

September 6, 2016

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
PA Public Utility Commission
Commonwealth Keystone Building, 2 North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Docket No. C-2016-2532581
Alfred Stempo - Sammy Jo's Inc. v. Metropolitan Edison Company
Memorandum of Law of Met-Ed

Dear Secretary Chiavetta:

Attached is the Memorandum of Law of the Respondent, Metropolitan Edison Company (Met-Ed), to be filed in the above referenced matter.

A copy of the Memorandum of Law has been forwarded to counsel for the Complainant in the manner indicated on the attached Certificate of Service.

If there are any questions, please contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM/jmm
Attachment

cc: The Hon. Elizabeth Barnes, Pennsylvania Public Utility Commission
Tori Giesler, Esquire, FirstEnergy Service Company
Philip D. Lauer, Esquire, Lauer & Fulmer

**Re: Docket No. C-2016-2532581
Alfred Stempo - Sammy Jo's Inc. v. Metropolitan Edison Company
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the person(s) on this service list, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

Via Facsimile and First Class Mail

Philip D. Lauer, Esquire
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Easton, PA 18042

Counsel for Complainants

Dated: September 6, 2016


Margaret A. Morris, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Administrative Law Judge Elizabeth Barnes

ALFRED STEMPO – SAMMY JO’S

v.

METROPOLITAN EDISON COMPANY

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Docket No. C-2016-2532581

MEMORANDUM OF LAW OF METROPOLITAN EDISON COMPANY

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

ALFRED STEMPO – SAMMY JO’S :
v. : Docket No. C-2016-2532581
METROPOLITAN EDISON COMPANY :

Pursuant to the directive of presiding Administrative Law Judge Elizabeth Barnes (Judge Barnes), Metropolitan Edison Company (Met-Ed or Respondent) files this Memorandum of Law in support of its position that the Amended Petition filed by Alfred Stempo (Complainant) against Met-Ed seeking an Interim Emergency Order to restore commercial service should be denied in its entirety. The Complainant has not met the requisite burden of proof under Section 3.6 of the Commission’s Regulations and the Amended Petition should be denied in its entirety.

I. HISTORY OF PROCEEDINGS

On March 3, 2016, the Complainant filed a Formal Complaint¹ alleging, *inter alia*, that Met-Ed refused to establish commercial service in his name at 831 S. Delaware Drive, Easton, Pennsylvania (Service Location). Sammy Jo’s, Inc. (Business) is the business operated at the Service Location.

¹ The Complainant listed himself and Sammy Jo’s as “customer/complainant” (Complaint at ¶ 1).

On March 28, 2016, Met-Ed filed an Answer denying the material allegations and averred that service was currently in the name of Ricca, Inc. (Customer) under Account No. 100105482416; the Customer is the landlord for the Service Location.²

The initial evidentiary hearing was held on August 16, 2016 before Judge Barnes.

On August 22, 2016, the Business filed a Petition for Interim Emergency Order seeking to delay the termination of service scheduled on or after August 22, 2016 (Petition).

Met-Ed timely filed its Answer asserting that: (1) the Petition was not supported by a verified statement of facts necessary to establish the existence of the need for interim emergency relief; (2) the Business was not a party to the proceedings; and (3) the requested relief was moot since service was lawfully terminated for non-payment of undisputed charges before the Petition was filed.

A telephonic hearing on the Petition was held before Judge Barnes on September 1, 2016. At the hearing, the Petition was amended as follows: (1) the Complainant was substituted for the Business as the petitioner; and (2) the requested relief sought service immediately restored in the Customer's name on the Complainant's "promise to pay" the termination amount (plus restoration fee) within thirty (30) days after service was restored (Amended Petition).

² The Customer is not affiliated with the Business or the Complainant.

II. FACTS

- The Customer entered into a lease agreement with the Complainant for the Service Location effective July 2013.
- The Business has operated from the Service Location since 2002 under the name of Stemie's Place.
- The Customer does not dispute any charges.
- Met-Ed posted the 3-day notice on August 15, 2016 at the Service Location. Exhibit R-2.
- Service was terminated on August 22, 2016. The post termination notice was posted at the Service Location. Exhibit R-2.
- The Complainant rented a small generator to minimize the loss of food and beer.
- The amount to restore service is \$4,142.54 (termination amount of \$4,106.54 plus \$36.00 reconnection fee).
- The Customer does not want service restored and continued in its name.
- A final bill for the Customer's Account has not been issued.
- The Complainant has promised to pay and "will try his best" within thirty (30) days of restoration to satisfy the delinquent amount.

