

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

**STANLEY AND CAROL FELLERMAN'S ANSWER :
IN OPPOSITION TO PETITION OF PECO ENERGY :
COMPANY FOR A DECLARATORY ORDER TO :
RESOLVE A CONTROVERSY REGARDING PECO'S: DOCKET NO.
POINT-OF-DELIVERY AND FOR A :
DETERMINATION THAT PECO DOES NOT HAVE : P-2017 2606 245
RESPONSIBILITY FOR CUSTOMER FACILITIES :
BEYOND THE POINT-OF-DELIVERY :**

**STANLEY AND CAROL FELLERMAN'S ANSWER IN OPPOSITION TO THE
PETITION OF PECO ENERGY COMPANY FOR A DECLARATORY ORDER TO
RESOLVE A CONTROVERSEY REGARDING PECO'S POINT-OF-DELIVERY AND
FOR A DETERMINATION THAT PECO DOES NOT HAVE RESPONSIBILITY FOR
CUSTOMER FACILITIES BEYOND THE POINT-OF DELIVERY**

Stanley and Carol Fellerman, by and through their counsel, Hill & Associates, P.C., file this Answer in Opposition to the Petition of PECO Energy Company for a Declaratory Order to Resolve a Controversy Regarding PECO's Point-of-Delivery and for a Determination that PECO does not have Responsibility for Customer Facilities¹ Beyond the Point-of-Delivery pursuant to 52 Pa. Code Section 5.61 (e).

BACKGROUND

There is ongoing litigation between PECO and Stanley and Carol Fellerman, as well as other parties. This litigation is pending in the Philadelphia Court of Common Pleas and is captioned Fellerman v. PECO, et. al, July Term 2014, No. 2640 ("Underlying Litigation"). The Underlying Litigation arises from an incident of December 2, 2013, wherein Stanley Fellerman suffered debilitating electrical shock injuries effectively resulting in the loss of both of his hands, and a disabling traumatic brain injury. These injuries resulted from Mr. Fellerman coming into

¹ The phrase "customer facilities" is undefined in PECO's Petition, as well as in the Electric Service Tariff. As such, the request for declaratory relief is overly broad and, as discussed below, must be denied for this reason, among others.

contact with power lines on the Fellerman property located at 6858 Upper York Road, New Hope, Pennsylvania.

The power lines were strung along four poles that ran up the Fellerman driveway. The fourth pole, closest to the house, had a PECO transformer, provided by, owned by and maintained by PECO, mounted to it.² The rotted/fallen pole with the PECO transformer mounted to it was located more than 100 feet inside the Fellerman Property line, and was beyond the first pole located on the Fellerman property. This is not in dispute. When this rotted pole with the PECO transformer mounted to it fell to the ground, it brought with it the power lines. On the morning of December 2, 2013, the fallen pole was discovered, Stanley Fellerman came into contact with those downed power lines and suffered the aforementioned catastrophic injuries as a result.

The Fellermans assert, inter alia, that PECO had the duty to maintain the pole on which the PECO transformer was mounted, inspect the pole on which the PECO transformer was mounted, and warn the Fellermans regarding ownership, maintenance, and the condition of the pole on which the PECO transformer was mounted, especially in light of PECO's actual and/or constructive notice of the condition of this particular pole, i.e. that it was severely rotted and in danger of falling. See Amended Complaint attached as Exhibit "A" to PECO's Petition.

Notwithstanding the presence of PECO's transformer on the pole, PECO claims no responsibility for the fourth pole whatsoever, on the basis that it is a private power pole.³ PECO claims it has/had no duty to inform, warn, or otherwise communicate with the homeowner about

²Section 6.4 of the Electric Service Tariff provides that the transformers required in the supply of service are provided, owned and maintained by the Company, in this instance, PECO. This would necessary include making sure that the transformer was securely mounted.

³ This information regarding ownership is information that PECO admittedly never relayed to the Fellermans or any other owner of the property.

the ownership, maintenance, or condition of the pole regardless of PECO's actual or constructive notice of the condition of the pole and despite the fact that PECO's transformer is mounted to it.

SUMMARY

PECO's Petition seeking a Declaratory Order relative to the point-of-delivery and PECO's responsibilities for "customer facilities" beyond the point-of-deliver is both procedurally and substantively improper.

