PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120

Melvin D. Williams
v.
Duquesne Light Company

Public Meeting January 28, 2016
2446701-OSA
Docket No. C-2014-2446701

Joint Motion of Vice Chairman Andrew G. Place and Commissioner John F. Coleman, Jr.

Before the Commission for consideration and disposition are the Exceptions of Duquesne Light Company (Duquesne or Respondent) to the Initial Decision (ID) issued in the above-captioned Formal Complaint proceeding. Replies to Exceptions were filed by the Complainant Melvin D. Williams. The ID sustains the Complaint that Duquesne did not provide reasonable service, imposes a civil penalty, and directs Duquesne to repair damage to the Complainant's sidewalk that occurred when Duquesne replaced a utility pole. Upon review of the record evidence and applicable law, we propose to resolve Duquesne's exceptions as follows.

Hearsay Ruling

We propose to grant Duquesne's third, fourth, and fifth Exceptions regarding the application of the hearsay rule.

Duquesne excepts to the finding in the ID that its witness Mr. Barrett lacked personal knowledge concerning the damaged cement slab and that his testimony was inadmissible hearsay. Mr. Barrett testified in his capacity as the supervisor of construction and maintenance who was responsible for overseeing the repair of sidewalks after the replacement of a utility pole. Mr. Barrett explained that as the supervisor of the repair crew, he personally visited and inspected the damage to Mr. Williams' sidewalk on three occasions. Mr. Barrett also took the photographs of the sidewalk, which were admitted into the record without objection. He also met with Mr. Williams to discuss the Complainant's concerns. Tr. at 54-55, 57-59, 61-62, and 87-88. Under these circumstances, we conclude that Mr. Barrett testified with personal knowledge as to the condition of the sidewalk. Thus, his testimony is permissible[1] and is not hearsay.

Duquesne also excepts to the finding that its witness Ms. Mueller lacked personal knowledge of the events surrounding the complaint to properly authenticate Duquesne's Exhibit 1 and that her testimony was inadmissible hearsay. The law does not require that a witness qualifying business records have personal knowledge of the facts reported in the

[1] The testimony is permissible under Pennsylvania Rule of Evidence 602 (Need for Personal Knowledge). To the extent that Mr. Barrett testified as to his opinion about the cause of the damage to the adjacent sidewalk (Tr. at 64, 91), his testimony could reasonably be considered to be his perception of the cause of the damage based on his observation of the conditions of the sidewalk. Thus, as testimony that is rationally based on the witness' perception, such testimony was also permissible under Pennsylvania Rule of Evidence 701 (Opinion Testimony by Lay Witnesses).

business record.[2] Rather, the witness must be able to provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of trustworthiness.[3] Such information was provided when Ms. Mueller in her testimony properly authenticated Exhibit 1 as a business record, and the record was admitted without objection. Tr. at 35-36, 99.

Moreover, Ms. Mueller's testimony was based on Exhibit 1, which is admissible under the business records exception to the hearsay rule. Pa. R. Evid. 803(6). Exhibit 1 is record of Mr. Williams' customer account with Duquesne, and Ms. Mueller's testimony related to dates contained in the exhibit pertaining to when Duquesne investigated Mr. Williams' complaint about his sidewalk. For example, she testified as to when Mr. Williams contacted Duquesne, when Duquesne responded to investigate the complaint, and when Duquesne informed Mr. Williams of the results of its investigation. Tr. at 35-37. We believe this testimony is admissible for purposes of determining whether the Respondent conducted a full and prompt investigation of Mr. Williams' claims.[4]

Complaint Investigation and Report

We also propose to grant Duquesne's sixth Exception, in part, and to grant its seventh Exception regarding the adequacy of Duquesne's investigation into Mr. Williams' complaint about his sidewalk.

In its sixth Exception, Duquesne argues that Section 56.151 of the Commission's Regulations, 52 Pa. Code § 56.151, does not apply to property damage cases and, thus, Duquesne was not required to issue a written investigation report to Mr. Williams. Alternatively, the Respondent argues that even if Section 56.151 applies, Duquesne complied with the regulation by providing a report of its findings to Mr. Williams by telephone. Exc. at 16-17.

We do not agree with limiting the application of Section 56.151 to billing and related issues and prohibiting its application to property damage disputes.[5] Thus, we propose to deny this portion of the sixth Exception. Nonetheless, we agree with Duquesne that Section 56.151 does not require the issuance of a written report under the facts of this proceeding. There is no record of the Complainant having requested a written report and hence, no basis upon which to find that Duquesne violated Section 56.151 of our regulations by failing to send such a report to Mr. Williams. Thus, we propose to grant this portion of Respondent's sixth Exception.

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[2] *Wayne County Bd. of Assessment v. Federation of Jewish Philanthropies,* 43 Pa.Cmwlth. 508, 403 A.2d 613 (1979).

[3] *Boyle v. Steiman,* 429 Pa.Super. 1, 631 A.2d 1025, 1032 (1993).

[4] Although Ms. Mueller also restated the conclusion of Duquesne's investigation (*i.e.*, that the Respondent was not responsible for the damage), I do not consider this statement as evidence to prove the truth of the matter asserted.

[5] There may be circumstances in which billing and related issues may encompass property damage questions. Our Regulations appear to contemplate such a scenario. For example, 52 Pa. Code § 56.152 delineates the required contents of a utility company report. It states in part, "[i]f the matter involves a dispute *other than a billing dispute,* the utility company report must also state the following ...." 52 Pa. Code § 56.152(8) (emphasis added).

