

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

38

1. REPORT DATE: July 1, 1994	2. BUREAU AGENDA NO.: JUL-94-OSA-188*
3. BUREAU: Office of Special Assistants	
4. SECTION(S):	5. PUBLIC MEETING DATE: July 7, 1994
6. APPROVED BY: Director: Cheryl Walker-Davis Supervisor: Russel Albert 7-1808	
7. PERSONS IN CHARGE: Verdina Y. Showell 7-4717	
8. DOCKET NO.: F-00160324	

9. (a) CAPTION (abbreviate if more than 4 lines)
(b) Short summary of history & facts, documents & briefs
(c) Recommendation

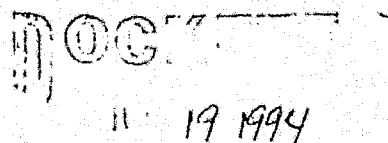
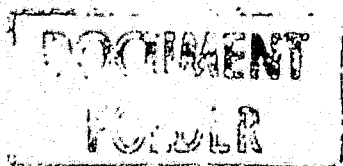
(a) Daniel J. Kerwin ("Complainant") v. Philadelphia Electric Company ("PECo")

(b) On February 3, 1993, the Complainant filed the instant Complaint against PECo alleging that his meter was inaccurate. PECo filed its Answer on March 5, 1993, denying that the bills were inaccurate because the Complainant had the potential for use. An evidentiary hearing was held on May 10, 1993, before ALJ Nguyen. On August 10, 1993, the ALJ issued his Initial Decision sustaining the Complaint. PECo filed Exceptions to the Initial Decision to which the Complainant filed Reply Exceptions.

(c) The Office of Special Assistants recommends that the Commission adopt a proposed draft Opinion and Order denying the Exceptions, thereby adopting the ALJ's Initial Decision.

10. MOTION BY:	Commissioner Chm. Rolka	Commissioner Quain - Yes
		Commissioner Crutchfield - Yes
SECONDED:	Commissioner Rhodes	Commissioner Hanger - Yes

CONTENT OF MOTION: Staff recommendation adopted.





COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

July 13, 1994

IN REPLY PLEASE
REFER TO OUR FILE

F-00160324

DANIEL J KERWIN
122 DEWEY ROAD
MELROSE PARK
CHELTENHAM PA 19012-1320

DOCUMENT
FOLDER

Daniel J. Kerwin
v.
Philadelphia Electric Company **JUL 26 1994**

To Whom It May Concern:

This is to advise you that an Opinion and Order has been adopted by the Commission in Public Meeting on July 7, 1994 in the above entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,

John G. Alford
Secretary

Enclosure
Certified Mail
Receipt Requested
JEP

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA. 17105-3265

Public Meeting held July 7, 1994

Commissioners Present:

David W. Rolka, Chairman
Joseph Rhodes, Jr., Vice-Chairman
John M. Quain
Lisa Crutchfield
John Hanger

DOCUMENT
FOLDER

Daniel J. Kerwin

v.

F-00160324

Philadelphia Electric Company

OPINION AND ORDER

JUL 26 1994

BY THE COMMISSION:

Before the Commission for review are the Exceptions filed by Philadelphia Electric Company ("PECo" or "Respondent") taken to the Initial Decision issued by Administrative Law Judge ("ALJ") Ky Van Nguyen, relative to the above-captioned proceeding. Reply to Exceptions were filed by Daniel J. Kerwin ("Complainant").

HISTORY OF THE PROCEEDING

On February 3, 1993, the Complainant filed a complaint with this Commission against PECo. In his Complaint, the Complainant alleged that his electricity consumption had gone up from 446 Kwh to 883 Kwh a month after PECo changed his meter in May, 1991. The

Complainant requested that PECO check his meter for a possible malfunction.

In its Answer filed on March 5, 1993, the Respondent admitted that it changed the meter in August, 1991 and May, 1992, but denied that his bills were inaccurate because he had a potential for use.

An evidentiary hearing on the Complaint was held on May 10, 1993. The Complainant proceeded pro se. The Respondent was represented by counsel. The hearing generated 76 pages of testimony. The Complainant's two exhibits were admitted into the record. PECO presented three witnesses and offered eleven exhibits which were admitted into the record. No Main Briefs and Reply Briefs were filed by the parties.