Procedurally, jurisdiction over this controversy between the Fellersmans and PECO, along with numerous other parties, lies with the Philadelphia Court of Common Pleas. The law of the case prevents the PUC from entering PECO's requested relief. This controversy is pending in the Philadelphia Court of Common Pleas, captioned Fellerman v. PECO, et al, July Term 2014, No. 2640, and the Court determined months ago that the matter belongs in the civil court and not in the PUC. To wit, on October 20, 2014, PECO filed Preliminary Objections seeking to remand this civil action to the Public Utility Commission; however, those Preliminary Objections were overruled by the Court on November 24, 2014. The Court held that the controversy between the parties belonged in the court system. Copies of the Preliminary Objections filed by PECO, Plaintiffs' Response in Opposition to same, and the Court's Order overruling PECO's Preliminary Objections are attached to this Response and collectively marked as Exhibit "A". Although PECO initially appealed that decision to the Commonwealth Court, PECO subsequently discontinued that appeal. A copy of PECO's Praecipe to Discontinue its Appeal is attached to this Response as Exhibit "B". In the Underlying Action, discovery is not yet complete, expert reports have not yet been exchanged, and Pretrial Motions have not yet been filed. The discovery deadline is August 7, 2017, and the case is expected to be in the December 2017 Trial Pool. See recent Case Management Order attached as Exhibit "C"

Substantively, notwithstanding the heading of PECO's Petition, there is, in fact, no controversy that the Tariff defines the point-of-delivery as "The single point at which the service-supply lines of the Company terminate and the customer's facilities for receiving the service begin." There is likewise no controversy that the rotten/fallen pole with the PECO transformer mounted to it was located in close proximity to the Fellerman home, more than 100 feet inside the Fellerman Property Line. As such, no Declaratory Order under 52 Pa. Code Section 5.42 should be issued as to the first requested declaration.

As to PECO's second requested declaration, it is overly broad as stated. PECO's requested Declaratory Order relative to its "responsibilities" seeks a declaration that it does not have "responsibility to operate, maintain, or inspect the customer facilities beyond the point-of-delivery". The phrase "customer facilities" is undefined in the Petition, as well as in the Electric Service Tariff.⁴ Notably, in its Petition, PECO fails to acknowledge, distinguish, or otherwise include in its analysis that **there is a PECO transformer mounted to the pole in question**, which PECO **admittedly** provided, owned, and has/had the responsibility to inspect and maintain. Therefore, to the extent that the "customer facilities" to which PECO is referring in its proposed order includes the rotted/fallen pole on which the PECO transformer is mounted, such "customer facilities" are in fact not *solely* "customer facilities", but rather, at a minimum, they are "joint facilities". Discovery in the Underlying Action on these issues is ongoing. The discovery deadline is August 7, 2017.

PECO does not dispute that the transformer mounted on the subject pole, is a PECO transformer. If the PUC enters the relief requested by PECO, i.e. that PECO bears no

⁴ Depositions of PECO designees are being scheduled for the end of June/beginning of July. It is unknown how PECO defines the phrase "customer facilities" and whether such definition includes the PECO transformer.

responsibility for anything on the customer side of the point-of-delivery, then the PUC would necessarily be finding that PECO bears no responsibilities with regard to the PECO transformer mounted to the subject pole. Such a finding would be at odds with Section 6.4 of the Electric Service Tariff, which requires that the Company maintain the PECO transformer.

Finally, PECO fails to recognize that there are common law duties at issue in this litigation among the parties, common law duties that are not within the province of the Public Utility Commission. These common law duties include the duty of the public utility to take reasonable measures to warn its customers, such as the Fellermans, of dangerous conditions impacting their electric system of which the utility company knew or should have known.⁵ Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014)(recognizing that questions regarding the utility company's knowledge are questions of fact for the fact finder). Again, in the Underlying Action, discovery is not yet complete, expert reports have not yet been exchanged, and dispositive motions have not yet been filed or briefed.⁶

For the reasons stated herein, it is respectfully submitted that the Petition should be denied in its entirety.

