorneys for Respondent

- **Colwell, Susan D.**

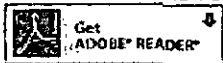
Harrisburg, Pennsylvania 17105

[Litigation History Report](#) | [Profiler](#)

END OF DOCUMENT

 [West Reporter Image \(PDF\)](#)

Adobe Reader is required to view PDF images.



(c) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

 [West Reporter Image \(PDF\)](#)

63 Pa.Cmwlth. 238, 437 A.2d 1067

Commonwealth Court of Pennsylvania.
BROCKWAY GLASS COMPANY, Petitioner,
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent.

Argued Sept. 14, 1981.

Decided Dec. 16, 1981.


Public utility customer appealed from order of the Public Utility Commission which adopted initial decision in ruling on exceptions of administrative law judge and dismissed petitioner's complaint against public utility. The Commonwealth Court, No. 2835 C.D. 1980, Blatt, J., held that: (1) public utility was required to impose 1979 tariff then in effect and any attempt by it to vary the terms of the tariff either as to rate or notice requirements would have been ineffective; moreover, public utility was not free to enter into a contract with customer which differed from tariff filed with the Public Utility Commission, but was constrained to charge the lawful rate until expiration of the one year notice period, as tariffed, and (2) rate schedule 47, which included requirement of a one year notice of cancellation in addition to a four-year initial term of service, had met test of reasonableness at rate proceedings on at least two previous occasions when it had been submitted by public utility as a proposed rate, and customer had not failed to meet its burden of demonstrating that rate schedule 47 was now unreasonable.

Affirmed.

West Headnotes


[1]  [KeyCite Citing References for this Headnote](#)

 [317A Public Utilities](#)

 [317AIII Public Service Commissions or Boards](#)

 [317AIII\(C\) Judicial Review or Intervention](#)


 [317Ak188 Appeal from Orders of Commission](#)


 [317Ak194 k. Review and Determination in General. Most Cited Cases](#)
(Formerly 317Ak32)


The Commonwealth Court's scope of review in rate-making cases is limited to a determination of whether or not constitutional rights have been violated, or if an error of law has been committed, or whether or not the findings, determinations or orders of the Public Utility Commission are supported by substantial evidence.

[2]  [KeyCite Citing References for this Headnote](#)

 [317A Public Utilities](#)

 [317AII Regulation](#)

 [317Ak119 Regulation of Charges](#)

 [317Ak120 k. Nature and Extent in General. Most Cited Cases](#)
(Formerly 317Ak7.1)

Tariffs can include schedules of rates and all rules, regulations, practices or contracts involving rates and have the force of law and are binding on both the utility and its customer.

[3] KeyCite Citing References for this Headnote

- ↳ 145 Electricity
 - ↳ 145k11.3 Regulation of Charges
 - ↳ 145k11.3(1) k. In General. Most Cited Cases

Power company was required to impose 1979 tariff then in effect and any attempt by it to vary the terms of the tariff either as to rate or notice requirements would have been ineffective; moreover, it was not free to enter into a contract with customer which differed from the tariff filed with the Public Utility Commission, but was constrained to charge the lawful rate until expiration of the one-year notice period, as tariffed.

[4] KeyCite Citing References for this Headnote

- ↳ 317A Public Utilities
 - ↳ 317AIII Public Service Commissions or Boards
 - ↳ 317AIII(B) Proceedings Before Commissions
 - ↳ 317Ak165 k. Evidence. Most Cited Cases (Formerly 317Ak15)

Where a customer is heard to complain concerning a proposed change in public utility rates, the burden of proof is upon the public utility to show that the proposed rate is just and reasonable; however, where the complaint involves an existing rate, the burden then falls upon the customer to prove that the charge is no longer reasonable.

[5] KeyCite Citing References for this Headnote

- ↳ 145 Electricity
 - ↳ 145k11.3 Regulation of Charges
 - ↳ 145k11.3(5) k. Reasonableness of Charges. Most Cited Cases

Rate schedule 47, which included requirement of a one year notice of cancellation in addition to a four-year initial term of service, had met test of reasonableness at rate proceedings on at least two previous occasions where it had been submitted by public utility as a proposed rate, and public utility customer had failed to meet its burden of demonstrating that rate schedule 47 was now unreasonable. 66 P.S. § 1301.

[6] KeyCite Citing References for this Headnote

- ↳ 145 Electricity
 - ↳ 145k11.3 Regulation of Charges
 - ↳ 145k11.3(7) k. Judicial Review and Enforcement. Most Cited Cases

Misstatement of law by the Public Utility Commission when it stated that "where there is an outstanding contract, based on reasonable tariff provisions, it is the time of the contract that governs the application of section 1303, and not the time of use" was harmless error, for rate schedule 47, as part of the last published tariff, was tariff in effect at the time of use as well as at the time of contracting and was, therefore, the controlling lawful rate. 66 P.S. § 1303.

****1068 *239** Robert H. Griswold, McNees Wallace & Nurick, Harrisburg, for petitioner.

Joseph J. Malatesta, Jr., Chief Counsel, Kandace F. Foust, Asst. Counsel, Shirley Rae Don, Pennsylvania Public Utility Commission, Harrisburg, Edward S. Stiteler, Cabin Hill, Greensburg, for respondent.

Before BLATT, MacPHAIL and PALLADINO, JJ.

****1069 OPINION**

BLATT, Judge.


Brockway Glass Company (Brockway) appeals here from an order of the Pennsylvania Public Utility Commission (PUC) entered October 15, 1980, which adopted the Initial Decision and Ruling on Exceptions of the Administrative Law Judge (ALJ) and dismissed the petitioner's complaint against West Penn Power Company (West Penn). We affirm.

Brockway, an industrial customer of West Penn at several locations, has been taking electric service at its Plant No. 11 in Washington, Pennsylvania since acquisition of that plant in 1964, at which time it succeeded to the then-existing electric service agreement for that plant. Brockway and West Penn subsequently executed three new agreements: on October 10, 1965, September 8, 1967 and May 3, 1974, each of which was based upon a different West Penn rate schedule ***240** chosen by Brockway with regard to its demand requirements at the time in question. The last agreement, dated May 3, 1974, was computed in accordance with Rate Schedule 47 and provided for 25,000 volt service to a maximum load of 10,000 kilowatts, and a minimum demand of 7,500 kilowatts. This agreement, as did Rate Schedule 47, provided for an initial agreement term of four years, subject to cancellation thereafter upon one-year's written notice by either party. On August 31, 1973 West Penn filed Rate Schedule 47 with the PUC as part of its tariff and refiled it on September 4, 1979.

On or about September 18, 1979, [FN1] Brockway notified West Penn that, due to the termination of operations at Plant No. 11 as of January 1, 1980, the power use at the plant would be drastically reduced and a transfer to a more appropriate rate was therefore requested as of that date. On January 3, 1980, Brockway confirmed the reduction in operations at the plant and again requested transfer to a more suitable rate. West Penn, considering itself bound by the one-year minimum notice provision of its filed tariff and, therefore, unable to effect a change in rate until September 18, 1980, continued to bill Brockway in accordance with Rate Schedule 47. Brockway, however, recomputed the billings for service provided it after January 1, 1980 pursuant to Rate Schedule 30, which it viewed as the rate most beneficial to it under its changed circumstances.

FN1. The record indicates that Thomas L. Anderson, Jr., the author of the September 18, 1979 letter from Brockway, succeeded in recalling the letter from West Penn pending Brockway's public announcement on October 1, 1979 of its intention to terminate operations at Plant No. 11. Anderson, by letter of October 1, 1979, then reconfirmed Brockway's intention to shut down Plant No. 11 as of January 1, 1980. The Administrative Law Judge found September 18, 1979 to be the controlling date.

***241** On February 22, 1980 Brockway filed a complaint with the PUC 1) seeking to have it find that the one-year notice of cancellation requirement in the contract and in Rate Schedule 47 was unjust, unreasonable and unlawful and would result in West Penn's collecting excessive charges from Brockway, and 2) seeking a determination of Brockway's right to have its billing computed under a more beneficial rate in light of the drastic reduction in its demand requirements. After a hearing, at which only Brockway offered evidence, the ALJ found that Brockway had failed to meet its burden of proof and dismissed the complaint. The initial decision was reaffirmed by the ALJ in his Ruling on Exceptions and both of these determinations by the ALJ were subsequently adopted as its action by the PUC. This appeal then followed.

[1]  Our scope of review in rate making cases is limited to a determination of whether or not constitutional rights have been violated, or if an error of law has been committed, or whether or not the findings, determinations or order of the PUC are supported by substantial evidence. Zucker v. Pennsylvania Public Utility Commission, 43 Pa. Commonwealth Ct. 207, 401 A.2d 1377 (1979).

Brockway contends that Section 1303 of the Public Utility Code (Code), ****1070** 66 Pa.C.S. s 1303, requires a customer, whose service requirements have changed subsequent to execution of a service agreement and who has given notice to the utility of the changed conditions, to have its future

billings computed at the rate most advantageous to the customer's realigned service requirements. Brockway's reliance on this Section of the Code, however, is misplaced.

Section 1303 of the Code provides:

No public utility shall, directly or indirectly, by any device whatsoever, or in anywise, demand or receive from any person, corporation, *242 or municipal corporation a greater or less rate for any service rendered or to be rendered by such public utility than that specified in the tariffs of such public utility applicable thereto. The rates specified in such tariffs shall be the lawful rates of such public utility until changed, as provided in this part. Any public utility, having more than one rate applicable to service rendered to a patron, shall, after notice of service conditions, compute bills under the rate most advantageous to the patron. (Emphasis added.)

[2] [3] Tariffs, of course, can include schedules of rates, and all rules, regulations, practices or contracts involving rates and have the force of law and are binding on both the utility and its customer. Behrend v. Bell Telephone Company, 242 Pa. Superior Ct. 47, 363 A.2d 1152 (1976). And, in Bell Telephone Co. v. Pennsylvania Public Utility Commission, 53 Pa. Commonwealth Ct. 241, 244, 417 A.2d 827, 828-29 (1980), this Court construed Section 1303 of the Code and stated that "(t)here can be no lawful rate except the last tariff published as provided by law.... Further, it is well established that in the absence of an exception by the Commission, a public utility may not charge any rate for services other than that lawfully tarified...." (Citations omitted, emphasis in original.) It is well-settled in Pennsylvania that:


Contracts for the service of utilities are presumed to have been made subject to the police power of the state ..., and it is beyond the power of the contracting parties to fix rates or provide for service permanently.... (T)he Public Utility Law supplant(s) any agreement in so far as rates are involved between the consumer and the utility. (Citations omitted, emphasis added.)

*243 Delph v. Pennsylvania Public Utility Commission, 46 Pa. Commonwealth Ct. 552, 555, 406 A.2d 1209, 1210 (1979) (quoting Scranton Electric Co. v. Avoca Borough School District, 155 Pa. Superior Ct. 270, 274, 37 A.2d 725, 727 (1944)). West Penn, therefore, was required to impose the 1979 tariff then in effect, Bell Telephone, and any attempt by it to vary the terms of the tariff either as to rate or notice requirements would have been ineffective. Delph. West Penn, moreover, was not free to enter into a contract with Brockway which differed from the tariff filed with the PUC; it was constrained to charge the lawful rate until expiration of the one-year notice period, as tarified.

[4] [5] Brockway asserts that the requirement of a one-year notice of cancellation in addition to a four-year initial term of service operated as an unlawful penalty, and, further, that the said requirement was a term of adhesion. Public utility rates, of course, are required to be just and reasonable, 66 Pa.C.S. s 1301, and, where a customer is heard to complain concerning a proposed change in rate, the burden of proof is upon the public utility to show that the proposed rate is just and reasonable. Where the complaint involves an existing rate, however, the burden then falls upon the customer to prove that the charge is no longer reasonable. Zucker. Brockway did not meet its burden here. The record indicates that in each of its successive agreements Brockway obtained a new and different rate schedule which was economically compatible with its then-current electric service requirements. In 1974 it opted for Rate Schedule 47 with its one-year notice of cancellation provision to apply after expiration of the initial four-year term and it continued under that schedule without complaint until it curtailed its operations at Plant No. 11 in 1980. Brockway submitted virtually no evidence at the hearing as to the unreasonableness of the cancellation **1071 provision per se, but addressed *244 itself, from the position of hindsight, primarily to the unreasonableness of the provision as now applied to Brockway. Indeed Brockway did not complain of any unreasonableness until such time as Rate Schedule 47 became financially disadvantageous to it.

