

May 18, 2016

*Via Electronic Filing*

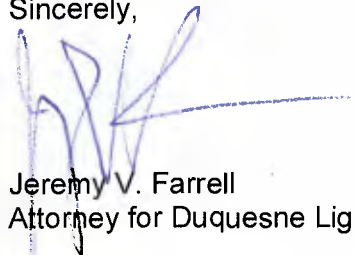
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

RE: Melvin Williams v. Duquesne Light Company  
Docket No. C-2014-2446701

Dear Secretary Chiavetta:

Pursuant to the Commission's Opinion and Order dated February 24, 2016, enclosed please find Duquesne Light Company's Compliance Report. A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,



Jeremy V. Farrell  
Attorney for Duquesne Light Company

Enclosure

cc: Melvin Williams (with enclosure)

LIT:603456-1 014657-158498

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MELVIN WILLIAMS,

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2014-2446701

**COMPLIANCE REPORT**

Filed on behalf of Respondent  
Duquesne Light Company

Counsel of Record for this Party:

Jeremy V. Farrell, Esquire

PA I.D. No. 316258  
1500 One PPG Place  
Pittsburgh, PA 15222  
(412) 594-3938  
Counsel for Respondent

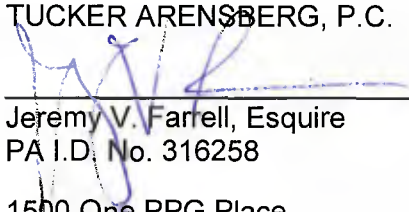


3. Duquesne Light hired a contractor, Liberty Fuel, to complete the repairs and associated debris clean-up. That work was completed on March 30, 2016. Copies of photographs depicting the repairs and clean-up are attached as Exhibit B.

WHEREFORE, Respondent Duquesne Light Company respectfully requests that the Pennsylvania Public Utility Commission mark this proceeding as closed.

Respectfully submitted,

TUCKER ARENSBERG, P.C.



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Jeremy V. Farrell, Esquire  
PA I.D. No. 316258

1500 One PPG Place  
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(412) 594-3938  
Counsel for Respondent, Duquesne Light  
Company

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held January 28, 2016

Commissioners Present:

Gladys M. Brown, Chairman  
Andrew G. Place, Vice Chairman  
Pamela A. Witmer, Dissenting  
John F. Coleman, Jr.  
Robert F. Powelson

Melvin D. Williams

C-2014-2446701

v.

Duquesne Light Company

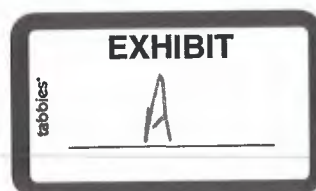
**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Duquesne Light Company (Respondent or Duquesne) filed on July 20, 2015, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Conrad A. Johnson, issued on June 29, 2015, in the above-captioned proceeding. Melvin D. Williams (Complainant or Mr. Williams) filed Replies to Exceptions on August 3, 2015.<sup>1</sup> For the reasons stated below, we shall grant

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<sup>1</sup> By letter dated July 30, 2015, the Commission's Secretary's Bureau returned the originally filed Replies to Exceptions to the Complainant because they did not contain an original signature. The Secretary's Bureau directed the Complainant to provide an original signature on the filing and return it to the Commission within ten days.



the Respondent's Exceptions, in part, deny them, in part, and modify the ALJ's Initial Decision consistent with this Opinion and Order.

### History of the Proceeding

On September 29, 2014, Mr. Williams filed a Formal Complaint (Complaint) against the Respondent alleging that Duquesne damaged his sidewalk, left debris from the installation of a new utility pole near his home and refused to meet with him about the matter.<sup>2</sup> For relief, Mr. Williams requested that the Respondent repair the damage and remove the debris.