⁵ For this reason, the declaratory relief sought in this action has no practical impact on the underlying action, which is captioned Fellerman v. PECO, et al, July Term 2014, No. 2640 ("Underlying Action"). Under 52 Pa. Code Section 5.42, therefore, declaratory relief is not proper.

⁶ The discovery deadline in the Underlying Action is August 7, 2017. The case is expected to be listed in the December 2017 Trial Pool. See attached revised Case Management Order marked as Exhibit "C".

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I. STATEMENTS REQUIRED BY 52 PA. CODE SECTION 5.61(E)

A. Position on Petition

Respondents, Stanley and Carol Fellerman, oppose the Petition filed on behalf of PECO Energy Company (“PECO”) for the reasons set forth below.

B. Standing

To have standing...before the PUC under Section 701 of the Code, the complainant “must have a *direct, immediate, and substantial* interest in the subject matter of the controversy.” The Municipal Authority of the Borough of West View v. Public Utility Commission, 41 A.3d 929, 933 (Pa. Cmwlth. Ct. 2012); Funk v. Wolf, 144 A.3d 228, 243 (Pa. Cmwlth. 2016). An interest is direct if there is a causal connection between the matter complained of and the harm alleged. Id. An interest is immediate when the causal connection is not remote or speculative. Id. Finally, an interest is substantial, when the interest surpasses that of all citizens in the matter at issue. Id.

Respondents, Stanley and Carol Fellerman, have a direct and substantial interest in opposing the Petition filed on behalf of PECO as they are the individuals bringing personal injury claims against PECO in the Underlying Action. The Fellermans’ interest is immediate as PECO has requested declarations upon which it intends to rely in the pending Underlying Action against the Fellermans. As such, the Fellermans have a direct, immediate and substantial interest in this Petition and the requested relief.

Furthermore, the Fellermans were PECO customers at the time of the subject incident. Thus, the Fellermans have a direct, immediate and substantial interest in any PUC declaration setting forth PECO’s responsibilities for customer-owned facilities and the location of PECO’s point-of-delivery on the Fellerman property. This is particularly true with regard to PECO’s

responsibilities for customer-owned facilities and the location of PECO's point-of-delivery at 6858 Upper York Road, New Hope, Pennsylvania, as the Fellersmans were the owners of that property at the relevant time.

C. The Facts and Law Relied Upon

1. 52 Pa. Code Section 5.42

PECO is attempting to circumvent this Court of Common Pleas' Order overruling the Preliminary Objections of PECO by asking the PUC to issue declaratory relief on issues that will neither terminate a controversy nor remove uncertainty. This request by PECO is improper under 52 Pa. Code Section 5.42. This section of the Pennsylvania Code specifically provides for petitions for declaratory orders that will "terminate a controversy or remove uncertainty". 52 Pa. Code Section 5.42. PECO acknowledges in its Petition that notwithstanding any Order by the PUC on this Petition, the civil court case will continue. PECO Petition, pp. 13, 14 n. 12. As such, the declaratory relief sought by PECO will neither terminate a controversy nor remove uncertainty and, therefore, declaratory relief under 52 Pa. Code Section 5.42 is improper and the Petition should be denied in its entirety.

2. Lack of Jurisdiction/Law of the Case

The "law of the case doctrine" refers to a family of rules which embody the concept that a tribunal involved in later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter. Neidert v. Charlie, 143 A.3d 384, 390 (Pa. Super. Ct. 2016). This rule of law promotes judicial economy, as well as operates to: 1) protect the settled expectations of the parties; 2) insure uniformity of decisions; 3) maintain consistency during the course of a single case; 4) effectuate the proper and streamlined administration of justice; and 5) bring litigation to an end. Id. This

rule is one of convenience and public policy, both of which are served by the stability in judicial decisions. The Court of Common Pleas of Philadelphia County has determined that this matter belongs in the civil court, and not before the Public Utility Commission. Exhibit A, Order overruling PECO's Preliminary Objections.