Tariff limitations have been upheld by our courts, which have recognized "the power vested in the PUC to evaluate the reasonableness of tariffs or regulations filed with it and to determine whether the provisions therein are compatible with the code and policies of the commission and consistent with its regulatory scheme." Behrend, 242 Pa. Superior Ct. at 74-75, 363 A.2d at 1166. Rate Schedule 47 had

met the test of reasonableness at rate proceedings on at least two previous occasions when it had been submitted by West Penn as a proposed rate, and Brockway has now failed to meet its burden of demonstrating that Rate Schedule 47 is now unreasonable.

[6]  Brockway does contend, and rightly, that the PUC was incorrect when it stated that "(w) here there is an outstanding contract, based on reasonable tariff provisions, it is the time of the contract that governs the application of Section 1303, and not the time of use." (Emphasis in original.) [FN2] We have previously held that the rate in effect at the time of delivery of service, rather than the rate at the time of contracting is controlling, because, "(t)here can be no lawful rate except the last tariff published as provided by law." Bell Telephone, 53 Pa.Commonwealth Ct. at 244, 417 A.2d at 828 (emphasis in original). We must conclude here, however, that the PUC's *misstatement of the law in this adjudication is harmless error, for Rate Schedule 47, as part of the last published tariff, was the tariff in effect at the time of use as well as at the time of contracting and was, therefore, the controlling lawful rate.*

FN2. Reproduced Record at p. 112a.

***245** For the foregoing reasons, we must affirm the order of the PUC.

ORDER

AND NOW, this 16th day of December, 1981, the order of the Pennsylvania Public Utility Commission in the above-captioned matter is affirmed.

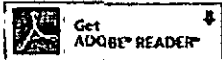
MENCER, J., did not participate in the decision in this case.

Pa.Cmwth., 1981.
Brockway Glass Co. v. Pennsylvania Public Utility Commission
63 Pa.Cmwth. 238, 437 A.2d 1067

END OF DOCUMENT

 [West Reporter Image \(PDF\)](#)

Adobe Reader is required to view PDF images.



(c) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

 [West Reporter Image \(PDF\)](#)

768 A.2d 1217

Briefs and Other Related Documents
Judges and Attorneys

Commonwealth Court of Pennsylvania.
Robert H. MILKIE, Petitioner,
v.
PENNSYLVANIA PUBLIC UTILITY COMMISSION, Respondent.

Argued May 20, 1999.
Decided Feb. 23, 2001.

Ratepayer appealed Public Utility Commission's (PUC) order, No. C-00970807, that dismissed his complaint of overbilling against electric company. The Commonwealth Court, No. 2859 C.D. 1998, Leadbetter, J., held that substantial evidence supported PUC's decision that ratepayer was not overcharged for electric usage at his vacation home.

Affirmed.

Colins, J., dissented.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)


↪ [317A Public Utilities](#)
 ↪ [317AII Regulation](#)
 ↪ [317Ak119 Regulation of Charges](#)
 ↪ [317Ak119.1 k. In General. Most Cited Cases](#)

Under the "Waldron rule," a complainant may establish a prima facie case of public utility overbilling by showing that the disputed bill was abnormally high when compared to prior bills, although his usage pattern had not changed.

[2]  [KeyCite Citing References for this Headnote](#)

↪ [317A Public Utilities](#)
 ↪ [317AIII Public Service Commissions or Boards](#)
 ↪ [317AIII\(B\) Proceedings Before Commissions](#)
 ↪ [317Ak165 k. Evidence. Most Cited Cases](#)

The controlling principle of the "Waldron rule," which governs how a complainant may establish a prima facie case of public utility overbilling, is that even where the utility can present evidence that it has tested the customer's meter and found it to be accurate, the customer may, nonetheless, prove his case by circumstantial evidence which would support a finding that the metered usage exceeded the actual usage.

[3]  [KeyCite Citing References for this Headnote](#)

↪ [317A Public Utilities](#)
 ↪ [317AIII Public Service Commissions or Boards](#)

- ↔[317AIII\(B\) Proceedings Before Commissions](#)
- ↔[317Ak165 k. Evidence. Most Cited Cases](#)

In an action alleging public utility overbilling, any circumstantial evidence presented by a complainant that shows that a disputed bill was abnormally high when compared to prior bills, although his usage pattern had not changed, will establish a prima facie case under the "Waldron rule."

[4] [KeyCite Citing References for this Headnote](#)

- ↔[317A Public Utilities](#)
- ↔[317AIII Public Service Commissions or Boards](#)
- ↔[317AIII\(B\) Proceedings Before Commissions](#)
- ↔[317Ak165 k. Evidence. Most Cited Cases](#)

Once it is determined that the complainant has made out his prima facie case of public utility overbilling, the burden of going forward shifts to the utility, but the ultimate burden of persuasion remains with the complainant.

[5] [KeyCite Citing References for this Headnote](#)

- ↔[317A Public Utilities](#)
- ↔[317AIII Public Service Commissions or Boards](#)
- ↔[317AIII\(B\) Proceedings Before Commissions](#)
- ↔[317Ak165 k. Evidence. Most Cited Cases](#)

In an action alleging public utility overbilling, the Public Utility Commission (PUC) must measure the weight and credibility of all the evidence, and simply because the ratepayer has presented a prima facie case does not obligate the PUC to credit this evidence or to give it any special weight.

[6] [KeyCite Citing References for this Headnote](#)

- ↔[317A Public Utilities](#)
- ↔[317AIII Public Service Commissions or Boards](#)
- ↔[317AIII\(B\) Proceedings Before Commissions](#)
- ↔[317Ak165 k. Evidence. Most Cited Cases](#)

In an action alleging public utility overbilling, if the utility presents evidence found to be of equal weight with that of the complainant, then the complainant will not have met his burden of proof.

[7] [KeyCite Citing References for this Headnote](#)

- ↔[317A Public Utilities](#)
- ↔[317AIII Public Service Commissions or Boards](#)
- ↔[317AIII\(C\) Judicial Review or Intervention](#)
- ↔[317Ak188 Appeal from Orders of Commission](#)
- ↔[317Ak194 k. Review and Determination in General. Most Cited Cases](#)

The "Waldron rule," which governs how a customer may establish a prima facie case of public utility overbilling, is irrelevant on appeal where the Public Utility Commission (PUC) has dismissed the complaint because the customer has failed to sustain his burden of persuasion, rather than because the customer failed to present a prima facie case as a matter of law.

[8] [KeyCite Citing References for this Headnote](#)

↳ [317A Public Utilities](#)

↳ [317AIII Public Service Commissions or Boards](#)

↳ [317AIII\(B\) Proceedings Before Commissions](#)

↳ [317Ak167 k. Hearing and Rehearing. Most Cited Cases](#)

The Public Utility Commission (PUC), not the ALJ, is the ultimate fact-finder in formal proceedings on a complaint of public utility overbilling; it weighs the evidence and resolves conflicts in the testimony. [66 Pa.C.S.A. § 335\(a\)](#).

[9] [KeyCite Citing References for this Headnote](#)

↳ [145 Electricity](#)

↳ [145k11.5 Discrimination and Overcharge](#)

↳ [145k11.5\(2\) k. Actions by Consumers. Most Cited Cases](#)

Substantial evidence supported Public Utility Commission's (PUC) decision that ratepayer was not overcharged for electric usage at his vacation home; ratepayer's conclusory testimony concerning consistency of use of the vacation home was outweighed by evidence that the meters were checked by the electric company and found to be accurate, and that the potential energy use in the home was greater than the use billed in the disputed period.

***1218** [Michael D. Shaffer](#), Philadelphia, for petitioner.

Andrew S. Tubbs, Harrisburg, for respondent.

[David B. MacGregor](#), Philadelphia, for intervenor, PP&L.

Before [COLINS](#), Judge, [LEADBETTER](#), Judge, and [McCLOSKEY](#), Senior Judge.

[LEADBETTER](#), Judge.

[1] Robert H. Milkie appeals from an order of the Public Utility Commission (PUC) that dismissed Milkie's complaint against Pennsylvania Power & Light (PP & L). At issue is the proper application of a doctrine known as the "Waldron rule," under which a complainant may establish a prima facie case of overbilling by showing that the disputed bill was abnormally high when compared to prior bills, although his usage pattern had not changed. [Waldron v. Philadelphia Elec. Co., 54 Pa. PUC 98, 1980 WL 140964 \(1980\)](#).

Milkie filed a formal complaint with the PUC on September 26, 1996. He claimed that he had been overcharged for electric usage at his vacation home from 1986 until early in 1996, when his bills dropped precipitously. Following a telephonic hearing at which both sides presented evidence, an administrative law judge recommended that Milkie's bills for 1993, 1994 and 1995 be recalculated based upon average usage during 1996 and 1997. ^{FN1} PP & L filed exceptions. The Commission reversed, concluding that Milkie failed to meet his burden of proof. Milkie now appeals to this court.

^{FN1}. The administrative law judge found that any overbillings prior to 1993 were beyond the applicable statute of limitations, and this ruling is not in issue in this appeal.

Milkie, an architect, testified that he designed the Pocono Lake vacation home to be energy efficient. He, his wife and two teenaged children, (whose primary residence is in Staten Island, New York) use the home "maybe once a month, sometimes once in two months," and for about one week during the Christmas holiday. When the house was empty, he set the thermostat at 40-45 degrees Fahrenheit and shut the water pump off and lights off, except for two automatic outside lights. The family's usage of the property had been "pretty consistent" in the eleven years they owned it. After

he compared his bills with those received by neighbors living year-round in the area, in 1988 or 1989 Milkie notified PP & L that he suspected overbilling. He complained again in around 1992 and in 1996. Each time PP & L checked the meter and found it to be accurate. In February of 1996, he threatened to complain to the PUC and thereafter his bills dropped "probably 200 percent." Milkie presented his calculations as to his average payments (based upon his checking account records) during 1993, 1994, 1995 [disputed period] and after February of 1996 [undisputed period].

PP & L presented the testimony of John Janofsky, an employee whose duties included the investigation of billing complaints. He presented PP & L's usage and billing records for the Milkie property from 1994-97. Although these figures showed a far less dramatic difference between the average billings during the *1219 disputed and undisputed periods, they nonetheless verified a reduction in metered usage during 1996 and 1997.^{FN2} Janofsky also testified that, based upon the billings, the bulk of electric usage by the Milkie family was heat-related, and explained the various factors which can affect heat loss and fluctuations in power usage. He had inspected the house in March of 1996 and in December of 1997. The Milkies were not in residence and a neighbor let him in. He testified to his observations and measurements of the house itself and of the appliances on the premises which would draw electric power when in use. On the December visit, he measured the temperature inside the house at 50 degrees although the thermostats were set at 45 degrees. He also found the fireplace flue to be open. In November of 1997, he checked the Milkies' electric meter and found it to be 99.8% accurate. He also identified a document (admitted as P-3) sent by the Bureau of Consumer Services of the Commission dated March 13, 1996, which stated "CO HAS BEEN ONSITE TO CHK PROPERTY METER CHKED OUT OK FOUND NO LEAKS CO CAN'T ACCOUNT FOR HIGH KW VS LOW USAGE." ^{FN3}

^{FN2.} Milkie testified that his average bills in 1993 were \$199.56; in 1994 were \$223.00; in 1995 were \$184.13; and after February of 1996 were \$98.75; Janofsky testified that PP & L's records reflected average bills of \$179.36 in 1994; \$183.24 in 1995; \$145.76 in 1996; and \$137.64 for the period November 1996 through November 1997. PP & L's records did not go back to 1993.

^{FN3.} Interestingly, PP & L did not introduce any independent evidence of meter checks before 1996. The only evidence regarding the meter inspections of 1988-89 and 1992 was Milkie's testimony that PP & L advised him the meter was checked and found to be working properly. Milkie has not, however, challenged the PUC's reliance on this evidence.