On October 27, 2014, Duquesne filed an Answer to the Complaint, admitting that it replaced a utility pole near the service address but denying that it caused the damage and debris as alleged by Mr. Williams. Duquesne alleged it had already repaired the sidewalk and any other sidewalk damage appeared to have been caused by natural deterioration. The Respondent also denied that it refused to meet with the Complainant and averred that its foreman met with Mr. Williams on October 13, 2014, to discuss the Complainant's concerns. Duquesne requested dismissal of the Complaint with prejudice.<sup>3</sup>

ALJ Johnson conducted a telephonic hearing on March 10, 2015. The Complainant appeared *pro se* and presented testimony, but did not sponsor any exhibits.

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<sup>2</sup> The Complaint is a timely appeal of a decision of the Commission's Bureau of Consumer Services (BCS) at BCS Case No. 3238238.

<sup>3</sup> On November 10, 2014, Mr. Williams filed a response to the Answer averring, in part, that Duquesne only met with him after repeated refusals and after the issuance of the Complaint. Here, however, the Respondent did not file an Answer seeking affirmative relief or raising new matter pursuant to 52 Pa. Code § 5.62. Accordingly, our Regulations do not authorize the filing of a further response by the Complainant. Nevertheless, we acknowledge that Mr. Williams provided testimony related to these allegations during the hearing and will therefore consider this evidence as part of the record.

The Respondent was represented by counsel and presented two witnesses and three exhibits, which were admitted into the record. Duquesne presented the testimony of Kevin Barrett, a supervisor of construction and maintenance, and Margaret Mueller, a regulatory consumer relations specialist. The hearing generated 103 pages of testimony. The record closed on March 31, 2015.

In the Initial Decision, issued on June 29, 2015, the ALJ sustained the Complaint finding that Duquesne provided unreasonable service when it installed a utility pole and damaged the Complainant's cement sidewalk. Additionally, the ALJ determined that the Respondent violated the Commission's Regulations pertaining to the investigation of a customer's complaint. The Initial Decision assessed a civil penalty of \$5,000 and directed Duquesne to repair a section of Mr. Williams' sidewalk.

As previously indicated, the Respondent filed Exceptions on July 20, 2015. The Complainant filed Replies to Exceptions on August 3, 2015.

## Discussion

### Legal Standards

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the

Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. 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).

Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the customer shifts to the respondent. If the evidence presented by the respondent is of co-equal value or "weight," the burden of proof has not been satisfied. The complainant then has to provide some additional evidence to rebut that of the respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence 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).

ALJ Johnson made thirty-six Findings of Fact and reached six Conclusions of Law. I.D. at 2-7, 19. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa.*

*PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

### **ALJ's Initial Decision**

ALJ Johnson explained that the circumstances of the case raise the following issues: (1) Did Duquesne damage the Complainant's sidewalk while replacing the utility pole? (2) Did Duquesne respond to the Complainant's damage complaint in compliance with the Commission's Regulations? (3) If Duquesne violated the Commission's Regulations are civil penalties warranted? I.D. at 11.

In addressing the damages issue, the ALJ stated that Mr. Williams presented credible testimony that before the Respondent installed the new utility pole his sidewalk was not damaged. The ALJ found that, after the pole was installed, there was spalling or crumbling of the surface area of an adjacent cement slab; the cement slab was raised three-quarters of an inch; and there was a six-inch saw cut in the sidewalk. Further, the ALJ determined that the Respondent's exhibit showing a picture of the sidewalk area supported Mr. Williams' testimony that the only place exhibiting damage was the cement slab adjacent to the newly-cemented portion of the sidewalk repaired by Duquesne. *Id.* at 12.

In contrast, the ALJ considered the Respondent's testimony as lacking credibility. According to the ALJ, Duquesne relied upon the report of its supervisor of construction and maintenance, Kevin Barrett, who had no first-hand knowledge of the condition of the sidewalk prior to the removal of the old utility pole and the installation of the new pole. Citing to Mr. Williams' closing statements, the ALJ found that the Complainant effectively objected to the Respondent's testimony as lacking personal knowledge about the cause of the damaged cement slab. The ALJ found the testimony of

both of Duquesne's witnesses to be uncorroborated hearsay which cannot form the basis for a finding of fact. *Id.*

The ALJ also found that the Respondent's failure to call its excavation and utility pole installation crew members as witnesses established a presumption that had these witnesses testified their testimony would have been adverse to Duquesne. *Id.* at 13 (citing *Kovach v. Solomon*, 732 A.2d 1 (Pa. Super. 1999)). The Respondent did not present any evidence to rebut this adverse presumption and, therefore, the ALJ concluded it is reasonable to infer that Duquesne's employees contributed to the damage to Mr. Williams' sidewalk in some manner. *I.D.* at 13.