III. STANDARD FOR INTERIM EMERGENCY ORDER

Section 3.6(b) of Commission Regulations³ sets forth the standard to establish the existence of the need for interim emergency relief. The Petition was not supported by a verified statement of facts that established the existence of the need for interim emergency relief. As the proponent of a rule or order, the Complainant has the burden of proof in this matter pursuant to 66 Pa.C.S.A. § 332(a). The Complainant has the burden of proving that: (1) his right to relief is clear; (2) the need for relief is immediate; (3) the injury would be irreparable if relief is not granted; and (4) the relief requested is not injurious to the public interest. To establish a sufficient case and satisfy the burden of proof, the Complainant must show that Met-Ed improperly refused to establish service in his name. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990); *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 134 Pa.Cmwlth. 218; 221-222, 578 A.2d 600; 602 (1990), app. denied, 602 A.2d 863 (1992). A preponderance of the evidence is established by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 67 Pa.Cmwlth. 597, 447 A.2d 1100 (1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 154 Pa.Cmwlth. 21, 623 A.2d 6 (1993); 2 Pa.C.S. § 704. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Bd. (Skirpan)*, 531 Pa. 287, 612 A.2d 434 (1992). More is required than a

³ 52 Pa. Code § 3.6(b).

mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Dep't. of Public Welfare, White Haven Center*, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984). No matter how strongly held, an opinion does not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987).

IV. QUESTIONS PRESENTED

1. *Is the Complainant's right to relief clear?*

SUGGESTED ANSWER: No

The Complainant did not address this factor in the Petition or in his testimony.

The Complainant has not made a *prima facie* case that his right to relief in the underlying complaint is clear. Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent that, if not met, results in an obligatory decision for the proponent. *In re: Fink's Estate*, 343 Pa. 65, 74, 21 A.2d 883, 888-889 (1941); *Rogers v. United States*, 66 F. Supp. 663, 667, relying, in relevant part, on *Roseberry v. Home Life Insurance Company*, 120 Pa. Superior Ct. 450, 454, 183 A. 121, 95 A.L.R. 749 (1936). The record is devoid of any that the Complainant's right to relief is clear.

2. *Is the need for relief immediate?*

SUGGESTED ANSWER: No

The Complainant did not address this factor in the Petition. He testified that as result of the service termination, the Business suffered monetary damages due to loss of revenue and product. The Complainant did not produce any documentation to support his opinion testimony.

Met-Ed asserts that the Complainant has not made a *prima facie* case for this factor. The Complainant simply offered his personal opinion that the Business suffered “damages.” No matter how strongly held an opinion does not constitute evidence. *PA Bureau of Corrections, supra*. The record evidence does not support a finding that the need for the relief requested is immediate.

3. *Is the injury irreparable if relief is not granted?*

SUGGESTED ANSWER: No

The Complainant did not address this factor in the Petition. He testified that the Business may lose clientele due to the Business being closed. The Complainant requested at the hearing that the Customer’s service be immediately restored in the Customer’s name and he “promises to pay” the Customer’s terminated amount within thirty days of restoration. He did not produce any documentation to support this allegation. The Customer testified that it does not want service restored in its name.

Met-Ed asserts that the Complainant has not made a *prima facie* case for this factor. The record evidence of irreparable harm to the Business is speculative at best. The Complainant’s “promise to pay” is also speculative. On cross-examination, the Complainant

admitted that he will “try his best” to keep his “promise to pay.” There is no substantial record evidence that the harm, if any, is irreparable.

4. *Is the relief requested injurious to the public interest?*

SUGGESTED ANSWER: Yes

The Complainant did not address this factor in the Petition. He testified that the local community is harmed by the Business being closed. He offered opinion testimony to support his allegation and conclusion.

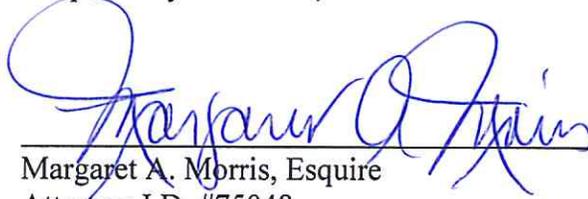
Met-Ed asserts that the Complainant has not made a *prima facie* case for this factor. The Respondent avers that the public interest, not the local community, will be harmed if Met-Ed is ordered to restore service under the Customer’s account without any payment of the undisputed delinquent charges. Met-Ed is entitled to full payment (at the currently approved tariff rate) for the services provided. *Scaccia v West Penn Power Co.*, 55 Pa.PUC 637 (1982); *Kea v Peoples Natural Gas Co.*, 60 Pa. PUC 215 (1985); *Mill v Pa. PUC*, 623 A.2d 1100 (Pa. Cmwlth. 1982). Otherwise, unpaid utility bills are included in Met-Ed’s uncollectible expense, and ultimately paid by the remaining ratepayers. *Cf.*, *Bolt v. Duquesne Light Co.*, 66 Pa. P.U.C. 463 (1988); *O’Toole v. The Bell Telephone Co. of Pennsylvania*, Docket Number C-923964 (Final Order entered August 20, 1992).

V. CONCLUSION

The record evidence does not support a finding that Section 3.6 of the Commission’s Regulations has been satisfied. The Complainant has not carried his burden of proof that the Commission should issue an interim emergency order.

WHEREFORE, Metropolitan Edison Company respectfully requests that the Amended Petition for Interim Emergency Order be denied.

Respectfully submitted,



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Dated: September 6, 2016

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