ALJ Nguyen issued his Initial Decision on August 10, 1993. Exceptions to the Initial Decision were filed by PECO to which the Complainant filed Reply Exceptions.¹

DISCUSSION

Subsequent to the close of the record, ALJ Nguyen issued his Initial Decision wherein he made the following Finding of Facts:

¹ We note that PECO's Exceptions were due and were filed on August 30, 1993. Although the Complainant's Replies due on September 9, 1993, were not filed until September 17, 1993, we will, in our discretion waive this technical defect and deem the Reply timely.

1. The Complainant is a residential customer of the Respondent and takes service at 122 Dewey Road, Cheltenham, Pennsylvania 19012. (N.T. 3; PECO Exhibit 6)
2. The Complainant lives in a three-bedroom house with his wife. (N.T. 7)
3. The Complainant's electric appliances consist of two refrigerator-freezers, two clocks, a television, a microwave oven, a drip coffee maker, a washer, a dryer, a dishwasher, a furnace fan, and a central air conditioner. (N.T. 7-9; PECO Exhibit 4)
4. The Complainant's average consumption in 1989 and 1990 was 5654.6 Kwh and 5512.8 Kwh (daily average Kwh x number of days in a month x 12). (PECO Exhibit 5)
5. The number of the Complainant's household members has been reduced to 2 since 1989: the Complainant and his wife. Before that, they lived at this address with 4 children. (N.T. 11,12).
6. On August 26,1991, the Complainant's 1965 meter was changed at random. The old meter was tested and found to be slow. (N.T. 18-20, 22, 23, 60-62; PECO Exhibits 1 and 5)
7. Before the installation, the August 26,1991 meter was tested and found to be accurate. (N.T. 19; PECO Exhibit 2)
8. In September 1991, the Complainant asked the Respondent to check an increased consumption in his bill. On October 4, 1991, \$78.59 was credited to the Complainant's account because of an error in the calculation. (N.T. 17, 22, 23, 46, 47)
9. In May 1992, the Complainant called the Respondent to complain about the consumption which increased more than twice as much as the year before. The August 26,1991 meter was then tested and found to be slow on the first and third

dials and fast on the fifth dial. (N.T. 23, 24, 51-54, 58; PECO Exhibit 8)

10. On May 29, 1992, the August 26, 1991 meter was replaced. Before the installation, the May 29, 1992 meter was also tested and found to be accurate. (N.T. 24, 25, 55-57; PECO Exhibits 5 and 9)
11. In June 1992, \$80.49 was credited to the Complainant's account because of an error which occurred during the period between July 3 and September 26, 1991. (N.T. 25)
12. On July 23, 1992, the Respondent did an analysis of the use of the Complainant's appliances to determine whether the use was in line with the bills rendered. The estimated use was about 41.4 Kwh a day. (N.T. 27-32; PECO Exhibit 4)
13. After reviewing the load study, which revealed that use of the heating system in 12 hours and 24 hours a day did not match the load survey, the Respondent made another analysis of the use of the Complainant's appliances. This analysis increased the monthly kilowatt hours of the dryer from 18 to 55, the furnace fan from 240 to 265, the lighting from 0 to 60, the nightlight from 6 to 10; and dropped the monthly kilowatt hours of the central air conditioner. The estimated use was about 27.3 Kwh a day. (N.T. 37-41; PECO Exhibits 6 and 7)
14. In June 1992, because of the meter removed on May 29, 1992, the Complainant did not have service for about 10 days. The average consumption for this month was 930 Kwh. (N.T. 44-46, 59, 60, 71, 72; PECO Exhibit 5)

(I.D., at 2-4) (Footnote in original deleted)

Based on his evaluation and analysis of the record, ALJ Nguyen reached the following Conclusions of Law:

1. The Commission has jurisdiction over the parties and the subject matter of this complaint.
2. The Complainant has sustained the burden of proving that the Respondent's make-up bills for service from August 26, 1991 to April 1993 are excessive.
3. The Complainant's account should be adjusted, using the consumption for the comparable period between August 1989 and April 1991; the consumption for this period is 10,101.5 Kwh.

(I.D., at 8).

Section 332(a) of the Public Utility Code, 66 Pa. C.S. §332(a), provides that a party seeking relief from the Commission has the "burden of proof". In this proceeding, the Complainant, as the party seeking affirmative relief from the Commission, has the burden of proof.