In addition, the ALJ explained that Mr. Williams repeatedly asked Duquesne to repair a six-inch saw cut adjacent to the cement slab surrounding the new pole. Mr. Barrett admitted that the Respondent made the saw-cut in May 2014, but did not fill it in until September 2014. According to the ALJ, this delay, in addition to the Respondent's failure to repair the spallation and the elevation to the adjacent sidewalk, constituted unreasonable service in violation of Section 1501 of the Code, 66 Pa. C.S. § 1501. *I.D.* at 13.

Regarding the issue of Duquesne's response to the damage complaint, the ALJ noted the requirement for utilities to conduct a full and prompt investigation pursuant to 52 Pa. Code § 57.12(a).<sup>4</sup> Here, the ALJ concluded that the Respondent did not conduct a full investigation based on the following reasons: (1) there is no evidence that anyone from Duquesne ever questioned the removal and installation crew as to whether or not they caused any damage to the Complainant's sidewalk; (2) Duquesne did not meet with Mr. Williams, as he had requested, until after he filed his Complaint; and

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<sup>4</sup> "Investigations. A public utility shall make a full and prompt investigation of complaints made by its customers, either directly to it or through the Commission." 52 Pa. Code § 57.12(a).

(3) Duquesne violated its own internal procedures by failing to refer Mr. Williams' damage complaint to its damage claim department for investigation. I.D. at 13.

Additionally, the ALJ stated that Section 56.151 of our Regulations, 52 Pa. Code § 56.151, requires a utility to issue a written report addressing the complaining party's dispute, within thirty days of initiating the dispute.<sup>5</sup> In this matter, the ALJ noted that Duquesne admitted to receiving Mr. Williams' complaint on May 12, 2014, and to closing the complaint on September 10, 2014. According to the ALJ, there is no evidence of the Respondent ever issuing a written report to Mr. Williams and that this failure constituted a violation of the Commission's Regulations. I.D. at 14.

The ALJ determined that the Respondent failed to provide reasonable service under Section 1501 of the Code, based on the following actions by Duquesne:

- (1) Failure to meet with Mr. Williams about his damage claim until after he had filed his Complaint.
- (2) Admitting to saw-cutting into Mr. Williams's cement slab and not repairing the saw-cut until several months later.

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<sup>5</sup> Section 56.151(5)(i) provides as follows:

Upon initiation of a dispute covered by this section, the public utility shall:

\* \* \*

(5) Within 30 days of the initiation of the dispute, issue its report to the complaining party. The public utility shall inform the complaining party that the report is available upon request.

(i) If the complainant is not satisfied with the dispute resolution, the utility company report must be in writing and conform to § 56.152 (relating to contents of the public utility company report). Further, in these instances, the written report shall be sent to the complaining party if requested or if the public utility deems it necessary.

- (3) Not taking any action to repair the saw-cut until after Mr. Williams had filed his Complaint with the Commission.
- (4) Not repairing the cement slab, and its three-quarters inch lift, which pose a tripping hazard to pedestrians.
- (5) Not conducting a full investigation of Mr. Williams' complaint and not issuing him a written report as required under 52 Pa. Code § 56.151.

After evaluating the standards for imposing a civil penalty under the policy statement set forth in 52 Pa. Code § 69.1201 (Statement of Policy), the ALJ concluded that a civil penalty of \$5,000 was appropriate. I.D. at 16-18.

Lastly, the ALJ directed Duquesne to repair the Complainant's cement sidewalk. *Id.* at 19.

### Exceptions and Replies

Duquesne filed ten Exceptions to the Initial Decision which generally claim that the Complainant's uncorroborated statements are insufficient to meet his burden of proof and the Initial Decision contained multiple erroneous Findings of Fact and Conclusions of Law. Exc. at 6-24.