Finally, in lieu of further testimony, Milkie stipulated "that the actual usage was less than the potential [energy use at the home]" and that "the heat loss related usage at this home, assuming the temperature inside the home is 50 degrees and the temperature outside the home is minus 10 would be 20,356 KWH for the heating season." ^{FN4}

^{FN4.} Based upon this stipulation, PP & L made the following argument: Mr. Milkie stipulated that the potential energy usage at the home is higher than the actual usage. In fact, the potential usage at the home stipulated to by Mr. Milkie is higher than the actual usage in any year for which PP & L has records. As Mr. Milkie is not contesting his bills after February 1996, we can take his summer usage in 1996 as uncontested, non-heat related usage (i.e., all the electric appliances in the home other than the electric heat). PP & L Hearing Exhibit No. 1 shows an average monthly usage of 798.33 KWH for June, July and August of 1996. This multiplied by 12 gives 9580 KWH for non-heat related appliances over the year. When this is added to the 20,356 KWH stipulated to by Mr. Milkie for heating the home to 50, it gives a yearly total of 29,936 KWH for actual, nondisputed appliance usage plus potential heat usage, even assuming the home is only heated to 50. This potential is higher than the actual yearly KWH totals for each year for which PP & L has records. The actual yearly totals are derived by adding the figures for

each year under the "KWHUSAGE" column in PP & L Hearing Exhibit No. 1. Those totals are: 27,876 KWH for 1994, 28,861 KWH for 1995, 21,370 KWH for 1996 and 19,432 KWH for 1997.

[2] [3] On appeal, Milkie claims that the administrative law judge properly found that he had established a prima facie case of overbilling and that PP & L had failed to come forward with "co-equal" evidence, thus that the Commission erred in dismissing his complaint. The heart of this dispute, at all levels, reflects confusion about the "Waldron rule" and the role it plays in the PUC's adjudication of an overbilling claim. While the rule is often explained by stating that the ratepayer must establish certain specific elements ^{FN5} in order to make *1220 out a prima facie case of overbilling by a utility company, we believe this view is too restrictive. Rather, the controlling principle is that even where the utility can present evidence that it has tested the customer's meter and found it to be accurate, the customer may, nonetheless, prove his case by circumstantial evidence which would support a finding that the metered usage exceeded the actual usage. Thus, as our Supreme Court has explained, the rule operates as a device by which the complainant is protected from dismissal because of his inability to marshal *direct* proof that his meter had malfunctioned. Burleson v. Pennsylvania Pub. Util. Comm'n, 501 Pa. 433, 435-36, 461 A.2d 1234, 1235 (1983). Any circumstantial evidence which meets this standard will establish a prima facie case. ^{FN6}

^{FN5}. For instance our Supreme Court stated in *Burleson*, "a complainant may establish a prima facie case by showing that his power usage for the billing period in question was unchanged from earlier periods and his bill for the same period was higher than previous bills." Burleson v. Pennsylvania Pub. Util. Comm'n, 501 Pa. 433, 435-36, 461 A.2d 1234, 1235 (1983).

^{FN6}. It should be noted that whether or not that circumstantial evidence establishes a prima facie case is an inquiry into its legal sufficiency, not into the ultimate weight it will be accorded.

[4] [5] [6] [7] [8] Once it is determined that the complainant has made out his prima facie case, the burden of going forward shifts to the utility, but the ultimate burden of persuasion remains with the complainant. The Commission ^{FN7} must measure the weight and credibility of all the evidence, and simply because the ratepayer has presented a prima facie case does not obligate the Commission to credit this evidence or to give it any special weight. If the utility presents evidence found to be of co-equal (or greater) weight with that of the complainant, the complainant will not have met his burden of proof. At this stage, the Waldron doctrine provides "that the mere proof by the utility that its power measuring devices were accurate is no longer the *sole* determinant as to whether there is a basis to a complaint of overbilling." *Id.* at 436, 461 A.2d at 1236 [emphasis supplied]. Finally, where the Commission has dismissed the complaint because the customer has failed to sustain his burden of persuasion (generally a fact question), rather than because the customer failed to present a prima facie case as a matter of law, the Waldron rule is irrelevant on appeal. *Id.* at 436, 461 A.2d at 1236.

^{FN7}. The Commission, not the ALJ, is the ultimate fact-finder in formal complaint proceedings; it weighs the evidence and resolves conflicts in the testimony. Section 335 (a) of the Public Utility Code, 66 Pa.C.S. § 335(a); Pennsylvania Elec. Co. v. Pennsylvania Pub. Util. Comm'n, 81 Pa.Cmwlth. 285, 473 A.2d 704 (1984). When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. 66 Pa.C.S. § 335(a).

On appeal, Milkie seeks to have us review whether he presented a prima facie case under Waldron,

while PP & L argues that Waldron is of no consequence at this point and the proper focus of our review is whether the Commission's decision is supported by substantial evidence. That the parties view the issue before us in such a vastly different manner is explained by the fact that the Commission has employed language in its decision which is at variance with the nature of its analysis. Although opining that Milkie failed to establish a prima facie case, it is clear that the Commission reached its decision by reviewing and evaluating the weight and probative value of all the evidence. Therefore, we agree with PP & L as to our proper standard of review.

[9] Here, the Commission simply found Milkie's evidence to be of little weight. As it noted, where the premises in question is not a continuously occupied primary residence, but instead a vacation home used occasionally, the evidence concerning frequency and consistency of use during the disputed and undisputed periods must be reasonably specific to have significant probative value. However, Milkie's testimony concerning the consistency of the family's use of the property *1221 was vague and somewhat equivocal.^{FN8} It would appear self-evident that significant changes in power usage could result from the difference between monthly and bi-monthly visits, not to mention whether the home was visited more frequently during the heating season. Moreover, such occurrences as failing to close a fireplace flue between monthly or bi-monthly visits during the winter months could have a substantial impact. The Commission found that Milkie's general and conclusory testimony concerning consistency of use was outweighed by the evidence that the meters had been checked and found to be accurate and that the potential energy use in the home was greater than the use billed in the disputed period.^{FN9} Such determinations are the sole province of the Commission as fact-finder, and we will not disturb them on appeal.

^{FN8}. Milkie testified that:It's been pretty consistent across the 11 years that I built it. We get up with the family, hopefully once a month, if we can, but with the school and kids and everything, we'll be lucky if we get there once a month.We try and spend at least one week between Christmas and New Years there every year and basically that's it.

* * *

Q. Did you use the property more [after February of 1996]?A. No. Less, actually. Actually, it was about the same. I was using it about once a month.

N.T. 12/22/97 at 15, 22.

^{FN9}. The Commission also noted that in all prior cases in which a charge of overbilling was sustained on the basis claimed here, the complainant had shown a long pattern of constant usage followed by a sudden *increase* in his bills, while Milkie complains that the usage pattern established over many years in the past must be incorrect because his current bills are lower. As the PUC notes in its brief, a complaint about the level of billings in the past precludes the utility from conducting an investigation into the validity of the claim because it cannot go back in time to do a field survey of energy use in the home or check the meter for the relevant period. While we find the relative duration and order of the disputed and undisputed periods to be of no talismanic effect, they are factors which the Commission may consider.

ORDER

AND NOW, this 23rd day of February, 2001, the order of Pennsylvania Public Utility Commission in the above captioned matter is hereby AFFIRMED.

Judge COLINS dissents.

Pa.Cmwltth.,2001.
Milkie v. Pennsylvania Public Utility Com'n
768 A.2d 1217

Briefs and Other Related Documents ([Back to top](#))

- [1999 WL 33938990](#) (Appellate Brief) Brief for Respondent Pennsylvania Public Utility Commission (Apr. 13, 1999)
 - [1999 WL 33938992](#) (Appellate Brief) Brief of Intervenor PP&L, Inc. in Support of the Pennsylvania Public Utility Commission's Order Entered on September 25, 1998 at Docket No.C-970807 (Apr. 12, 1999)
 - [1999 WL 33938991](#) (Appellate Brief) Brief of Petitioner (Mar. 11, 1999)
-

Judges and Attorneys ([Back to top](#))

[Judges](#) | [Attorneys](#)

Judges

- **Colins, Hon. James Gardner**

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Profiler](#)

- **Leadbetter, Hon. Bonnie Brigance**

Commonwealth of Pennsylvania Commonwealth Court
Harrisburg, Pennsylvania 17106

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **McCloskey, Hon. Joseph F.**

Commonwealth of Pennsylvania Commonwealth Court
Harrisburg, Pennsylvania 17106

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Profiler](#)

Attorneys

Attorneys for Intervenor

- **MacGregor, David B.**

Philadelphia, Pennsylvania 19103

[Litigation History Report](#) | [Profiler](#)

Attorneys for Petitioner

- **Shaffer, Michael D.**

Philadelphia, Pennsylvania 19103

[Litigation History Report](#) | [Profiler](#)

Other Attorneys

- **Colins, Hon. James Gardner**

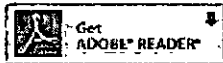
Philadelphia, Pennsylvania 19103

[Litigation History Report](#) | [Profiler](#)

END OF DOCUMENT

 [West Reporter Image \(PDF\)](#)

Adobe Reader is required to view PDF images.



(c) 2012 Thomson Reuters. No Claim to Orig. US Gov. Works.

 [West Reporter Image \(PDF\)](#)

516 Pa. 75, 532 A.2d 12

Supreme Court of Pennsylvania.
COMMONWEALTH OF PENNSYLVANIA, BUREAU OF CORRECTIONS, Appellee,
v.
CITY OF PITTSBURGH, PITTSBURGH CITY COUNCIL, Appellant.

Argued March 11, 1987.
Decided Oct. 15, 1987.

Bureau of Corrections brought action challenging city council's denial of conditional use permit for prerelease facility for state prisoners. The Court of Common Pleas, Allegheny County, No. S.A. 654 of 1984, affirmed denial and Bureau appealed. The Commonwealth Court, No. 37 C.D. 1985, 91 Pa.Cmwlth. 293, 496 A.2d 1361, reversed and objectors appealed. The Supreme Court, No. 76 W.D. Appeal Docket 1986, Zappala, J., held that objectors failed to sustain their burden of showing that proposed facility would pose a substantial threat to the community and Bureau was entitled to conditional use permit.

Affirmed.

Larsen, J., dissented and filed opinion in which McDermott, J., joined.

Papadakos, J., dissented and filed opinion.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

☞ [414 Zoning and Planning](#)

☞ [414VIII Permits, Certificates, and Approvals](#)

☞ [414VIII\(B\) Proceedings on Permits, Certificates, or Approvals](#)

☞ [414k1418 Notice and Hearing](#)

☞ [414k1422 k. Evidence and fact questions. Most Cited Cases](#)
(Formerly 414k435)

An applicant for a conditional use must prove that the standards set forth in the zoning ordinance have been met.

[2]  [KeyCite Citing References for this Headnote](#)

☞ [414 Zoning and Planning](#)

☞ [414VIII Permits, Certificates, and Approvals](#)

☞ [414VIII\(B\) Proceedings on Permits, Certificates, or Approvals](#)

☞ [414k1418 Notice and Hearing](#)

☞ [414k1422 k. Evidence and fact questions. Most Cited Cases](#)
(Formerly 414k435)

After an applicant for a conditional use has proved that the standards set forth in the zoning ordinance have been met, party seeking to defeat application must produce evidence showing that the proposed use would pose a substantial threat to the community; if the evidence does not demonstrate a substantial threat, the conditional use application should be granted.

[3] KeyCite Citing References for this Headnote

- ☞414 Zoning and Planning
 - ☞414VIII Permits, Certificates, and Approvals
 - ☞414VIII(A) In General
 - ☞414k1387 k. Prisons, jails, and rehabilitative institutions. Most Cited Cases
(Formerly 414k435)

Objectors to prerelease center for state prisoners failed to show by substantial evidence that its proposed siting would pose a threat to the community, and Bureau of Corrections was therefore entitled to conditional use permit for the facility.

[4] KeyCite Citing References for this Headnote

- ☞414 Zoning and Planning
 - ☞414VIII Permits, Certificates, and Approvals
 - ☞414VIII(B) Proceedings on Permits, Certificates, or Approvals
 - ☞414k1418 Notice and Hearing
 - ☞414k1422 k. Evidence and fact questions. Most Cited Cases
(Formerly 414k435)

Objectors to conditional use permit for prerelease facility for state prisoners had burden of proving that the proposed use would harm the community, absent any showing that that burden was changed by language of applicable zoning ordinance.