The Pennsylvania Supreme Court held in Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950), that the term "burden of proof" means a duty to establish by a preponderance of the evidence. The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, even by the smallest amount, than the evidence presented by the other party. We have 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. Feinstein v. Philadelphia Suburban Water Company, 50 Pa.P.U.C. 300 (1976).

Once the complainant has established a prima facie case, the burden of going forward with evidence, sometimes called the burden of persuasion, shifts to the utility. A complainant will prevail if the utility fails to rebut such evidence. However, if the utility has placed into the record evidence to rebut that of a complainant, the burden of going forward with the evidence then shifts back to the Complainant. In order to satisfy the burden of proof, a complainant must now rebut the utility's evidence by a preponderance of the evidence. While the burden of going forward with the evidence may shift from one party to another during a proceeding, the burden of proof never shifts. It always remains on a complainant. Waldron v. Philadelphia Electric Company, 54 Pa. P.U.C. 98 (1980).

We must review the record to determine whether the Complainant herein has satisfied the burden of proof. If our review indicates that this burden has been met, then we must ascertain if the Respondent 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 Complainant in opposition to Respondent's evidence. Morrissey v. Pennsylvania Department of Highways, 424 Pa. 87, 225 A.2d 895 (1967); Burleson v. Pennsylvania Public Utility Commission, 66 Pa. Commonwealth Ct. 282, 443 A.2d 1373 (1982), aff'd. 501 Pa. 443, 461 A.2d 1234.

In Waldron v. Philadelphia Electric Company, 54 Pa. P.U.C. 98 and its progeny², we enunciated the standards to be applied in cases involving inaccurate meter disputes. In Waldron, we determined that a complainant has presented a prima facie case, if three facets of evidence are presented: (1) that the number of occupants in the household has not changed; (2) that the potential for energy utilization was low; and (3) that prior billing history reflects no previous abnormalities. If the respondent utility does not present sufficient evidence to rebut the above evidence, the complainant will prevail. However, if the respondent utility has placed into the record evidence of meter tests as well as other credible evidence such as appliance analysis and load surveys, it has rebutted the complainant's prima case. The complainant must meet the shifted burden of going forward by a preponderance of the evidence.

PECO, in the instant proceeding, filed the following Exceptions to the Initial Decision:

1. PECO's evidence is sufficient, under the standards set by the Commission to satisfactorily rebut the Complainant's prima facie high bill allegations.

²See: Branham v. Philadelphia Electric Company, 54 Pa. P.U.C. 120 (1980); Replogle v. Pennsylvania Electric Company, 54 Pa. P.U.C. 528 (1980); Albert v. Pennsylvania Power & Light Co., Docket No. F-04226108 (entered April 3, 1980); O'Brien v. Pennsylvania Power & Light Co., Docket No. F-057225746 (entered June 19, 1980); Hooper v. Duquesne Light Co., Docket No. F-086621970 (entered June 19, 1980); Windsheimer v. Western Pennsylvania Water Co., Docket No. C-79081408 (entered August 29, 1980).

2. PECO excepts to Judge Van Nguyen's finding that the August 26, 1991 meter was inaccurate.
3. PECO excepts to Judge Van Nguyen's finding that Complainant was without a meter for 10 days in June, 1992.

We shall address the foregoing Exceptions seriatim. In its first Exceptions, the Respondent contends that the ALJ failed to find that its evidence was sufficient to overcome the Complainant's prima facie case. PECO believes that the following evidence established at the hearing was sufficient to rebut the Complainant's prima facie case:

- 1) The Complainant's original meter, which was installed prior to 1965, was removed on August 26, 1991, because it is PECO's policy to remove all "dash 6 meters", on a random basis;
- 2) After removal on August 26, 1991, the Complainant's meter was tested and found to be operating slowly, at 98.6 percent at full load and 89.6 percent at light load;
- 3) Prior to installation, the August 26, 1991 meter was tested and found to be operating at 100.1 percent accuracy;
- 4) In July, 1992, PECO's field representative conducted an appliance analysis at the Complainant's residence. The Complainant's usage was estimated to be 41.4 kwh, taking into consideration central air conditioning use of 4 hour per day;
- 5) PECO conducted a load survey for the Complainant's heating system and dryer which revealed that the original estimates of the appliance for these appliances should be modified;
- 6) A subsequent analysis conducted in January, 1993, utilizing the load survey data indicated

that the Complainant's average daily use was 27.3 kwh daily for the winter of 1993. (Exceptions, at 4-6).