In its first Exception, the Respondent argues that the ALJ erred in concluding that Duquesne damaged a portion of the Complainant's sidewalk adjacent to the newly-repaired sidewalk surrounding the utility pole. The Respondent contends that the only evidence supporting that determination was the uncorroborated testimony of Mr. Williams who admitted to not witnessing the work done by Duquesne. Additionally, the Respondent asserts that the Complainant, who owned the property, failed to offer any documentary evidence such as photographs to substantiate his claims. *Id.* at 6.

According to Duquesne, the Complainant's testimony was explicitly contradicted by the testimony of its witness, Mr. Barrett, and by the photographs the Respondent entered into evidence. Specifically, the Respondent proffers that Mr. Barrett, whose duties pertain to the repair of sidewalks after installation of utility poles, visited the location on three separate occasions and testified that Duquesne did not cause the damage alleged by Mr. Williams, including the alleged three-quarter inch lift in the sidewalk. Duquesne further argues that its photo exhibits clearly show that the spalling did not occur in the cemented areas immediately next to the location where the Respondent performed its work. *Id.* at 6-8.

In the second Exception, Duquesne asserts that the ALJ committed an error of law by relying on the adverse inference doctrine in concluding that the Respondent caused the spalling and the three-quarter inch lift in the sidewalk. *Id.* at 8-9 (citing to *John Snow v. Equitable Gas Co., LLC*, Docket No. C-2012-2315572 (Order entered July 16, 2013) (*Snow*)).<sup>6</sup> The Respondent argues that the negative inference drawn by the ALJ is insufficient to carry Mr. Williams' burden of proof or create substantial evidence to support the Initial Decision. *Exc.* at 9-10.

In addition, Duquesne contends that the fundamental premise underlying the adverse inference doctrine is that access to evidence lies exclusively in the possession of one party. Here, the Respondent asserts, this premise does not apply because Duquesne is not equally suited to the Complainant to testify about the condition of the sidewalk prior to the installation of the new pole. According to Duquesne, Mr. Williams owns the property and has the burden the proof. However, the Respondent states, he

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<sup>6</sup> In *Snow*, the complainant alleged that the respondent's gas meter was faulty and caused an explosion at his residence. The ALJ relied on the adverse inference doctrine to find that the complainant carried his burden of proof regarding causation of property damage when the respondent failed to conduct an analysis of the meter and submit it into evidence. The Commission reversed this finding explaining, in part, that such an inference cannot be used to sustain the complainant's burden of proof. *Snow* at 13-14.

failed to offer any corroborating evidence that the sidewalk was in better condition prior to the Respondent's work. Thus, Duquesne avers that the adverse inference doctrine cannot be used to justify the ALJ's conclusions. *Id.* at 10-11.

The Respondent's third Exception states that the ALJ erred in determining that Mr. Barrett lacked personal knowledge concerning the damaged cement slab. The Respondent explained that Mr. Barrett, as the supervisor of construction and maintenance, is responsible for overseeing the repair of sidewalks after the replacement of a utility pole. Here, Mr. Barrett supervised the crew performing the repair work and made three personal visits to inspect the damage to the sidewalk of the Complainant as part of his investigation. Additionally, the Respondent contends that Mr. Barrett personally met and spoke with Mr. Williams regarding the concerns about the sidewalk. Moreover, the Respondent notes that Mr. Barrett took all of the pictures discussed during the hearing. According to Duquesne, the fact that Mr. Barrett was not present during the pole replacement itself does not erase Mr. Barrett's personal knowledge obtained from his investigation, multiple site visits, and conversation with Mr. Williams. Under these circumstances, Duquesne argues that it was clear error for the ALJ to rule that Mr. Barrett lacked personal knowledge regarding the damaged cement slab. *Exc.* at 11-12.

In the fourth Exception, the Respondent argues that the ALJ erred in determining that Margaret Mueller lacked personal knowledge of the events surrounding Mr. Williams' Complaint and, thus, could not authenticate and testify about Duquesne's business records. Duquesne contends that Finding of Fact No. 22 – pertaining to the determination that Ms. Mueller lacked personal knowledge of the events surrounding the Complaint – is legally flawed and misapplies the business records exception to the hearsay rule. *Id.* at 12.