This controversy is pending in the Philadelphia Court of Common Pleas, captioned Fellerman v. PECO, et al, July Term 2014, No. 2640, and the Court determined months ago that the matter belongs in the civil court and not in the PUC. To wit, on October 20, 2014, PECO filed Preliminary Objections seeking to remand this civil action to the Public Utility Commission; however, those Preliminary Objections were overruled by the Court on November 24, 2014. The Court held that the controversy between the parties belonged in the court system. Exhibit "A". Although PECO initially appealed that decision to the Commonwealth Court, PECO subsequently withdrew that appeal. Exhibit "B". In the Underlying Action, discovery is not yet complete, expert reports have not yet been exchanged, and Pretrial Motions have not yet been filed.

In addition, *res judicata* prevents this tribunal from entering the requested relief. *Res judicata* applies when four conditions are met: 1) identity of the thing sued upon or for; 2) identity of the cause of action; 3) identity of the parties to the action; 4) identity of the quality or capacity of the parties being sued. Merkel v. W.C.A.B., 918 A.2d 190, 192 (Pa. Cmwlth. Ct. 2007). Causes of action are identical when the subject matter and ultimate issue are the same in both proceedings. Id. The doctrine also applies to matters that could have been or should have been litigated in previous proceeding. Id. at 193.

The parties to the Underlying Action, are identical to those with standing in this PUC Petition. The issues upon which PECO seeks the PUC declarations are issues in the Underlying

Action, and PECO concedes that it intends on using these declarations, if issued, in the civil action. PECO Petition, n. 19, p. 25. PECO requested, *vis a vis* its Preliminary Objections, to have the PUC rule on PECO's responsibilities with regard to maintenance of the facilities at issue in this case. The Court overruled those Preliminary Objections, Exhibit B, and ruled instead that the matter belonged in the civil court. PECO filed an appeal of that decision and then withdrew it. This filing is nothing more than an attempt to circumvent the ruling already issued in this action, i.e. where should the Fellermans' claims be litigated. Entertaining this Petition, in the face of the Court's prior ruling, is improper under the Pennsylvania Code as it will neither terminate a controversy nor remove uncertainty, as well as under the law of the case doctrine, and *res judicata*.

3. No Case in Controversy Relative to Point-of-Delivery

Notwithstanding the heading of PECO's Petition, there is, in fact, no controversy that the Tariff defines the point-of-delivery as "The single point at which the service-supply lines of the Company terminate and the customer's facilities for receiving the service begin." As such, no Declaratory Order should be issued relative to same. "Declaratory judgment must not be employed...as a medium for the rendition of an advisory opinion which may prove to be purely academic." Funk, 144 A.3d at 251. Requests for declaratory relief should be refused where it would not resolve a controversy or uncertainty. Id.; 52 Pa. Code. Section 5.42 (providing for declaratory relief where such declarations will terminate a controversy or remove uncertainty, neither of which applies herein).

In the Underlying Action, neither the Fellermans nor any other party to the action, has challenged that the Tariff defines the point-of-delivery as "The single point at which the service-supply lines of the Company terminate and the customer's facilities for receiving the service

begin.” PECO recognizes this fact and notes in its Petition, “[t]he location of the incident is not in meaningful dispute – the incident occurred in close proximity to the Fellermans’ home, more than 100 feet inside the Fellerman property line, and beyond the first pole located on the Fellerman property.” PECO Petition, p. 6. As such, PECO’s request for a declaration from the PUC regarding the point-of-delivery is purely academic and, therefore, improper. For this reason, the first of PECO’s two requests for declaratory relief should be denied.

In the body of the Petition, however, PECO expands its first declaratory judgment issue beyond simply the point-of-delivery to also seemingly encompass the notion that PECO Facilities stop at the point-of-delivery, which is in fact **not true** in this case. Rather, PECO has a transformer mounted to the fourth pole closest to the Fellerman home, which is the pole that fell from rot. In support of its position, PECO relies on Norbeck v. Pennsylvania Public Utility Com’n, 2011 WL 10857826 (Pa. Cmwlth. Ct. 2011). The Norbeck decision is inapposite for several reasons. First, as noted above, the parties herein do not dispute that the Tariff defines the point-of-delivery as “The single point at which the service-supply lines of the Company terminate and the customer’s facilities for receiving the service begin.” Second, the line in question in Norbeck was an underground cable, and did not have mounted to it, or affixed to it, a PECO provided, owned and maintained transformer as the aerial lines do in this matter. Third, the holding in Norbeck was limited to PECO not having responsibility under Section 1501 of the Public Utility Code to maintain the underground cable, and did not address whether it had such responsibility under any other source, such as common law, or whether it had the responsibility to maintain its own equipment.