[5] KeyCite Citing References for this Headnote

- ☞414 Zoning and Planning
 - ☞414VIII Permits, Certificates, and Approvals
 - ☞414VIII(A) In General
 - ☞414k1387 k. Prisons, jails, and rehabilitative institutions. Most Cited Cases
(Formerly 414k384.1, 414k384)

- ☞414 Zoning and Planning KeyCite Citing References for this Headnote
 - ☞414VIII Permits, Certificates, and Approvals
 - ☞414VIII(B) Proceedings on Permits, Certificates, or Approvals
 - ☞414k1418 Notice and Hearing
 - ☞414k1422 k. Evidence and fact questions. Most Cited Cases
(Formerly 414k435)

Prerelease facility for state prisoners was not a per se detriment to the community, for purposes of action challenging grant of conditional use permit for the facility, and objectors retained burden of proving that detriment by substantial evidence.

****12 *77** D.R. Pellegrini, City Sol., Kellen McClendon, Asst. City Sol., Pittsburgh, for appellant.

Thomas F. Halloran, Sr. Deputy Atty. Gen., Kenneth J. Benson, Pittsburgh, for appellee..

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

****13 OPINION**

ZAPPALA, Justice.

This is an appeal from an order of the Commonwealth Court, 91 Pa.Cmwlth. 293, 496 A.2d 1361, reversing and remanding a decision of the Allegheny County Court of Common Pleas. The question we are called upon to decide is whether the Appellant met its burden of proof of showing that the

placement of a pre-release center for state prisoners in a Pittsburgh neighborhood would pose a substantial threat to the community. We hold that Appellant did not meet that burden, and accordingly, affirm the decision of the Commonwealth Court.

On November 21, 1983, Appellee filed a conditional use application, seeking to use property located at 108-110 Miltenberger Street, Pittsburgh, as a pre-release center for state prisoners. A similar facility had been operated by Appellee at another Pittsburgh location (Ridge Avenue) without incident since 1969; however, because the Ridge Avenue property was being sold, Appellee wished to relocate *78 to the Miltenberger Street site. The Miltenberger property is located in the Soho/Bluff area of Pittsburgh which is zoned a C-3 commercial district. Under Section 993.01(a)(A)(10) of the Pittsburgh Zoning Ordinance, institutional facilities are permitted in C-3 districts as a conditional use.

A hearing was held before the City Planning Commission on January 24, 1984 and February 7, 1984. At that time, persons who objected to the placement of the facility in the neighborhood were allowed to give testimony indicating why they did not want the center in the community. Thereafter, the Commission recommended denial of Appellee's application. In March, 1984, City Council reviewed the Commission's recommendation, and referred the matter back to the Commission requesting that a meeting be held with all of the interested parties in order to resolve the objections to the facility. R. 76a. The Commission rejected that request, however, and City Council then voted to accept the Commission's recommendation and deny Appellee's application. R. 77a.^{FN1}

FN1. Justice Papadakos notes in his dissent that no findings or written decision were issued by City Council in support of its decision to deny this application, and thus that there is nothing for the courts to review. A lack of written findings is not a fatal defect in this case, but more importantly, the dissent is raising an issue that has been waived by the parties. See, North Point Breeze Coalition v. City of Pittsburgh, 60 Pa. Commw. 298, 305, n. 9, 431 A.2d 398, 401, n. 9 (1981).

Appellee appealed City Council's decision to the Court of Common Pleas. That court took no additional evidence and affirmed the denial of the application. Appellee then appealed to the Commonwealth Court, which reversed the decision of the Court of Common Pleas and remanded with the direction that the application for conditional use be granted. Appellant now appeals from that decision.

The basis of the Commonwealth Court's decision was that the objectors to the facility had failed to meet their burden of showing that the facility would pose a substantial threat to the community. That court's scope of review, and ours, is limited to determining whether an abuse of discretion or *79 error of law has been committed. See, Lower Merion Township v. Enokay, Inc., 427 Pa. 128, 233 A.2d 883 (1967). Only if the findings of City Council are unsupported by substantial evidence may we hold that there has been an abuse of discretion. See, Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983).

A conditional use is one which, under the Pittsburgh Zoning Ordinance, must be approved by City Council. More specifically, the ordinance reads:

(a) Conditional Uses Permitted by Council Approval. The uses named in this category are in general those of a public or semi-public character, deemed to be essential and desirable for the general convenience and welfare, and because of the nature of the use and/or its relationship to the overall plan, require the exercise of planning judgment on location and site plan. Specific conditions to be met are listed as minimum requirements.

****14 A.** Location and specific requirements. The uses listed hereunder and the establishment or enlargement thereof may be permitted in the districts herein and previously designated, by Council, when the specific conditions for approval have been met, after a public hearing and recommendation of the Commission.

Pittsburgh Zoning Ordinance, Chapter 993.01(a)(A).

[1] [2] An applicant for a conditional use must prove that the standards set forth in the zoning ordinance were met. Greensburg City Planning Commission v. Threshold, Inc., 12 Pa. Commw. 104, 315 A.2d 311 (1974). After the applicant has met those standards, to defeat the application evidence must be produced showing that the proposed use would pose a substantial threat to the community. Susquehanna Township Board of Commissioner v. Hardee's Food Systems, Inc., 59 Pa. Commw. 479, 430 A.2d 367 (1981). If the evidence does not demonstrate a substantial threat to the community, the conditional use application should be granted. *Id.*

*80 [3] Appellant's principal argument is that the objectors to the pre-release facility *did* show by substantial evidence that relocating the pre-release center to Miltenberger Street would pose a threat to the community and thus, that no abuse of discretion by City Council occurred. A review of the record, however, shows that the Commonwealth Court's conclusion to the contrary was correct.

"Substantial evidence" is "relevant evidence as a reasonable mind might accept to support a conclusion." Valley View Civic Association, 501 Pa. at 555, 462 A.2d at 640 (citations omitted). The evidence presented by the objectors consisted of testimony of various residents of the Soho/Bluff area of Pittsburgh. The testimony showed that many of the residents perceived that the addition of the center to the neighborhood would ruin the neighborhood for various reasons. R. 26a-28a. For example, there were statements made concerning the high crime rate in the area, the number of bars in the area, and the existence of a house of prostitution in the area. There was also concern voiced about the numerous elderly and female residents in the area. Finally, concern over the effect on property values which would be caused by the center was expressed. The testimony of the neighborhood's residents, however, was not substantiated by facts but was no more than their bald assertions, personal opinions, and perceptions of the pre-release center and the area. They did not present any studies, police records, property valuations or any type of substantive evidence upon which their fears were based, which would lead a reasonable mind to conclude that the facility would be detrimental to the community's general welfare. Although it had ample opportunity to do so at prior stages of these proceedings, the City, for whatever reason, failed to introduce any evidence to bolster the claims voiced by the objectors.

[4] Appellant argues that Appellee should shoulder the burden of showing that the center is not a detriment to the community in this case. In support of this conclusion, the Appellant relies on *81 Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). *Burdine* is a case brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq. Appellant finds in that case a complicated scheme of shifting of burdens of proof between the parties and urges that the same should be applied in the instant case. Appellant does not explain why the burdens of persuasion in a federal sex discrimination case have any relevance to zoning, and for this reason alone we are unpersuaded that *Burdine*, even were Appellant's questionable reading correct, should have any effect on the disposition of this case.

More importantly, a reading of the zoning ordinance itself and a review of the relevant law of this Commonwealth convinces us that once the applicant for a conditional use has met the standards of the statute, any objectors, including the City, have the burden of proving that the use will harm the community.

**15 Appellant notes that in Bray v. Zoning Board of Adjustment, 48 Pa. Commw. 523, 410 A.2d 909 (1980) the applicants for a special exception under the Philadelphia Zoning Ordinance had the evidence production burden and persuasion burden as to detriment to health, safety and general welfare. In *Bray*, however, the court recognized that while normally the objectors carry the burden of showing the proposal to be detrimental to public health, safety and welfare, the burden can be changed by the language of the ordinance. *Id.* The Philadelphia Zoning Ordinance involved in *Bray* had accomplished this, but that court noted:

[A]n applicant, by showing compliance with the specific requirements of the ordinance, identifies the

proposal as one which the local legislation expressly designates to be appropriate in the district and therefore presumptively consistent with the promotion of health, safety and general welfare; hence it is logical that, as noted below, the Pennsylvania decisions have placed on the objectors the 'burden' of showing the proposal to be detrimental to public health, safety and welfare.

***82** *Id.* at 527, 410 A.2d at 911; citing *Borden Appeal*, 369 Pa. 517, 87 A.2d 465 (1952); *Root v. Erie Zoning Board of Appeals*, 180 Pa.Superior Ct. 38, 118 A.2d 297 (1955); *Zoning Hearing Board v. Konyk*, 5 Pa.Comm. Ct. 466, 470-71, 290 A.2d 715, 718 (1972). Later cases have reaffirmed this principle: See, *Susquehanna Township Board of Commissioners, supra*; *Foster Grading Company v. Venango Township Zoning Hearing Board*, 49 Pa.Comm. Ct. 1, 412 A.2d 647 (1980); *Greensburg City Planning Commission, supra*.

[5] Appellant also argues that the Commonwealth Court erred in relying upon cases involving innocuous uses of property. This argument is based on a flawed premise; that is, the assumption that by its nature a pre-release center is a detriment to a neighborhood. Such a conclusion is unsupported in view of the fact that the Ridge Avenue facility operated without any problems since 1969. R. 54a. It is also clear that "no one [questioned] the quality of the program, or the excellent track record of the Community Service Division ...". R. 67a. Accordingly, for Appellant to now assert that the pre-release facility is *per se* a detriment to the community is unfounded. Appellant failing to show by any substantial evidence that the facility will be such a detriment, we affirm the judgment of the Commonwealth Court.

Affirmed.

LARSEN, J., files a dissenting opinion in which McDERMOTT, J., joined.
PAPADAKOS, J., files a dissenting opinion.

LARSEN, Justice, dissenting.
I dissent.

The majority requires objectors to produce "studies, police records, property valuations or any type of substantive evidence ... which would lead a reasonable mind to conclude that the facility would be detrimental to the community's general welfare." Maj. op. at 14. The majority, ***83** realizing that this type of evidence is expensive, also states that the City could have provided such evidence in this case, but does not indicate procedurally how this could be accomplished. Since the City, at the time public hearings are conducted and evidence is received, functions in a judicial capacity, the City would have been precluded from simultaneously presenting evidence. Thus, the burden has to rest upon neighborhood residents who are opposed to the conditional use to provide the kind of cumulative and unnecessary evidence required by the majority. In addition, the majority has exceeded the proper scope of review, and, in weighing the evidence, has, in effect, conducted a *de novo* hearing in the matter.

In this case, appellee sought to open a pre-release center for 24 convicted male felons (with convictions for the full range of felonies, including rape, robbery, burglary and manslaughter). Appellee proved that the standards set forth in the zoning ordinance were met, during hearings before the City Planning Commission.

****16** To meet their burden, neighborhood residents, speaking from personal knowledge, reported that: (1) muggings on residents' doorsteps were frequent; (2) the facility would be located near five bars, a State Liquor Store and a house of prostitution; (3) many female and elderly residents considered themselves to be "prisoners within their own homes" due to the local incidence of burglary, rape, murder and drug and alcohol abuse; and (4) the neighborhood was increasing in population and residents were actively seeking to attract investors to develop the area into a stable community. I would hold that such evidence on the part of the objectors is sufficient to prove detriment to the general welfare of the community and impediment to development of the surrounding property.

Appellee, responding to concerns about security at the hearings, stated only that a trained "house manager" would be available 24 hours a day. Reproduced Record at 24a. In addition, contrary to what the majority found regarding this center's operation at another location, appellee admitted *84 that one incident since 1969 had required outside help "to control the situation." *Id.* Appellee alleged that other centers operate safely in residential high crime areas but did not produce documentary evidence to support this allegation. Hence, Appellee did not rebut appellant's evidence.

For this Court to foist this pre-release center upon the residents of the Soho/Bluff area of the City of Pittsburgh (sensitively described as a community in a " 'fragile' state of transition" by the Court of Common Pleas) is particularly repugnant in that this Court refused recently to recognize a cause of action in tort against a Youth Study Center and the political entities owning and operating it in an allegedly negligent manner for the criminal activity of youths who had escaped therefrom. *Mascaro v. Youth Study Center*, 514 Pa. 351, 523 A.2d 1118 (Larsen, J., dissenting). With one hand we introduce a potential danger into the community; with the other, we take away any recourse for injuries caused by that danger.