According to the Respondent, Ms. Mueller was qualified to authenticate the records as evidenced by the fact that the records were admitted without objection.

Furthermore, Duquesne proffers that Mr. Williams did not dispute Ms. Mueller's testimony regarding when he contacted Duquesne and that he was advised that the Respondent denied that it damaged part of the sidewalk he wanted to be replaced. *Id.* at 13.

The Respondent's fifth Exception states that the ALJ erred in determining that the testimony of Duquesne's witnesses was hearsay. The Respondent argues that Mr. Barrett's testimony was based on his personal observations of Complainant's property and on his training and experience with Duquesne. Duquesne also avers that the Initial Decision fails to identify any portion of Mr. Barrett's testimony that constitutes hearsay. Additionally, the Respondent contends that Ms. Mueller's testimony was based on the business records exception to the hearsay rule and was, therefore, admissible. *Id.* at 13-15 (citing Pa. R. Evid. 803(6) and 42 Pa. C.S. § 6108)).

In the sixth Exception, Duquesne claims that the ALJ erred in concluding that the Respondent violated 52 Pa. Code § 56.151 by failing to prepare a written report regarding Mr. Williams' dispute. According to Duquesne, Section 56.151 does not apply to the complaint made by Mr. Williams and thus did not require the Respondent to prepare a written report. *Exc.* at 16.

Duquesne contends that by its plain terms, Chapter 56 of our Regulations, 52 Pa. Code §§ 56.1, *et seq.*, applies to billing and related issues and not to allegations of property damage. Additionally, the Respondent argues that it was reasonable for Duquesne not to physically meet with Mr. Williams and to not provide a written report because Duquesne informed the Complainant of its position via telephone. Duquesne states that Mr. Williams immediately filed an informal complaint with BCS without requesting a report from the Respondent. *I.D.* at 16 (citing 56 Pa. Code §§ 56.151(2) and 56.151(5)(i)).

The Respondent's seventh Exception argues that the ALJ failed to properly consider Duquesne's witness testimony and evidence and improperly determined that the Respondent failed to conduct a full and prompt investigation under 52 Pa. Code § 57.12. Exc. at 17-19.

In its eighth Exception, Duquesne objects to the ALJ's conclusion that the Respondent provided unreasonable service based on a delay in repairing the saw-cut and the failure to fix the sidewalk spalling and the three-quarter inch lift. Duquesne argues that such a conclusion is based on a flawed assumption that the sealant or Sikaflex that it applied to the saw cut was a necessary repair and that the Respondent was not permitted to deny responsibility for a claim made by a customer. Specifically, Duquesne asserts that it installed the Sikaflex as a courtesy to Mr. Williams after he expressed concern about water getting in the saw cuts. The Respondent also argues that it inspected Mr. Williams' sidewalk on four separate occasions and that Duquesne denied responsibility for damage in good faith. According to Duquesne, the failure to make repairs when liability for damage is disputed in good faith cannot constitute unreasonable service. *Id.* at 19.

In its ninth Exception, Duquesne argues that the record lacks evidence of any violation of the Code or Commission Regulations and, thus, the ALJ erred in assessing a civil penalty and ordering the Respondent to repair the sidewalk slab. The tenth Exception contends that the ALJ erroneously applied the factors under 52 Pa. Code § 69.1201 and that a \$5,000 is unwarranted under the facts of this case. Exc. at 20-24.

In his Replies to Exceptions, Mr. Williams reiterates his prior arguments that the Respondent caused the three-quarter inch raise and the shattering of the cement surface in the adjacent sidewalk section. The Complainant also states that the Respondent refused and continues to refuse to remove its debris despite several requests. He also contends that the adjacent section had no damage prior to Duquesne's work and

that the Respondent refused to meet with him to discuss the problem until after he filed the Complaint with the Commission. Specifically, Mr. Williams argues that Duquesne's claims of inspections and visits are not documented and, even if true, did not result in any attempts to compromise with the Complainant. According to Mr. Williams, Mr. Barrett's one brief meeting with the Complainant contained no agreement and the Respondent took months to take any action. R. Exc. at 1.