PECO concludes this section of its Petition relative to the point-of-delivery by asking the PUC for a declaratory order that “PECO’s facilities end at the point-of-delivery, which for aerial

electric facilities is the first suitable support of the Customer, nominally 100 feet inside the Fellerman Property line.” PECO Petition, p. 25. **This is absolutely factually not true, and such a declaration is not warranted. PECO owns and maintains the transformer mounted to the pole in question, which is closest to the house, more than 100 feet inside the Fellerman property line.**

4. **Insufficient Specificity for Declaration on PECO’s “Responsibilities”**

As to PECO’s second requested declaration, it is overly broad as stated. PECO’s requested declaratory order relative to its “responsibilities” seeks a declaration that it does not have “responsibility to operate, maintain, or inspect the customer facilities beyond the point-of-delivery”. However, what PECO is actually seeking is something much broader and is set forth at page 14 of the Petition, “whether PECO has *any* duty to inspect and/or maintain a customer-owned utility pole and/or aerial power line.”⁷ PECO Petition, p. 14 (emphasis added).

PECO argues in its Petition that it seeks a determination of Commission law and policy as to the limits of its legal responsibility for “facilities” on the premises side of the point of delivery. PECO Petition, pp. 11-12. Importantly, however, the duties of PECO come not only from the Public Utility Commission, but from common law as well. Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014). There can be no determination by the PUC of PECO’s legal responsibilities when some of those responsibilities stem from common law.

In addition, PECO fails to acknowledge, distinguish, or otherwise include in its analysis that **there is a PECO transformer mounted to the pole in question**, which PECO **admittedly** provided, owned, and has/had the responsibility to inspect and maintain. Section 6.4 of the

⁷ PECO has repeatedly denied that the pole in question is a “utility pole”, see attached PECO Responses to Plaintiffs’ Requests for Admissions marked as Exhibit “D” at Nos. 1, 2, 3, 4, 6, 7, 8, 9, 10, and 11. As such, the scope and/or subject matter of the requested declaration is unclear.

Electric Service Tariff. Therefore, the “customer facilities” to which PECO is seemingly referring in its proposed order, are in fact not solely “customer facilities”, but rather, at a minimum, they are joint facilities.

There is no bright line test, such as the one Duquesne sought in the Alderwoods matter and the one PECO seeks herein that a utility company has absolutely no responsibility for anything on the customer side of the point-of-delivery regardless of what PECO equipment exists on the customer side of the point-of-delivery and regardless of what PECO knows or should have known about the dangerous conditions on the customer side of the point-of-delivery impacting the electrical system. PECO’s request for the PUC to determine “whether PECO has *any duty to inspect and/or maintain a customer-owned utility pole and/or aerial line*” is entirely too broad for declaratory relief in this tribunal, and fails to address the PECO transformer mounted to the pole in question. There are sources of duty, such as common law, that are beyond the jurisdiction of the Public Utility Commission. Furthermore, the pole at issue in this case, i.e. the fourth pole, is not purely a customer facility as it has mounted to it a PECO transformer, which is owned and maintained by PECO. Such maintenance would necessarily include insuring that the transformer is securely mounted.

PECO goes so far in its Petition to argue that the Tariff controls over common law. PECO Petition, p. 16. However, the Pennsylvania Supreme Court has expressly held otherwise. “[T]he service-point rule has its limits and does not wholly supplant the salient common-law duty.” Id. at 63. “[W]e have no intention of exempting a company administering in a dangerous commodity from well-recognized duties of care, in the face of actual or constructive knowledge of a danger.” Id. at 64. The requested relief must be denied.

5. Requested Relief has no Impact on Common Law Duties

PECO inaccurately asserts that the “resolution of the Fellersmans’ civil lawsuit depends wholly on the interpretation of PECO Energy Company’s Electric Service Tariff and the Public Utility Code....” PECO Petition, p. 18. To the contrary, as noted above, there are sources of duty, such as common law, that are beyond the jurisdiction of the Public Utility Commission. Furthermore, the pole at issue in this case, i.e. the fourth pole, is not purely a customer facility as it has mounted to it a PECO transformer, which was provided by, and is owned and maintained by PECO. Such maintenance would necessarily include insuring that the transformer is securely mounted.

In Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co., 106 A.3d 27 (Pa. 2014), Duquesne, the Pennsylvania public utility engaged in the business of transmitting and distributing electric power in the city of Pittsburgh, argued to the Pennsylvania Supreme Court that there is a “bright line allocation of responsibility from the service point between an electric service provider and any customer.” Id. at 53. The Pennsylvania Supreme Court aptly summarized the utility’s position as follows:

The electric company’s essential position [is] that the service point establishes a firm line of demarcation between the responsibilities of an electric service provider and the customer – if a failure occurs on the utility’s side, it may bear responsibility, and certainly the company has the obligation to make reasonable inspections of its own equipment up to the service point. But if any failure occurs on the customer side, Duquesne asserted, it can be the customer’s – and only the customer’s – responsibility, and under no circumstances is an electric provider obliged to inspect private electrical systems internal to serviced premises.

Id. at 52. The utility company in Duquesne argued it would be impractical to require it to inspect and enter private premises and claimed that imposing such a requirement would cause delays and complications in power restorations. The Public Utility Commission filed an amicus brief in support of the utility company’s position against imposing a duty to inspect customer equipment

after storms and outages. Id. at 59. The PUC did not, however, address the common law duty that was imposed on the electric company to warn its customers of dangerous conditions impacting the customer's electrical system about which the electric company knew or should have known. Id.

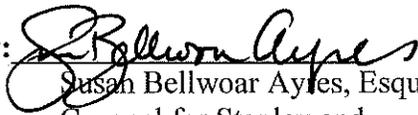
The Pennsylvania Supreme Court held, "the service-point rule has its limits and does not wholly supplant the salient common-law duty." Id. at 63. "[W]e have no intention of exempting a company administering in a dangerous commodity from well-recognized duties of care, in the face of actual or constructive knowledge of a danger." Id. at 64. PECO concedes this point recognizing that even if the requested declarations were made by the PUC, "the civil matter would proceed, but with the Commission's guidance on point-of-delivery issues." PECO Petition, n. 12, p. 14.

In the case *sub judice*, PECO adopts an argument identical to Duquesne's, claiming that if the Public Utility Commission's enters its declaration as to PECO's point-of-delivery, it will "avoid having the civil courts create a burden expansion of utility responsibility to include responsibility on the customer side of the point-of-delivery." PECO Petition, p. 3. This argument, however, is misguided as a declaration as to the location of the point-of-delivery by the PUC will have no impact on the public utility's **common law duties** to take reasonable measures to avert harm, such as warning a customer, if the utility had actual or constructive knowledge of a dangerous condition impacting customer's electrical system. Moreover, the pole at issue has mounted to it a PECO transformer, which PECO owns and is required to maintain. As such, more than just customer facilities are at issue.

II. RELIEF REQUESTED

Stanley and Carol Fellerman, respectfully request that the Public Utility Commission deny the request for declaratory relief of PECO Energy Company in its entirety.

HILL & ASSOCIATES, P.C.

By: 
Susan Bellwoar Ayles, Esquire
Counsel for Stanley and
Carol Fellerman

CERTIFICATE OF SERVICE

I, Susan B. Ayres, Esquire, hereby certify that I caused to be served via regular mail, a true and correct copy of Stanley and Carol Fellersmans' Response to the Petition of PECO seeking Declaratory Relief from the Public Utility Commission on the following:

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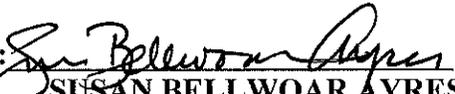
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HILL & ASSOCIATES, P.C.

BY: 
SUSAN BELLWOAR AYRES, ESQ.