By its decision today, the majority guarantees that facilities like the pre-release center herein will never be placed in wealthy communities. This is so because the majority places a burden upon objectors to conditional uses of producing cumulative and unnecessary evidence that none but the well-to-do could possibly afford.

Accordingly, I would reverse the judgment of the Commonwealth Court and affirm the Order of the Court of Common Pleas of Allegheny County.

McDERMOTT, J., joins in this dissenting opinion.

PAPADAKOS, Justice, dissenting.

I must respectfully dissent because, in my view, the issues raised by the parties are prematurely considered. The City Council of the City of Pittsburgh, *in considering applications for conditional uses*, is required to comply with the formalities of the Local Agency Law, 2 Pa.C.S.A. § 553, ^{FN1} and enter an adjudication in compliance with § 555 ^{FN2} *85 of said law. The Local **17 Agency Law is applicable in such a case because, when the City Council acts on a conditional use application, Council is acting in an administrative, not a legislative, capacity. It has been held that the act of approving or disapproving a conditional use application establishes no rule of general application, as the passage of an ordinance does, and that City Council essentially is only approving or rejecting the issuance of a permit, nothing more. *See, North Point Breeze Coalition v. City of Pittsburgh*, 60 Pa.Commonwealth Ct. 298, 431 A.2d 398 (1981), which, I believe, sets out the law properly.

FN1. 2 Pa.C.S.A. § 553 provides:

§ 553. Hearing and record

No adjudication of a local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony may be stenographically recorded and a full and complete record may be kept of the proceedings. In the event all testimony is not stenographically recorded and a full and complete record of the proceedings is not provided by the local agency, such testimony shall be stenographically recorded and a full and complete record of the proceedings shall be kept at the request of any party agreeing to pay the costs thereof.

1978, April 28, P.L. 202, No. 53, § 5, effective June 27, 1978.

FN2. 2 Pa.C.S.A. § 555 provides:

§ 555. Contents and service of adjudications

All adjudications of a local agency shall be in writing, shall contain findings and the reasons for the adjudication, and shall be served upon all parties or their counsel personally, or by mail.

1978, April 28, P.L. 202, No. 53, § 5, effective June 27, 1978.

Such an administrative act is reviewable under the Local Agency Law which effectuates the clear constitutional intent that parties aggrieved by an administrative adjudication be provided the same opportunity to pursue relief as those aggrieved by a judicial determination.^{FN3} *North Point Breeze, supra*. There is little question that Pittsburgh's City Council, like its Zoning Board of Adjustment, is a local agency when it acts administratively, and that a resolution disposing of a conditional use application is an "adjudication"*86 within the meaning of the Local Agency Law. 2 Pa.C.S.A. § 101.

FN3. Article V, Section 9, of the Pennsylvania Constitution provides in pertinent part:

There shall be a right of appeal ... from an administrative agency to a court of record or to an appellate court, the selection of such court to be provided by law.

Among the formalities with which a local agency must comply is the requirement that it provide a hearing, notice thereof to any party, and an opportunity to be heard. 2 Pa.C.S.A. § 553. The local agency must then issue its adjudication in writing and support it with findings and reasons. 2 Pa.C.S.A. § 555. City Council has not done so in this case and, until it supplies the required hearing and adjudication, there is simply nothing for the courts to review.

As correctly noted by the trial court, the Commonwealth Court and the Majority, the scope of review from the grant or denial of a conditional use request, under the Pittsburgh Zoning Ordinance, is governed by 2 Pa.C.S.A. § 754^{FN4} and is based on a review of the record as compiled by the local agency and a review of the findings made by the local agency to determine whether the findings are supported by substantial evidence. See, Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983); North Point Breeze Coalition v. City of Pittsburgh, supra.

FN4. 2 Pa.C.S.A. § 754 provides:

§ 754. Disposition of appeal

(a) Incomplete record.-In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.

(b) Complete record.-In the event a full and complete record of the proceedings before the local agency was made, the court shall hear the appeal without a jury on the record certified by the agency. After hearing the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter B of Chapter 5 (relating to practice and procedure of local agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals.)

*87 I am hardpressed, from my review of this record, to find that any hearing was conducted by the local agency, that any notice of a hearing was given to any party in interest, that any opportunity to be heard in a formal hearing before the local agency was given to any party in interest, and that *any findings or written decision* was issued by City Council in support of its decision to deny this application. At the City Council meeting of April 30, 1984, a motion was made and seconded to pass the following resolution:

Resolution approving a conditional use under Section 993.01(a)A-10 of the Pittsburgh Code, Title Nine, Zoning Article V, Chapter 993, for authorization to occupy the existing structure located at 108-110 **18 Miltenberger Street as an Institutional Facility to be used by the Pennsylvania Bureau of Corrections Community Services Division, as a Pre-Release Center for 24 convicted adult male State Prisoners, with supervision, on property zoned "C3" Commercial District, 1st Ward.

The motion was defeated with eight council members voting in the negative and zero voting in the affirmative. This vote represents the "adjudication" which triggers the present review under the Local Agency Law. The adjudication is not accompanied, however, by any findings of fact or reasons or even a record which *Council* compiled or adopted as its own at a hearing before it. At each level of review, an *assumption* has been made that City Council has acted based upon the recommendation of the City Planning Commission, but nowhere in the record is it indicated that City Council read this record, adopted the record and recommendations for its own, or that it relied on other reasons for denying the application. Nor is there any evidence that City Council appointed the City Planning Commission to conduct the hearing required by the Local Agency Law, 2 Pa.C.S.A. § 553.

While I agree in the Majority's legal analysis of which party bears the burden of establishing that a proposed use would be detrimental to the public interest, I feel that such an inquiry is premature.

***88** In its analysis of this case, the Majority has reviewed, and referred to, the record compiled before the City Planning Commission and has determined that the evidence presented by the objectors to the Planning Commission did not rise to the level of substantial evidence to support their burden. Nowhere in statutory or case law do I find that objectors must meet this burden before a Planning Commission that has no adjudicative powers, but can only recommend to the governing body.

The Majority, today, determines that the Supreme Court of Pennsylvania will henceforth review the *recommendations* of a Planning Commission which has no adjudicative powers to determine whether substantial evidence exists to support the *recommendations*. Gone are the days when due process required that every aggrieved party whose property rights were implicated was entitled to a hearing, *after notice*, before an adjudicative body.

In this case, there has never been a hearing before an adjudicative body. The only "hearing" held was before the Planning Commission, a non-adjudicative body which can only make recommendations. No hearing was held before City Council which was acting as a Zoning Board and not a legislative body. The parties were not given notice of a *hearing* before the City Council, acting as a Zoning Board. The parties were not afforded their constitutional right to be heard by City Council, acting as a Zoning Board, an adjudicative body as contemplated in the Local Agency Law.

I fear my brethren have short-circuited the system and given their imprimatur upon the denial of due process by the Pittsburgh City Council to all aggrieved property owners in conditional use applications. Henceforth, all Zoning Boards in Pennsylvania may avoid hearings and merely rely upon the recommendations of their municipal planning commissions where provided as an initial step in the zoning process. All this in the name of waiver. It seems the parties never raised the total lack of compliance with the Local Agency Law and have deprived themselves of the ***89** right to be heard. Perhaps the Majority is correct. I believe that the agency has an affirmative duty to provide a hearing, and notice thereof, as mandated by the Local Agency Law and, until it does so, there is nothing for any Court to review.

I would remand to City Council for a full hearing, with proper notice, and an opportunity for any objectors to present their evidence to the agency.

Pa., 1987.

Com. of Pa., Bureau of Corrections v. City of Pittsburgh, Pittsburgh City Council
516 Pa. 75, 532 A.2d 12

END OF DOCUMENT

 [West Reporter Image \(PDF\)](#)

Adobe Reader is required to view PDF images.

72 Pa.P.U.C. 196

Charles A. Patterson
v.
Bell Telephone Company of Pennsylvania
F-8966524

Pennsylvania Public Utility Commission
February 8, 1990; entered February 8, 1990

ORDER adopting initial decision implementing toll restriction and suspension of all nonbasic telephone service pending arrearage payment; exceptions by customer are denied.

P.U.R. Headnote and Classification

1.
PROCEDURE

s32 - Rehearings and reopenings - Exceptions - *Pro se* complainant.
Pa.P.U.C. 1990

Although complainant's exceptions were not in accordance with regulations at 52 Pa. Code § 5.533(b) which require that an exception be stated in specific, numbered paragraphs, identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision, with supporting reasons for the exception following a specific exception, because the complainant was appearing *pro se*, the commission accepted the exceptions as filed.
Charles A. Patterson v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

2.
EVIDENCE

s11 - Burden of proof - Preponderance of the evidence - Utility responsibility.
Pa.P.U.C. 1990

Pursuant to 66 Pa. Code § 332(a), the party seeking affirmative relief from the commission generally has the burden of proof, and burden of proof means a duty to establish a fact by a preponderance of the evidence; preponderance of the evidence means that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party, and the commission has held that a complainant, to establish a sufficient case against a utility and satisfy the burden of proof, must show that the utility is responsible or accountable for the problem described in the complaint.
Charles A. Patterson v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

3.
EVIDENCE

s11 - Burden of proof - Value or weight - Refutation.
Pa.P.U.C. 1990

The record in a contested proceeding must be reviewed to determine whether the complainant has satisfied the burden of proof, and if the review indicates that the burden has been satisfied, it must

then be determined whether the defendant has submitted evidence of coequal value or weight to refute the complainant's evidence; if that has occurred, the burden of proof cannot be deemed to have been satisfied, unless additional evidence has been presented by the party having the burden of proof.

Charles A. Patterson v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

4.
EVIDENCE

s11 - Burden of proof - Substantial evidence on the record - Definition.

Pa.P.U.C. 1990

In order for the commission to determine whether or not a party has satisfied its burden of proof, it is incumbent upon the commission to ensure that its decision is supported by substantial evidence in the record, and substantial evidence has been defined as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, so that more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.

Charles A. Patterson v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

5.
PAYMENT

s33 - Methods of enforcing - Denial of service - Toll service restriction - Telephone.

Pa.P.U.C. 1990

The act of obtaining toll service while under toll restriction constitutes toll fraud and is a very serious matter, and the commission has found toll fraud as a basis for restricting basic service in cases in which long-distance telephone service has already been terminated; also, the commission has authorized the suspension of all telephone services until all arrearages have been completely liquidated, where the telephone customer committed toll fraud while under toll restriction, and had *197 repeatedly failed to abide by payment arrangements.

Charles A. Patterson v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

6.
PAYMENT

s39 - Methods of enforcing - Denial of service - Restriction of nonbasic services - Telephone.

Pa.P.U.C. 1990

Where a local exchange carrier had restricted a customer's nonbasic telephone service, optional services such as voice grade local channel for off-premises extension, voice grade transmission function, and the guardian plan, until all arrearages were liquidated, such action was found appropriate based on the size of the arrearage (\$2,610.01) and the inability or unwillingness on the part of the complainant to abide by prior payment arrangements.

Charles A. Patterson v Bell Telephone Company of Pennsylvania

P.U.R. Headnote and Classification

7.
PAYMENT

s33 - Methods of enforcing - Denial of service - Toll service restriction - Telephone.

Pa.P.U.C. 1990

A local exchange carrier acted reasonably in restricting a customer's toll service while an arrearage payment plan was in effect, because it was obvious that the customer was only interested in a payment arrangement to liquidate arrearages while maintaining all optional and nonbasic telephone service, which is unfair to paying customers.

Charles A. Patterson v Bell Telephone Company of Pennsylvania

Commissioners Present:

Bill Shane, Chairman

William H. Smith, Vice-Chairman

Joseph Rhodes, Jr.

Frank Fischl

David W. Rolka

By the COMMISSION:

OPINION AND ORDER

Before the Commission for disposition are the timely filed Exceptions of Charles A. Patterson ("Complainant") filed on November 21, 1989, relative to the Initial Decision issued by Administrative Law Judge John A. Corbett, Jr. on November 1, 1989.

History of the Proceeding

The Complainant filed a formal Complaint on May 15, 1989, alleging that the Bell Telephone Company of Pennsylvania ("Bell") acted unreasonably in handling his inability to pay his overdue bills.

Bell responded, in its Answer filed June 7, 1989, that there is no basis for the allegations contained in the formal Complaint. Bell alleges that the Complainant has abused and misused provisions of the Standards and Billing Practices for Residential Telephone Service to avoid the suspension of his telephone service.