In addition, Mr. Williams asserts that Duquesne's actions related to the saw cut constituted gross negligence. The Complainant argues that it is common knowledge that the freezing and thawing of water in the visible saw cut would destroy the slab. According to Mr. Williams, no evidence of such potential damage is necessary because the Commission could take judicial notice of this fact. Finally, Mr. Williams denies that Duquesne ever reported its findings to him. *Id.*

## Disposition

### Hearsay Ruling

Preliminarily, we will address the ALJ's conclusion that the testimony of Mr. Barrett and Ms. Mueller was hearsay.

As an administrative agency, the Commission follows the *Walker* rule,<sup>7</sup> which provides that hearsay evidence, properly objected to, is not competent evidence to support a finding of the agency. Hearsay evidence admitted without objection, will be given its natural probative effect and may support a finding of an agency if it is corroborated by any competent evidence in the record. A finding of fact based solely on hearsay will not stand. *Walker*, 367 A.2d at 370.

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<sup>7</sup> *Walker v. Unemployment Compensation Bd. of Rev.*, 367 A.2d 366 (Pa. Cmwlth. 1976).

In *Gibson v. Workers' Compensation Bd. of Rev. (Armco Stainless & Alloy Products)*, 580 Pa. 470, 861 A.2d 938 (2004) (*Gibson*), the Pennsylvania Supreme Court applied the Pennsylvania Rules of Evidence in its review of an administrative proceeding. The Court stated that it is fundamental that a witness must have first-hand knowledge of the subject on which he or she is testifying for that testimony to be admissible. Thus, the Court found that the following rules of evidence apply to administrative agencies: Pa. R. Evid. 602 (need for personal knowledge); Pa. R. Evid. 701 (opinion testimony by lay witnesses); and Pa. R. Evid. 702 (testimony by experts). *Gibson*, 861 A.2d at 947.

The business records exception to the hearsay rule is commonly used in consumer complaint proceedings and only requires a copy of a business record and its appropriate authentication by a witness qualified to provide testimony on the subject matter.

**(6) Records of a Regularly Conducted Activity.** A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if,  
(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;  
(B) the record was kept in the course of a regularly conducted activity of a "business", which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;  
(C) making the record was a regular practice of that activity;  
(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and  
(E) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Pa. R. Evid. 803(6).<sup>8</sup>

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<sup>8</sup> The "business records" exception to the hearsay rule is further defined in the Uniform Business Records as Evidence Act (Act), 42 Pa. C.S. § 6108.

Authentication of business records requires that the submitting party satisfy the requirements of the Act, establishing the authenticating witness as the custodian or qualified witness who can testify to the record's identity and preparation, and whether it was made in the regular course of business at or near the time of the act, condition or event. 42 Pa. C.S. § 6108. It is not essential under the Act to produce either the person who made the entries or the custodian of the record at the time the entries were made, and the law does not require that the witness qualifying business records even have a personal knowledge of the facts reported in the business records, as long as the authenticating witness can provide sufficient information relating to the preparation and maintenance of the records to justify the presumption of trustworthiness of the business records of a company. *Boyle v. Steiman*, 631 A.2d 1025, 1032 (Pa. Super. 1993), *appeal denied*, 538 Pa. 663, 649 A.2d 666 (*Boyle*).

Here, the Complainant made a closing statement that neither of the Respondent's witnesses was present during the breakup of the sidewalk surrounding the utility pole and, thus, they were not valid witnesses about the cause of the damage to the sidewalk. Tr. at 101. The ALJ considered Mr. Williams' statement to be an objection that the Respondent's witnesses lacked personal knowledge concerning the damaged cement slab. The ALJ agreed and stated that the testimony of Mr. Barrett and Ms. Mueller was hearsay. I.D. at 12.