PECo maintains that the aforementioned record evidence constitutes sufficient evidence to explain the increase in the Complainant's bills from May, 1991 to May, 1992. Because the Complainant's original meter was operating slowly, PECO asserts, the installation of a new efficient meter would inevitably result in an increase in his monthly bills. Additionally, PECO suggests that it presented sufficient evidence by way of its appliance analyses that the Complainant had the potential to use the amount of electricity reflected in the disputed bills. PECO proffers that this evidence is sufficient rebuttal testimony under the standards set in Replogle, cited infra.

In Replogle v. Pennsylvania Electric Company, 54 Pa. P.U.C. 528 (1980), we said:

...We have ruled that when complainant has presented testimony that the number of occupants in the household has not changed, that the potential for energy utilization was low, and that complainant's prior billing history showed no previous abnormalities, he has established a prima facie case, which, un rebutted by a utility, would entitle complainant to prevail. We also stated that although the results of a meter test are an important factor to consider in these cases, the meter test results, standing alone may be insufficient rebuttal testimony. Waldron. However, if the respondent utility has placed into the record testimony in addition to the meter test results to rebut this prima facie case, complainant must meet the now shifted burden of going forward by a preponderance of

the evidence and need not prove beyond a reasonable doubt that the meter in question was defective. See Hooper.

(Replogle, at 530-531).

Based on our review of the record, we are satisfied that the ALJ properly evaluated the record evidence presented by the Parties in light of the standards articulated in Replogle. Specifically, the ALJ observed that:

The Complainant contends that his lifestyle has not changed over the past 4 years. He lives at his address with his wife. His children all grew up and moved out. The youngest one lives in New York, but others live in the area so that their visits to the Complainant's house would not have anything to do with increasing his electric consumption. (N.T. 12) Further, his actual use of electricity ought to be low because of the manner in which he uses it. He has reduced the wattage of the light bulbs in the house. He uses 40 watt bulbs instead of 60 watt bulbs. (N.T. 8) Yet, the consumption is unusually high after the two meter changes which took place on August 26, 1991 and May 29, 1992. The consumption is almost double those of the previous years.

The record shows that the Complainant's total consumption between August 1989 and April 1991 was 10,101.5 Kwh. His total consumption in the comparable period between August 1991 and April 1993, the years in which his meter changes took place, was 18,571.5 Kwh. (PECO Exhibit 5 and Exhibit A-2) The big difference between these figures and the Complainant's unchanged lifestyle indicate that the Complainant has established his prima facie case.

The Respondent submitted into evidence the results of the cost estimates and the tests on the Complainant's meters to explain away the difference.

The Complainant's 1965 meter was replaced at random on August 26, 1991. Later, the August 26, 1991 meter turned out to be inaccurate. Yet, the Respondent acted as if nothing had happened. The Respondent made two credits for the Complainant's account, not because of the inaccurate meter but because of some errors in the calculation. (N.T. 46, 47) One of these credits was made after May 29, 1992, the date on which the August 26, 1991 meter was replaced.

The Respondent even compared the Complainant's consumption in September 1991 and January 1992 with the Complainant's consumption in September 1992 and January 1993. The figures registered in September 1991 and January 1992 were inaccurate because they were produced by the August 26, 1992 meter. The figures registered in September 1992 and January 1993 were allegedly accurate because they were produced by the May 29, 1992 meter, which was allegedly accurate. The Respondent testified that the September 1991 consumption was "slightly higher than" the September 1992 consumption, and that the January 1993 consumption was "right in line" with the January 1993 consumption. (N.T. 34, 35) According to this comparison, there is no difference between an accurate and inaccurate meter.

Further, when the August 26, 1991 meter was replaced on May 29, 1992, according to the Complainant's uncontradicted testimony, there was no replacement for 10 days. Nevertheless, the May 29, 1992 meter still registered 930 Kwh for the month of June 1992. his daily consumption would be 42.27 Kwh (the registered amount of 930 Kwh divided by the number of days (22 days) between May 29 and June 30, 1992). This consumption is much higher than those of the previous months of June in 1989 (11 Kwh), 1990 (9.4 Kwh), 1991 (35.1 Kwh). (PECO Exhibit 5) This casts doubt on the accuracy of the May 29, 1992 meter. Therefore, the Respondent's evidence is insufficient to rebut the Complainant's prima facie case.