ALJ Corbett conducted a telephonic hearing regarding this matter on August 31, 1989. The Complainant appeared *pro se*, and Bell was represented by Counsel. The record consists of two transcripts totaling 117 pages and two exhibits. No briefs were filed.

Based on his evaluation and analysis of the record as developed, the ALJ made the following Findings of Fact:

Findings of Fact

1. The Complainant is Charles Patterson, who resides at 311 Maple Avenue, Pittsburgh, Pennsylvania, 15218, where he is a residential telephone customer of the Respondent utility, Bell of PA, receiving service at (412) 371-6205 and (412) 371-6206.

2. The Complainant resides at this residence with his wife, Joan, who is not employed outside of the home (N.T. 29).
3. As of the date of the hearing, the amount of the charges owed by the Complainant to Bell of PA for current and past-due amounts totals \$2,610.01 (N.T. 85). The monthly telephone charges for basic and non-basic services, for the two lines the Complainant uses, excluding toll charges, amounts to \$63.90 (N.T. 67-68). A more detailed statement of these charges is set forth in the Summary of Testimony, which is incorporated herein by reference.
4. Telephone service for the Complainant was toll-restricted as of May 16, 1988 (N.T. 68).
5. Toll charges in the amount of \$705.17 as reflected on the "live account" as past-due *198 were incurred during the time that this telephone service was under toll-restriction.
6. After the Complainant executed a letter of assurance that no toll calls would be made while under toll-restriction, the toll calls dramatically decreased, with no such calls being made in August, 1989 (N.T. 87).
7. The Complainant's total monthly household income amounts to approximately \$2,500 in gross earnings, which the Complainant earns upon a commission basis as a real estate sales person.
8. The Complainant's total monthly household expenses amount to \$1,910 as reflected in the statement set forth in the Summary of Testimony, which is incorporated herein by reference.
9. The Complainant failed to abide by four separate payment arrangements with Bell of PA between November, 1988 and February, 1989 (N.T. 70-83, 101).
10. The Respondent has acted reasonably in suspending Complainant's toll service and in attempting to negotiate payment arrangements for the arrearages with the Complainant.

Initial Decision, pp. 8-9.

The ALJ's Conclusion of Law was that:

Conclusion of Law

1. The Commission has jurisdiction over the subject matter and the parties to this dispute.

Based upon the foregoing Findings of Fact and the Conclusion of Law, the ALJ sustained the Complaint and ordered the Complainant to pay Bell the current monthly bills when due, plus \$125.00 a month towards payment of the arrearages. The ALJ further ordered the Complainant not to make toll calls while his service is under toll-restriction.

Complainant's Exceptions

We note that the Exceptions of the Complainant are not lengthy and, therefore, we shall quote them in their entirety as follows:

1) At the different times that I tried to effect a payment schedule with Bell of Pennsylvania it was based every time, despite the monthly payment I agreed to pay, upon Bell's restoring the toll service. At no time did Bell agree to restore the toll service. Bell categorically refused to restore the service until the delinquent toll charges were paid in full. This attitude prevailed, regardless of what amount I was willing to pay per month plus keep the current charges timely paid. As has been noted in the initial decision I have been a long time customer of Bell. Nevertheless, Bell treated this matter in a very cavalier manner. It appears to me that 52 Pa. Code 64.1 adequately and completely says that Bell's customers are to be treated fairly.

I do not challenge any of the charges incurred for services. All I want to do is pay them. The amount of money owed Bell in delinquent toll charges are not so unreasonable at [sic] some of their cases may be. A long history of this account should afford me more liberalism than I have been given.

3) I want to strongly assert that at no time, in writing, or by verbal instructions from a Bell Telephone employee, was I informed that I could appeal to the Public Utility Commission the cut off of my toll service. At all times during this debacle I talked to numerous women at Bell's office, including Mrs. Russo, and frankly going through so many different people to try and relieve this matter was a very difficult experience and required at all times a complete re-examination of why I was calling.

4) I am willing to agree with the \$125.00 toward the payment of arrearages and to keep the current monthly bills paid timely.

5) The fact that Bell is now authorized to immediately suspend all non-basic telephone service is completely without foundation. The cost of the Guardian service plan is \$2.00 per month. It is my understanding that if my phone needs repair Bell charges, absent the Guardian plan, approximately [sic] \$50.00 per hour for their repair man. It is ludicrous to think that I can afford to take the change of *199 needing telephone repair and having to pay such an outrageous amount when I can have the same service for only \$2.00 per month. The voice grade local channel for off-premises extension and the voice grade transmission function are also necessary to continue my operation because I am currently attempting to rebuild a house where the extension exists so that we can sell our present dwelling and move into that dwelling, which is being rebuilt after a disastrous fire.

6) I strongly object to any non-basic, or optional services being taken off my current service. I still strictly adhere to the feeling that if I can establish a monthly payment plan as set forth Bell could restore my toll services and if I miss a payment they can again restrict them.

[1] We further note that the Complainant's Exceptions are not in accordance with our regulations at 52 Pa. Code §5.533(b) which require that:

An exception shall be stated in specific, numbered paragraphs, identify the finding of fact or conclusions of law to which exception is taken and cite relevant pages of the decision. Supporting reasons for the exception shall follow a specific exception.

We recognize the Complainant is appearing *pro se* in this proceeding and, therefore, we shall entertain the Exceptions as filed.

Discussion

[2] Section 332(a) of the Public Utility Code, 66 Pa. C.S. §332(a), generally provides that the party seeking affirmative relief from the Commission has the burden of proof. In this proceeding, the Complainant filed a formal Complaint alleging Bell acted unreasonably in handling his financial inability to pay the accrued amount of his overdue bills. The Complainant is seeking our assistance in arranging a reasonable payment schedule with Bell, while resuming toll service. Accordingly, the Complainant, Charles A. Patterson, is the party with the burden of proof.

The Pennsylvania Supreme Court has held that the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. Se-Ling Hosiery v. Margilies, 364 Pa. 45, 70 A.2d 858 (1950). The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. The Commission has held that a Complaint, to establish a sufficient case against a utility and satisfy the burden of proof, must show that the utility is responsible or accountable for the problem described in the Complaint. Feinstein v. Philadelphia Suburban Water Company, 50 Pa PUC 300 (1976).

[3] As required by these decisions, the record in this proceeding must be reviewed to determine whether the Complainant satisfied his burden of proof. If the review indicates that the burden has been satisfied, it must then be determined whether Bell has submitted evidence of co-equal value or

weight to refute the Complainant's evidence. If this has occurred, the burden of proof cannot be deemed to have been satisfied, unless additional evidence has been presented by the party having the burden of proof. *Morrissey v. Pa. Dept. of Highways*, 424 Pa. 87, 225 A.2d 895 (1967), and *Burleson v. Pa PUC*, 66 Pa.Cmwlth. 282, 443 A.2d 1373 (1982) *aff'd.*, 501 Pa. 443, 461 A.2d 1234.

[4] We recognize that in order to determine whether or not a party has satisfied its burden of proof, it is incumbent upon us to ensure that our decision is supported by substantial evidence in the record (Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704). We hasten to point out that the term "substantial evidence" has been defined by the Pennsylvania Supreme, Superior, and Commonwealth Courts as such relevant 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 existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa.Super.Ct. 278, 166 A.2d 96 (1961); and *200 *Murphy v. Com. Dept. of Public Welfare, White Haven Center*, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

ALJ Corbett determined that the Respondent did not act unreasonably in suspending the Complainant's toll service and in attempting to negotiate a payment arrangement for the arrearages with the Complainant. However, the ALJ found Bell's demand to receive immediate full payment of the past due basic charges in the amount of \$442.69 and the toll charges in the amount of \$705.11 on the live account to be unreasonable.

As noted, the Complainant filed Exceptions to the ALJ's Initial Decision. The main thrust of the Complainant's Exceptions is his desire to maintain toll service, non-basic service and optional service on his telephone account. The Complainant attempts, in his Exceptions, to reargue these issues which have been carefully considered and decided against him by ALJ Corbett. A few examples will follow.

The Complainant, at page 1 of his Exceptions, suggests that Bell did not treat him fairly because they refused to restore his toll service until all arrearages have been liquidated. As of the date of the hearing in this proceeding, the amount of the charges owed by the Complainant to Bell for current and past due amounts totals \$2,610.01. Of this total, \$1,392.62 represents the amount owed for toll charges incurred prior to the time the Complainant's service was toll restricted. An additional \$705.17 was incurred for toll calls since the toll restriction was imposed by Bell. Charges for toll service have greatly diminished, since the Complainant signed a letter of assurance stating that he would place no further toll calls while under the toll restriction.

The ALJ concluded that although the act of obtaining toll service while under toll-restriction, which constitutes toll fraud, is a basis for suspending all telephone service until all arrearages have been completely liquidated, complete suspension of all telephone service was not appropriate in this proceeding, and we agree. On page 12 of his Initial Decision, the ALJ points out that:

Bell of PA has not requested immediate suspension of all telephone service. The history of this account discloses the account was established in November, 1965 (N.T. 101). Mr. Patterson apparently maintained this account in good standing until approximately a year ago, when he experienced a decline in his real estate business (N.T. 37). Toll charges, which account for \$2,097.81 of a total of \$2,610.01 in arrearages, have dramatically diminished, since the letter of assurance was given with no toll charges being incurred in the month preceding the hearing. The Complainant needs the service to maintain contact with his real estate business (N.T. 42). Depriving the Complainant of all telephone service would create an economic hardship at a time when the Complainant is making some effort to pay off his arrearages.

[5] We do not view the aforementioned factors as a basis for requiring Bell to restore the toll service as the Complainant would have us do in this proceeding. The act of obtaining toll service while under toll restriction constitutes toll fraud and is a very serious matter. We have found toll fraud as a basis for restricting basic service in cases in which long distance service has already been terminated. *Trinsley v. Bell of Pa.*, C-882090, adopted by Commission Order dated March 30, 1989. Furthermore, we have authorized the suspension of all telephone services until all arrearages have been completely liquidated, where the telephone customer committed toll fraud while under toll restriction, and had

repeatedly failed to abide by payment arrangements. *Berry v. Bell of Pa.*, C-882133, adopted by Commission Order dated July 20, 1989.

The Complainant, in his Exceptions, objects to the suspension of non-basic telephone service and optional services from his telephone account. The Complainant states in his Exceptions that, "[t]he fact that Bell is now authorized to immediately suspend all non-basic telephone service is completely without foundation."

[6] On review, we agree with ALJ Corbett's conclusion that a restriction of the Complainant's non-basic service and optional service which include voice grade local channel for off premises extension, the voice grade transmission function, and the guardian plan for *201 his telephone account, until all arrearages are liquidated is appropriate in view of the size of the arrearage and the inability or unwillingness on the part of the Complainant to abide by prior payment arrangements. On pages 12-13 of his Initial Decision, the ALJ points out that:

. . .the Complainant is receiving more than a bare-bones telephone service. His residence is serviced by two separate telephone lines, which the Complainant explains was started when he had young children living at home and he was trying to stay in touch with his real estate business (N.T. 47-48). However, his last child has just moved out of the home and he and his wife alone now reside there. He is familiar with the 'call-waiting' service, but claims that he 'hates it.' (N.T. 48). He maintains such optional services as a 'voice grade, local channel off premises extension' and a guardian plan, which appear to be non-essential luxury items, when compared to an arrearage of \$2,610.01. The Commission may order the discontinuance of a particular optional service, if the circumstances warrant it. *Roland v. Bell of PA*, C-881683, approved by Commission Order October 14, 1988.

The Complainant states in Exception No. 6 that "I still strictly adhere to the feeling that if I can establish a monthly payment plan as set forth Bell could restore my toll services and if I miss a payment they can again restrict them." We find the Complainant's continuing demand for the reinstatement of his toll service while the payment plan is in effect to be totally unreasonable. As ALJ Corbett so clearly points out in his Initial Decision, the Complainant owes Bell approximately \$2,100 for toll service and \$700 of this amount is owed for toll charges incurred after Bell imposed a toll restriction. Additionally, the Complainant has failed to abide by four previous payment arrangements. We agree with the ALJ's finding that the Complainant's argument that Bell at no time informed him that he could appeal the toll restriction to the Commission is unpersuasive.