Duquesne excepts to this finding that 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. He 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 photographs of the sidewalk which were admitted into

the record without objection. Additionally, he 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 as to his personal knowledge regarding the condition of the sidewalk and his investigation. Thus, his testimony was permissible and was not hearsay.<sup>9</sup>

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. As discussed above, however, the law does not require that a witness qualifying business records have personal knowledge of the facts reported in the business record. *See also, Wayne County Bd. of Assessment v. Federation of Jewish Philanthropies*, 403 A.2d 613 (Pa. Cmwlth. 1979). 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. *Boyle, supra*. 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 was admissible under the business records exception to the hearsay rule. Pa. R. Evid. 803(6). Exhibit 1 is a 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. For example, she testified as to when Mr. Williams contacted Duquesne (May 12, 2014), when Duquesne responded to

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<sup>9</sup> The testimony was permissible under Pennsylvania Rule of Evidence 602 (need for personal knowledge). Moreover, to the extent that Mr. Barrett testified as to his opinion about the cause of the damage to the adjacent sidewalk, Tr. at 64 and 91, his testimony could reasonably be considered as his perception of the cause of the damage based on his observation of the condition of the sidewalk. Thus, as testimony that is rationally based on the witness' perception, such testimony also was permissible under Pennsylvania Rule of Evidence 701 (opinion testimony by lay witnesses).

investigate the complaint (May 12, 2014), and when Duquesne informed Mr. Williams of the results of its investigation (May 14, 2014). Tr. at 35-37. We believe this testimony was admissible for purposes of determining whether the Respondent conducted a full and prompt investigation of Mr. Williams' claims, which is discussed further below.<sup>10</sup>

Accordingly, we shall grant the Respondent's third, fourth and fifth Exceptions.

### Complaint Investigation and Report

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

In its sixth Exception, Duquesne argues that Section 56.151 of our Regulations, 52 Pa. Code § 56.151, does not apply to property damage cases and, thus, it 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.

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<sup>10</sup> Although Ms. Mueller also restated the conclusion of Duquesne's investigation (*i.e.*, that the Respondent was not responsible for the damage), we do not consider this statement as evidence to prove the truth of the matter asserted.

We do not agree with limiting the application of 52 Pa. Code § 56.151 to billing and related issues and to prohibit its application to property damage disputes.<sup>11</sup> Thus, we shall deny this portion of the sixth Exception. Nonetheless, we agree with Duquesne that 52 Pa. Code § 56.151 did 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, thereby, no basis upon which to find that Duquesne violated Section 56.151 by failing to send such a report to Mr. Williams. Thus, we shall grant this portion of Respondent's sixth Exception.

Considering the totality of Duquesne's actions in investigating Mr. Williams' concerns, we do not believe the Respondent's failure to personally meet with Mr. Williams until after the filing of the 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 to the Respondent 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 52 Pa. Code § 57.12, when considering the multiple

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<sup>11</sup> 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).

on-site inspections made by Mr. Barrett. Accordingly, we shall grant the Respondent's seventh Exception.<sup>12</sup>

### Sidewalk Damage Allegations

Upon review, we shall deny Duquesne's first, second, and eighth Exceptions relating to the alleged sidewalk damage.

We find that the Complainant has established a *prima facie* case that the Respondent did not provide reasonable service when it replaced a utility pole and damaged the Complainant's cement sidewalk. The evidence provided includes Mr. Williams' testimony that Duquesne caused the following damage to his sidewalk: (1) a fifteen-inch long crack and a five-inch long saw-cut in the shape of an "L" in the sidewalk; (2) spalling or crumbling of the surface area of cement slab adjacent to the newly cemented area; and (3) a three-quarter-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 determine the Complainant's testimony to be 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 and 38, which was contemporaneous with the completion of the pole replacement and sidewalk project.

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<sup>12</sup> The ALJ also found that the Respondent violated its own internal procedures by failing to refer Mr. Williams' complaint to its damage claim department for investigation. I.D. at 13. However, Ms. Mueller testified that Mr. Williams filed his initial complaint with Duquesne's claims department. Tr. at 46. The record indicates that Duquesne sent a crew to investigate the claim of damage on the same day that Mr. Williams made this claim. Tr. at 37; Exh. 1. Thus, the finding that the Respondent failed to follow its own claims procedures does not appear to be supported by record evidence.