The Complainant has thus proved that the make-up bills for consumption for the period between August 26, 1991 and April 1993 (a

total of 18,571.3 Kwh) are excessive. To correct this error, I will use the consumption in a comparable period, the period between August 1989 and April 1991 (a total of 10,101.5 Kwh), to calculate the consumption from August 26, 1991 to April 1993 (Exhibit A-2; PECO Exhibit 5). Absent evidence to the contrary, I believe this method will most accurately reflect the Complainant's consumption in the disputed period.

(I.D., at 6-8).

The mere fact that PECO presented evidence other than the meter tests does not in itself constitute sufficient evidence to rebut the Complainant's prima facie case. In this proceeding, the ALJ found that a preponderance of the evidence established that the meter was in fact defective. PECO has admitted by the testimony of its witness that the meter in question was removed after it was found to have some discrepancies in the dial mechanism. We are convinced that the Complainant has established by a preponderance of the evidence as required by Replogle that the August 26, 1991 meter was defective. Accordingly, we shall deny this Exception.

In its second Exception, PECO argues that the ALJ's characterization of the August 26, 1991 meter is erroneous. PECO maintains that the fact that the three dial hands were not working properly on the meter does not affect the accuracy of the registration of the meter. PECO suggests that because an experienced meter reader could obtain an accurate reading proves that the meter is accurate. PECO conceded however that an

inexperienced reader would not get an accurate reading from the meter.

We cannot agree. We are of the opinion that an accurate meter should be readable by any trained meter reader. We note that the meter tests conducted on the August 21, 1991 meter revealed that the meter was operating at 100 percent at full load and 99.8 percent at light load. However, the bills calculated for the Complainant's account were based on the readings by PECO's meter readers. PECO did not present any evidence that the meter readers who obtained a reading from the August 26, 1991 meter were experienced readers. Consequently, we cannot conclude, based on the record evidence, that the August 26, 1991 meter was accurate or that an accurate reading was obtained. This Exception is denied.

PECO contends, in its third Exception, that the ALJ erred in finding that the Complainant was without a meter for 10 days. PECO maintains that its witness testified that he replaced the meter the same day he discovered that the dials were malfunctioning. Based on our review of the record, we find that the Respondent failed to present sufficient evidence to rebut the Complainant's testimony that he was without a meter for 10 days. The Complainant testified that the meter was removed by PECO after electrical power in his home was lost as a result of a storm. (Tr. 44-45). The Complainant further testified that the meter was replaced ten days later. PECO did not present which directly contradicts the Complainant's

testimony. The ALJ correctly concluded that this testimony was uncontroverted. We will deny this Exception; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Philadelphia Electric Company be, and hereby are denied.

2. That the Initial Decision of Administrative Law Judge Ky Van Nguyen issued on August 10, 1993, be, and hereby is adopted, consistent with this Opinion and Order.

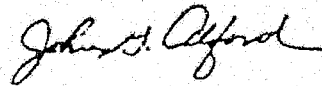
3. That the Complaint of Daniel J. Kerwin at Docket No. F-00160324, be, and hereby is sustained.

4. That Philadelphia Electric Company be, and is hereby, is directed to recompute the consumption of the account of Daniel J. Kerwin at 122 Dewey Road, Cheltenham, Pennsylvania 19012, for the period between August 26, 1991, and April 1993 for 10,101.5 Kwh.

5. That Philadelphia Electric Company be, and hereby, is directed to adjust the bills for the period between August 26, 1991, and April 1993, by issuing a bill for 10,101.5 Kwh and applying the then-applicable tariff rates.

6. That the difference between the bills for the period between August 26, 1991, and April 1993, and the bill adjusted under paragraphs 2 and 3 of this Order, shall be credited and refunded, if applicable, to the account of Daniel J. Kerwin.

BY THE COMMISSION,



John G. Alford
Secretary

(SEAL)

ORDER ADOPTED: July 7, 1994

ORDER ENTERED: JUL 13 1994