[7] Our review of the record in its entirety and the relationship between Bell and the Complainant, persuades us that Bell acted reasonably in restricting the Complainant's toll service. The Complainant's past conduct does not engender the degree of confidence one would expect, in order to justify the re-establishment of toll service. It is obvious that the Complainant is only interested in a payment arrangement to liquidate arrearages whereby he continues to maintain all optional and non-basic telephone service, which we do not view as being fair to paying customers. Accordingly, we deny the Complainant's Exceptions.

Conclusion

After a thorough review of the record in this case, the Initial Decision, and the Exceptions filed thereto, we have concluded that ALJ Corbett has committed no error in his disposition of this case as set forth in his Initial Decision. The Complainant's Exceptions amounted largely to a rearguing of points he originally argued before the ALJ, and which the ALJ properly rejected. In the above discussion of the issues raised in the Complainant's Exceptions, we have discussed in detail representative issues which have been raised, time and again, by the Complainant's Exceptions. Accordingly, we adopt the Initial Decision of the Administrative Law Judge; THEREFORE,

IT IS ORDERED:

1. That the Exceptions of Charles A. Patterson be, and hereby are, denied.
2. That the Initial Decision of Administrative Law Judge John H. Corbett, issued herein on November

1, 1989, be, and hereby is, adopted.

3. That the Complainant shall pay to the Respondent the current monthly bills when due, plus \$125 a month towards the arrearages on or before the due date for each monthly bill, effective with the first monthly bill received after the entry of this Order, and thereafter on or before the due date for the payment of each regular monthly bill.

4. That the Complainant shall not make any further toll calls using the telephone lines involved in this case, while this service is under toll-restriction.

5. That the Respondent is authorized to continue toll-restriction of the Complainant's telephone service, until all arrearages have been *202 completely liquidated.

6. That the Respondent is authorized to immediately suspend all non-basic telephone service, until all arrearages have been completely liquidated.

7. That the Respondent is authorized to suspend the optional services of voice grade local channel for off premises extension, the voice grade transmission function, and the guardian plan for this telephone account, until all arrearages have been completely liquidated.

8. That the non-basic, optional and toll services of the Complainant need not be reinstated, until all arrearages have been eliminated.

9. That the Respondent shall not charge the Complainant any service restoration charges in restoring these services after the Complainant has paid all arrearages.

10. That, so long as the Complainant adheres to the terms of this Order, the Respondent shall not assess any late charges nor shall the Respondent terminate service to the Complainant, except for safety and/or emergency reasons.

11. That, if the Complainant fails to adhere to the terms of this Order, the Respondent is authorized to terminate Complainant's service, including basic service, pursuant to 52 Pa. Code §64.1, et seq.

INITIAL DECISION

Before John H. Corbett, Jr.

Administrative Law Judge.

History of the Proceeding

On May 15, 1989, Charles A. Patterson ("Complainant") filed a formal complaint with the Pennsylvania Public Utility Commission ("Commission") against the Bell Telephone Company of Pennsylvania ("Respondent" or "Bell of PA") alleging that utility acted unreasonably in handling his financial inability to pay the accrued amount of his overdue bills with that utility. On June 7, 1989, the Respondent filed an appropriate answer describing in detail its efforts to settle this matter amicably.

A telephonic hearing was scheduled for August 9, 1989, but was postponed, when the Complainant alleged he did not receive appropriate notice of the hearing (N.T. 1-13). A further telephonic hearing was held on August 31, 1989, where the Complainant appeared without counsel. The Respondent was represented by Michael L. Swindler, Esquire. The record consists of two transcripts totalling 117 pages in length. Respondent offered two exhibits into the record. No briefs were filed. The matter is now before the undersigned for disposition.

Summary of the Testimony

Charles A. Patterson testified on his own behalf that he resides at 311 Maple Avenue, Pittsburgh, Pennsylvania, 15218, where, together with his wife, Joan, they receive residential telephone service from Bell of PA for two telephone lines: (412) 371-6205 & 6206 (N.T. 18-51). Mr. Patterson is 64 years of age, as is his wife (N.T. 19, 29). Mr. Patterson is a real estate sales person and has been employed on a commission basis with Shadyside Real Estate Company for thirty years (N.T. 24). Until the time of the hearing, a 26-year-old daughter lived at their residence (N.T. 30). The daughter does not contribute toward household expenses. The wife is not employed outside of the home (N.T. 29). Neither of the Pattersons have any special medical problems (N.T. 31).

Mr. Patterson explained that approximately one year ago, he began experiencing problems in paying his bills, when his income declined as the result of a decline in his real estate business (N.T. 37). He then found himself falling in arrears on his bill for telephone service, which he has maintained with Bell of PA for approximately 25 years (N.T. 22). Mr. Patterson offered to pay the current charges plus \$100 a month toward reduction of the arrearages, but only if Bell of Pa lifted the toll-restriction on his phone service (N.T. 39). He admitted that at one time he had offered to pay current charges plus \$300 a month toward satisfaction of the arrearages (N.T. 39). He later offered to pay the sum of \$200 per month toward reduction of the arrearages, which was the same offer stated in his complaint (N.T. 112).

Mr. Patterson was emphatic in his demand that Bell of PA lift the toll-restriction, since the service is needed for him to sell real estate (N.T. *203 42). In fact, the residence is served by two telephone lines, which permit him to receive business telephone calls in the event one of the lines is otherwise occupied (N.T. 30-31; 47-48). He is familiar with the "call-waiting" service offered by Bell of PA, but dislikes it (N.T. 48). Mr. Patterson reiterated that he would agree to a payment plan only if Bell of PA lifted its toll-restriction (N.T. 51). He further complains that the toll-restriction would not have occurred, if he had been informed sooner of his right to complain to the Commission about the unreasonableness of the utility in arranging a payment plan (N.T. 39-41).

Mr. Patterson reluctantly disclosed that he earns approximately \$30,000 a year in gross income before taxes on his real estate commissions (N.T. 28), which in turn amounts to approximately \$2,500 per month in gross income (N.T. 29). He summarized his expenses as follows (N.T. 32-36):

<i>Item</i>	<i>Amount</i>
Mortgage	\$500.00
Car	\$250.00
Car repairs	\$35.00
Car insurance	\$100.00
Health insurance	\$215.00
Life insurance	\$100.00
Electric	\$90.00
Gas	\$140.00
Water/Sewage	\$30.00
Food	\$300.00
Clothing	\$50.00
Daughter's support	\$100.00
Total:	\$1,910.00

The Complainant presented no further testimony or evidence on his own behalf.

Ms. Janet Elaine Russo testified on behalf of Bell of PA (N.T. 52-108). Ms. Russo is the Manager of the Wilksburg Service Center, which covers the telephone account of Mr. Patterson (N.T. 53). This account was established in November of 1965 (N.T. 101) and was toll-restricted for nonpayment of charges on May 16, 1988 (N.T. 68). On September 14, 1988, the past-due toll charges were transferred to a "final bill", which totals \$1,392.64 (N.T. 69; Exhibit 2). At that time, a second account, designated as a "live account", was opened with a zero balance. As of the July 13, 1989 billing statement, the "live account" totalled \$1,229.12 (N.T. 56; Exhibit 1). Because certain payments were made, the "live account" as of the date of the hearing gives the following information (N.T. 58-59):

<i>Item</i>	<i>Past Due</i>	<i>Current</i>	<i>Total</i>
Basic	\$354.77	\$87.92	\$442.69
Toll	\$705.17	-0-	\$705.17
Non-basic	\$62.20	\$7.31	\$69.51
Totals	\$1,122.14	\$95.23	\$1,217.37

The total outstanding charges for both the "final bill" and the "live account" amount to \$2,610.01 (N.T. 85).

The telephone services provided to Mr. Patterson and the monthly rates for each service are set forth as follows (N.T. 67-68).

For telephone account (412) 371-6205:

<i>Item</i>	<i>Amount</i>
Unlimited calling to local area	\$8.40
Touch tone line	\$1.00
Dial tone line	\$3.70
Voice grade local channel for an off premises extension	\$11.00
Federal line cost charge	\$3.20
Voice grade transmission	\$2.50
Guardian plan	\$2.00
Subtotal	\$31.80

For telephone account (412) 371-6206:

<i>Item</i>	<i>Amount</i>
Metropolitan area unlimited calling	\$19.20
Touch tone line	\$1.00
Dial tone line	\$3.70
Federal line cost charge	\$3.20
Three-way calling	\$3.00
Guardian plan	\$2.00
Subtotal	\$32.10
Total	\$63.90

***204** Ms. Russo then related various efforts she and her staff undertook with Mr. Patterson to arrange a payment schedule (N.T. 70-83). These efforts included four occasions, when Mr. Patterson did not keep payment arrangements previously agreed upon. These efforts covered a time period from November 29, 1988 through early February, 1989, when Mr. Patterson filed an informal complaint with the Commission. An assurance letter signed by Mr. Patterson stating that he would no longer place toll calls while under toll-restriction was received on January 26, 1989 (N.T. 83).

The payment history on this account discloses the following information (N.T. 83-84):

<i>Date</i>	<i>Amount</i>
August 23, 1989	\$206.98
April 21, 1989	\$131.91
February 1, 1989	\$82.52
January 10, 1989	\$310.53
October 24, 1988	\$315.98

No payments were made in November or December, 1988, nor in March, May, June or July of 1989 (N.T. 84).

Since the assurance letter was received by Bell of PA, the following toll charges were incurred:

<i>Date</i>	<i>Amount</i>
March, 1989	\$4.38
April, 1989	\$1.85
May, 1989	\$1.18
June, 1989	\$6.09
July, 1989	\$5.39
August, 1989	-0-

Ms. Russo admitted that toll service is restored for certain individuals under payment plans (N.T. 100). However, she felt it was not appropriate in this case to do so, because of the four attempted payment arrangements that were not kept, the final bill of approximately \$1,300 in toll charges and the toll arrearage on the current "live bill" of over \$700 (N.T. 101). The witness testified that Bell of Pa provides information on its suspension notice of the customer's right to appeal to the Commission (N.T. 102-104). Bell of PA did not begin the practice of informing the customer verbally of such appeal rights until September, 1988 (N.T. 102).

Ms. Russo explained the guardian plan service provided to Mr. Patterson covers any wiring maintenance that might be necessary in the customer's home (N.T. 105). She described the voice grade, local channel off premises extension as a service that provides a line from the customer's residential address at 311 Maple Avenue to 415 Maple Avenue so that the 6205 line rings at the 415 Maple Avenue address (N.T. 105).

Counsel for Bell of PA stated its position as follows (N.T. 109-112): all current and past-due basic charges should be paid within ten days of the date of the Commission's order; all past-due toll charges on the "live account" should likewise be paid within ten days of the date of the Commission's order; non-basic services should be discontinued until paid; toll service should continue to be denied until a final toll bill in the amount of \$1,392.64 is paid in full; the customer should pay monthly installments in the amount of \$125.00 to reduce the arrearages.

In closing, Mr. Patterson proposed making monthly installments in the amount of \$200 and having the toll service reinstated (N.T. 112).

Findings of Fact

1. The Complainant is Charles Patterson, who resides at 311 Maple Avenue, Pittsburgh, Pennsylvania, 15218, where he is a residential telephone customer of the Respondent utility, Bell of PA, receiving service at (412) 371-6205 and (412) 371-6206.
2. The Complainant resides at this residence with his wife, Joan, who is not employed outside of the home (N.T. 29).
3. As of the date of the hearing, the amount of the charges owed by the Complainant to Bell of PA for current and past-due amounts totals \$2,610.01 (N.T. 85). The monthly telephone charges for basic and non-basic services, for the *205 two lines the Complainant uses, excluding toll charges, amounts to \$63.90 (N.T. 67-68). A more detailed statement of these charges is set forth in the Summary of Testimony, which is incorporated herein by reference.
4. Telephone service for the Complainant was toll-restricted as of May 16, 1988 (N.T. 68).
5. Toll charges in the amount of \$705.17 as reflected on the "live account" as past-due were incurred during the time that this telephone service was under toll-restriction.
6. After the Complainant executed a letter of assurance that no toll calls would be made while under toll-restriction, the toll calls dramatically decreased, with no such calls being made in August, 1989 (N.T. 87).

7. The Complainant's total monthly household income amounts to approximately \$2,500 in gross earnings, which the Complainant earns upon a commission basis as a real estate sales person.
8. The Complainant's total monthly household expenses amount to \$1,910 as reflected in the statement set forth in the Summary of Testimony, which is incorporated herein by reference.
9. The Complainant failed to abide by four separate payment arrangements with Bell of PA between November, 1988 and February, 1989 (N.T. 70-83, 101).
10. The Respondent has acted reasonably in suspending Complainant's toll service and in attempting to negotiate payment arrangements for the arrearages with the Complainant.