At the same time, we find that Duquesne did not successfully rebut the Complainant's *prima facie* case. This conclusion is based on critical evidence that we believe is missing from Duquesne's case. Of note, the Respondent did not offer as a witness any member of the two crews that actually worked on the pole replacement and sidewalk project.<sup>13</sup> 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, the Respondent'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.<sup>14</sup>

Moreover, the Respondent did not provide any testimony that the pole replacement and sidewalk project were performed consistent with the requirements of the local municipality or with industry standards. *See, e.g., Moyer v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2013-2375588 (Initial Decision issued February 26, 2014; Final Order entered April 2, 2014).

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<sup>13</sup> 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.

<sup>14</sup> Irrespective of the timing issue, we 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 or just normal wear and tear over the years, Tr. at 64, the witness did not provide any specifics, including a specific explanation as to why he believes this is the case. The witness did not provide any specifics as to why he believes it was unnecessary to repair the five-inch saw cut (and crack) and did not specifically refute the Complainant's allegations that related to the three-quarter-inch rise in the cement slab.

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

### **Civil Penalty and Remedy**

In terms of a remedy, applying the ten factors in the Statement of Policy to the instant case, in which we find that Duquesne provided unreasonable service in violation of Section 1501 of the Code when it installed a utility pole and damaged the Complainant's cement sidewalk, we do not believe a civil penalty is warranted in this proceeding. The violation was not of a serious nature, the resulting consequences were not of a serious nature, only one customer was affected by the violation, and there is no evidence that the conduct was intentional.

However, we shall direct Duquesne to repair the damage to the Complainant's cement sidewalk. Specifically, the Respondent shall repair Mr. Williams' cement slab and remove any debris from the sidewalk that is generated during the course of repairing the cement slab within ninety days of the entry of this Order. Following the completion of the repairs, Duquesne shall file a compliance report with the Secretary's Bureau pursuant to 52 Pa. Code § 5.591.

Therefore, we shall grant the Respondent's ninth Exception, in part, and grant its tenth Exception.

## Conclusion

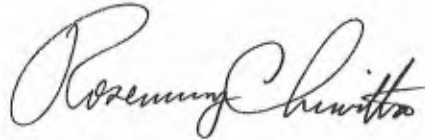
Based upon our review of the record, the ALJ's Initial Decision, and the applicable law, we shall grant the Exceptions, in part, deny them, in part, and modify the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

### IT IS ORDERED:

1. That the Exceptions filed by Duquesne Light Company on July 20, 2015, are granted, in part, and denied, in part, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Conrad A. Johnson is adopted, as modified, consistent with this Opinion and Order.
3. That the Complaint filed by Melvin D. Williams against Duquesne Light Company at Docket No. C-2014-2446701 is sustained, in part, and dismissed, in part.
4. That Duquesne Light Company shall cease and desist from further violations of the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.*, and the Regulations of this Commission, 52 Pa. Code §§ 1.1, *et seq.*
5. That Duquesne Light Company shall, within ninety days of the entry of this Order, repair the Complainant's cement slab and remove any debris from the Complainant's sidewalk that is generated during the course of repairing the cement slab.
6. Upon completion of the work described in Ordering Paragraph No. 5, Duquesne Light Company shall file a compliance report at this docket number, pursuant to 52 Pa. Code § 5.591.

7. That upon Duquesne Light Company's filing of the compliance report described in Ordering Paragraph No. 6, this proceeding shall be marked closed.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: January 28, 2016

ORDER ENTERED: February 24, 2016



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EXHIBIT

B









BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MELVIN WILLIAMS,

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2014-2446701

VERIFICATION

I, Kevia Barrett, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

K Barrett

5-18-16

Date

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MELVIN WILLIAMS,

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2014-2446701

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the participant listed below in accordance with the requirements of 52 PA. Code § 1.54 (relating to service by a participant):

Melvin Williams  
1119 North Lang Avenue, Apt. 1 & 2  
Pittsburgh, PA 15208

Dated this 18<sup>th</sup> day of May 2016.

  
\_\_\_\_\_  
Jeremy V. Farrell, Esquire  
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