Considering the totality of Duquesne's actions in investigating Mr. Williams' complaint, we do not believe the Respondent's failure to personally meet with Mr. Williams until after the filing of his Complaint with the Commission violated the full and prompt investigation requirements under 52 Pa. Code § 57.12. Under the circumstances, the Respondent's actions in response to the complaint appear to be reasonable. These actions include Duquesne immediately sending a crew to inspect the sidewalk in response to Mr. Williams' initial complaint made to the company in May 2014 and conveying within two days its inspection findings by telephone to Mr. Williams. Moreover, the fact that Duquesne did not speak with the excavation crew does not necessarily indicate a violation of Section 57.12, when considering the multiple on-site inspections done by Duquesne. Accordingly, we propose to grant Respondent's seventh Exception.

Sidewalk Damage Allegations

We propose to deny Duquesne's first, second, and eighth Exceptions relating to the alleged sidewalk damage.

The Complainant has the burden of proof here.[6] Although the burden of proof in a case never shifts, the burden of production or going forward with the evidence can shift. Upon a Complainant's presentation of evidence sufficient to make a prima facie case that initially satisfies the burden of proof, the burden of going forward with the evidence shifts to the Respondent to rebut the Complainant's evidence. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied the burden of proof and must provide additional evidence to rebut the Respondent's evidence.[7] If the evidence presented by the Respondent is not of co-equal weight to the Complainant's evidence, the Respondent has not successfully rebutted the Complainant's prima facie case, and the Complainant has satisfied the burden of proof.

Upon review, we believe the Complainant has established a prima facie case that Duquesne did not provide reasonable service when it replaced a utility pole and damaged Complainant's cement sidewalk. The evidence provided includes Mr. Williams' testimony that Duquesne caused the following damage to his sidewalk: (1) a 15-inch long crack and 5-inch long saw-cut in the shape of an "L" in the sidewalk; (2) spalling or crumbling of the surface area of a cement slab adjacent to the newly cemented area; and (3) a ¾-inch rise where the edge of the cement slab meets the newly cemented area. Tr. at 14, 23, 27. According to Mr. Williams at hearing, this damage did not exist prior to Duquesne replacing the utility pole. Tr. at 27, 96.

We find the Complainant's testimony credible, in part, because of the timing of Mr. Williams' complaint to Duquesne about the damage to his cement sidewalk. As noted in the record, Mr. Williams first contacted Duquesne to complain about the damage to his sidewalk on May 12, 2014 (Tr. at 35, 38), which is contemporaneous to the completion of the pole replacement and sidewalk project.

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[6] 66 Pa.C.S. § 332(a).

[7] *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

At the same time, we do not believe that Duquesne successfully rebutted the Complainant's prima facie case. This conclusion is based on critical evidence that we believe is missing from Duquesne's case. Of note, Duquesne did not offer as a witness any member of the two crews[8] that actually worked on the pole replacement and sidewalk project. Therefore, Duquesne did not offer as a witness any crew member with firsthand knowledge of the condition of the sidewalk at the time the crews arrived on the scene to perform the work.

Rather, Duquesne's evidence on the sidewalk damage issue was limited to the testimony of Mr. Barrett, a supervisor, who visited the site for the first time in August 2014. Tr. at 59-60. Based on this timing, Mr. Barrett's observations as to the cause of the sidewalk damage, at best, were three months after the project was completed. Thus, Duquesne produced no witness who viewed the site either shortly before or shortly after completion of the work that was the basis of Mr. Williams' complaint.[9]

Moreover, Duquesne did not provide any testimony that the pole replacement and sidewalk project was performed consistent with the requirements of the local municipality or with industry standards.[10]

Based upon these facts, we believe the Complaint should be sustained finding that Duquesne provided unreasonable service when it installed a utility pole and damaged the Complainant's cement sidewalk. We emphasize, however, that the outcome in this Motion is fact-sensitive and is based on the unique facts and circumstances from the record in this case.

In terms of a remedy, we do not believe a civil penalty is warranted here. However, we propose to direct Duquesne to repair the damage to the Complainant's cement sidewalk. Therefore, we propose to grant Duquesne's ninth Exception, in part, and to grant its tenth Exception.

THEREFORE, We move that:

1. The Exceptions of Duquesne Light Company are granted, in part, and denied, in part, consistent with this Motion.

2. The Initial Decision is modified, consistent with this Motion.

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[8] Two crews worked on the project – one crew that replaced the pole, which involved demolition of part of the sidewalk, and another crew that performed the sidewalk repair work.

[9] Irrespective of the timing issue, I do not find Mr. Barrett's testimony on the damage issue very persuasive. Although Mr. Barrett testified that the spalling/crumbling "looks like" it resulted from salt and just normal wear and tear over the years (Tr. at 64), the witness did not provide specifics, including a specific explanation as to why he believes this is the case. The witness also did not provide any specifics as to why it he believes it was unnecessary to repair the 5" saw cut (and crack) and did not specifically refute the Complainant's allegations related to the ¾-inch rise in the cement slab.

[10] *See, e.g., Moyer v. Columbia Gas of Pennsylvania, Inc.*, C-2013-2375588 (Initial Decision dated February 13, 2014; Final Order entered April 2, 2014).

3. The Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

DATE: **January 28, 2016**

Andrew G. Place
Vice Chairman

John F. Coleman, Jr.
Commissioner