Discussion

As set forth in the Public Utility Code, 66 Pa. C.S. §101, , the Commission is vested with broad power to regulate public utilities. Section 501(a) invests the Commission with ". . . the full power and authority . . . to enforce, execute, and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part and the full intent thereof . . ." Section 501(b) provides that:

The Commission shall have general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The Commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or the performance of its duties."

In furtherance of its regulatory function, the Commission has promulgated standards and billing practices for residential telephone service in Chapter 64 of Title 52 of the Pennsylvania Code of Regulations. Specifically, 52 Pa. Code §64.1 provides:

The purpose of this chapter is to establish and enforce uniform, fair and equitable residential telephone service standards governing account payment and billing, credit and deposit practices, suspension, termination and customer complaint procedures. The purpose of this chapter is to assure adequate provision of residential telephone service; to restrict unreasonable suspension or termination of or refusal to provide service; and to provide functional alternatives to suspension, termination, or refusal to provide service. Every privilege conferred or duty required by this chapter imposes an obligation of good faith, honesty and fair dealing in its performance and enforcement. This chapter will be liberally construed to fulfill its purpose and policy and to insure justice for all concerned.

This statement of purpose and policy provides the guidance for reviewing the case *sub judice*.

The Complainant has not challenged the accuracy or the amount of any charges incurred for the service rendered by this utility. Instead, he seeks Commission assistance in arranging a reasonable payment schedule with Bell of PA, while resuming toll service. The total charges owed to Bell of PA amount to \$2,610.01 (N.T. 85). Of this total, the sum of \$1,392.62 represents the amount owed for toll charges incurred prior to the time this service was toll-restricted (N.T. 59). Since toll-restriction was imposed, an additional \$705.17 was incurred for toll calls (N.T. 59). However, charges for toll service have greatly diminished, since the Complainant signed a letter of assurance stating that he would place no further toll calls while under ***206** toll-restriction (N.T. 87). No toll calls were placed in the month immediately preceding the hearing.

The act of obtaining toll service while under toll-restriction constitutes toll fraud. Toll fraud may be used as a basis for restricting basic service in a case in which long distance service has already been terminated. *Tinsley v. Bell of PA*, C-882090, adopted by Commission Order dated March 30, 1989. Furthermore, this Commission has suspended all telephone service until all arrearages have been completely liquidated, where the customer committed toll fraud while under toll-restriction and had repeatedly failed to abide by payment arrangements. *Berry v. Bell of PA*, C-882133, adopted by Order of the Commission dated July 20, 1989. However, I do not believe complete suspension of all

telephone service is appropriate in this case for several reasons.

Bell of PA has not requested immediate suspension of all telephone service. The history of this account discloses the account was established in November, 1965 (N.T. 101). Mr. Patterson apparently maintained this account in good standing until approximately a year ago, when he experienced a decline in his real estate business (N.T. 37). Toll charges, which account for \$2,097.81 of a total of \$2,610.01 in arrearages, have dramatically diminished, since the letter of assurance was given with no toll charges being incurred in the month preceding the hearing. The Complainant needs the service to maintain contact with his real estate business (N.T. 42). Depriving the Complainant of all telephone service would create an economic hardship at a time when the Complainant is making some effort to pay off his arrearages.

On the other hand, the Complainant is receiving more than a bare-bones telephone service. His residence is serviced by two separate telephone lines, which the Complainant explains was started when he had young children living at home and he was trying to stay in touch with his real estate business (N.T. 47-48). However, his last child has just moved out of the home and he and his wife alone now reside there. He is familiar with the "call-waiting" service, but claims that he "hates it." (N.T. 48). He maintains such optional services as a "voice grade, local channel off premises extension" and a guardian plan, which appear to be non-essential luxury items, when compared to an arrearage of \$2,610.01. The Commission may order the discontinuance of a particular optional service, if the circumstances warrant it. *Roland v. Bell of PA*, C-881683, approved by Commission Order October 14, 1988. In view of the size of the arrearage and the inability or unwillingness to abide by prior payment arrangements, a restriction of these more expensive optional services appears to be appropriate under the circumstances.

To reduce the arrearage, a sensible payment plan appears to be in order. The ability of a Complainant to pay is an issue that the Commission may consider in such a case. *Allen v. Bell of PA*, F-8863150, adopted by Commission Order dated October 27, 1988. In this respect, the Complainant has sufficient funds available to make a sizeable contribution each month toward reduction of the arrearage. With a gross monthly income of approximately \$2,500 and monthly expenses of approximately \$1,900, I believe the proposal of Bell of PA to pay \$125 a month toward reduction of the arrearage to be eminently fair. This amount falls well within the range of payments proposed by the Complainant of between \$100 to \$200 per month (N.T. 39, 112). In light of the funds available, I find the demand of Bell of PA to receive immediate full payment of the past due basic charges in the amount of \$442.69 and the toll charges in the amount of \$705.17 on the "live account" to be unreasonable and I will not consider it. The proposed payment plan is well within the means of the Complainant. Under these circumstances, I believe it is better to establish a realistic schedule for payment, rather than an unrealistically high one, only to have the parties return to the Commission again for the same problem. The Complainant is always free to pay off the arrears more quickly and have his full service re-established sooner.

With reference to the demand of the Complainant that his toll service be reinstated while the payment plan is in effect, I find this proposal to be unrealistic. The Complainant owes Bell of PA approximately \$2,100 for toll services. He has failed to abide by four previous payment *207 arrangements (N.T. 70-83). Over \$700 of this amount is owed for toll charges incurred after the toll-restriction was imposed. This history does not engender the degree of confidence one would expect in order to justify re-establishment of toll service. The Respondent's paying customers should not be expected to subsidize the Complainant's business until it becomes more lucrative.

Finally, I must note in passing that I find unpersuasive the argument of the Complainant that his problem with toll-restriction is the result of the Respondent's failure to inform him of his right to appeal to this Commission (N.T. 39-42). This telephone service was toll-restricted on May 16, 1988 for non-payment (N.T. 68). As of September 14, 1988, past-due toll charges amounted to \$1,392.64 (N.T. 69). Yet, the Complainant did not make any payment arrangements until November 29, 1988, when he agreed to the first of four unsuccessful attempts to liquidate the arrearage (N.T. 70-83). In the absence of any evidence to the contrary, the action of Bell of PA to toll-restrict this account is entirely reasonable. One must speculate how an earlier appeal to this Commission would have changed these circumstances.

For these reasons, the following order appears appropriate.

Conclusions of Law

1. The Commission has jurisdiction over the subject matter and the parties to this dispute.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of *Charles A. Patterson v. Bell Telephone Company of Pennsylvania*, docketed with this Commission at No. F-8966524, is hereby sustained.
2. That the Complainant shall pay to the Respondent the current monthly bills when due, plus \$125 a month towards payment of the arrearages on the due date for each monthly bill, effective with the first monthly bill received after the Commission order issued on this case and thereafter on the due date for the payment of each regular monthly bill.
3. That the Complainant shall not make any further toll calls using the telephone lines involved in this case, while this service is under toll-restriction.
4. That the Respondent is authorized to continue toll-restriction of the Complainant's telephone service, until all arrearages have been completely liquidated.
5. That the Respondent is authorized to immediately suspend all non-basic telephone service, until all arrearages have been completely liquidated.
6. That the Respondent is authorized to suspend the optional services of voice grade local channel for off premises extension, the voice grade transmission function, and the guardian plan for this telephone account, until all arrearages have been completely liquidated.
7. That the non-basic, optional and toll services of the Complainant shall not be reinstated, until all arrearages have been eliminated.
8. That the Respondent shall not charge the Complainant any service restoration charges in restoring these services after the Complainant has paid all arrearages.
9. That, so long as the Complainant adheres to the terms of this Order, the Respondent shall not assess any late payment charges nor shall Respondent terminate service to the Complainant, except for valid safety and/or emergency reasons.
10. That, if the Complainant fails to adhere to the terms of this Order, the Respondent is authorized to terminate Complainant's service, including basic service, pursuant to 52 Pa. Code §64.1, *et seq.*

Date: October 12, 1989

JOHN H. CORBETT, JR.

Administrative Law Judge

Pa.P.U.C. 1990
72 Pa.P.U.C. 196

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John R. Starzmann	:	
	:	
Complainant	:	
	:	Docket No. C-2010-2192759
v.	:	
	:	
PECO Energy Company	:	
	:	
Respondent	:	

NOTICE TO PLEAD

To: John Starzmann

You are hereby notified to file a written response to the attached Motion of PECO within twenty (20) days from the date of service of this notice. If you do not file a written response denying or correcting the enclosed Motion, within twenty (20) days of service, the facts set forth by PECO may be deemed to be true, thereby requiring no other proof, and judgment may be entered against you. All pleadings, such as an Answer to a Motion, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

RECEIVED
JAN 10 2012
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

You must also serve a copy of your response on the undersigned counsel for PECO.



Tishekia Williams
Counsel for PECO Energy Company
2301 Market St., S23-1
Philadelphia, PA 19101-8699
(215) 841-6841
Fax 215.568.3389
Tishekia.williams.@exelon.com

DATE: January 10, 2012

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John R. Starzmann	:	
	:	
Complainant	:	
	:	Docket No. C-2010-2192759
v.	:	
	:	
PECO Energy Company	:	
	:	
Respondent	:	

CERTIFICATE OF SERVICE

I, Tishekia Williams, hereby certify that I have this day served a copy of PECO Energy Company's Main Brief in the above matter upon all interested parties by mailing a copy, properly addressed and postage prepaid to:

Pennsylvania Public Utility Commission (Federal Express only)
Secretary of the Commission
PO Box 3265
Harrisburg, PA 17105-3265

Administrative Law Judge Joel E. Cheskis (via electronic mail and U.S. Mail)
Pennsylvania Public Utility Commission
400 North Street
P.O. Box 3265
Harrisburg, Pennsylvania, 17105-3265

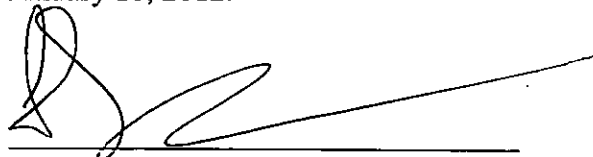
John Starzmann (via electronic mail and U.S. Mail)
515 London Tract Road
Landenberg PA 19350

RECEIVED

JAN 10 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Dated at Philadelphia, Pennsylvania, January 10, 2012.



Tishekia Williams
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699

From: (215) 841-5353
Anita Zaketa

Origin ID: PSQA



J11201108050225

2301 Market Street
S23-1
Philadelphia, PA 19101

Ship Date: 10JAN12
ActWgt: 1.0 LB
CAD: 101422610/NET3210

Delivery Address Bar Code



SHIP TO: (717) 772-7777

BILL SENDER

Rosemary Chiavetta, Secretary
Public Utilities Commission
400 NORTH ST FL 2
COMMONWEALTH KEYSTONE BUILDING
HARRISBURG, PA 17120

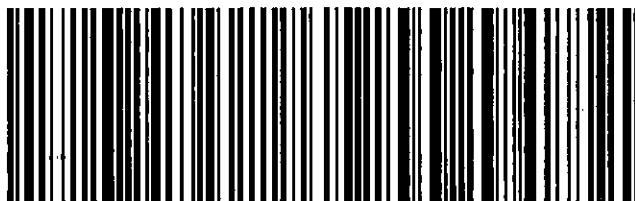
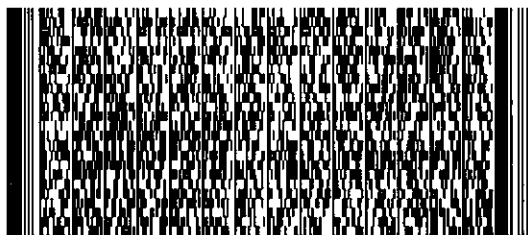
Ref #
Invoice #
PO #
Dept #

WED - 11 JAN A1
STANDARD OVERNIGHT

TRK# 7979 3086 9210
0201

17120
PA-US
MDT

ZN MDTA



50FG2/A78E/F5F4

After printing this label:

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits, see current FedEx Service Guide.