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION OF PECO ENERGY COMPANY :
FOR A DECLARATORY ORDER TO RESOLVE :
A CONTROVERSY REGARDING PECO'S : DOCKET NO.
POINT-OF-DELIVERY AND FOR A :
DETERMINATION THAT PECO DOES NOT HAVE : P-2017 2606 245
RESPONSIBILITY FOR CUSTOMER FACILITIES :
BEYOND THE POINT-OF-DELIVERY :

ORDER

AND NOW, this day of , 2017, upon consideration of
the Petition of PECO Energy Company for a Declaratory Order to Resolve a Controversy
Regarding PECO's Point-of-Delivery and for a Determination that PECO does not have
Responsibility for Customer Facilities Beyond the Point-of-Delivery, and the Answer(s) in
Opposition thereto, it is hereby ORDERED that the Petition is **DENIED**.

BY THE PUBLIC UTILITY COMMISSION:

FILED

07 NOV 2014 04:37 pm

Civil Administration

A. WARREN

Stanley Fellerman	:	COURT OF COMMON PLEAS
Carol Fellerman	:	
	:	
Plaintiffs	:	PHILADELPHIA COUNTY
	:	CIVIL TRIAL DIVISION
	:	
vs.	:	
	:	July Term, 2014
PECO Energy Co.	:	No. 2640
Comcast of Southeast Pennsylvania, LLC	:	
Defendants	:	

ORDER

AND NOW, this *29th* day of *November*, 2014, upon consideration of the Preliminary Objections of Defendant PECO Energy Co. to Plaintiffs' Amended Complaint, and Plaintiffs' Response thereto, it is ORDERED that the Preliminary Objections are OVERRULED in their entirety.

Defendant PECO Energy Co., is hereby ORDERED to file an Answer to the Amended Complaint within twenty (20) days of the date of this Order.

BY THE COURT:



Fellerman Etal Vs Peco -ORDER



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**DOCKETED
COMPLEX LIT CENTER**

NOV 24 2014

J. STEWART

Case
Control

**PLAINTIFF'S
EXHIBIT**
A

STANLEY FELLERMAN and CAROL
FELLERMAN,

Plaintiffs

v.

PECO ENERGY COMPANY and
COMCAST CORP.,

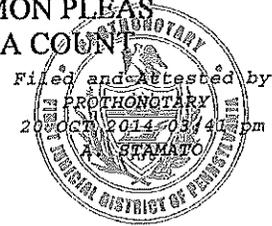
Defendants

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

LAW DIVISION

JULY TERM, 2014

NO.: 02640



ORDER

AND NOW, this ___ day of _____, 2014, upon consideration of Defendant PECO Energy Company's Preliminary Objections to Plaintiffs' Amended Complaint, and all responses thereto, it is hereby **ORDERED** that the objections are **SUSTAINED**.

It is hereby **ORDERED** that Plaintiffs' Amended Complaint is hereby **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that this case is hereby **STAYED** pending a final determination by the Pennsylvania Public Utility Commission. Plaintiffs may file the appropriate documents to bring their claims in the Pennsylvania Public Utility Commission.

By the Court:

, J.

STANLEY FELLERMAN and CAROL FELLERMAN,	:	COURT OF COMMON PLEAS OF PHILADELPHIA COUNT
Plaintiffs	:	LAW DIVISION
v.	:	JULY TERM, 2014
PECO ENERGY COMPANY and COMCAST CORP.,	:	NO.: 02640
Defendants	:	

ORDER

AND NOW, this ___ day of _____, 2014, upon consideration of Defendant PECO Energy Company's Preliminary Objections to Plaintiffs' Amended Complaint, and all responses thereto, it is hereby **ORDERED** that the objections are **SUSTAINED IN PART**.

It is hereby **ORDERED** that this Court will retain jurisdiction over this case.

It is further **ORDERED** that all averments of "recklessness" on the part of PECO, specifically, Count I and paragraphs 45, 46, 47, and 48 of Plaintiffs' Amended Complaint, are hereby **STRICKEN**.

It is further **ORDERED** that Plaintiffs' claim for punitive damages is hereby **DISMISSED WITH PREJUDICE**.

By the Court:

, J.

**CAMPBELL CAMPBELL EDWARDS
& CONROY, P.C.**

By: William J. Conroy, Esquire
Thomas M. Hinchey, Esquire
Lynda J. Klebanoff, Esquire
Attorney I.D. Nos.: 36433/46628/308936
1205 Westlakes Drive, Suite 330
Berwyn, PA 19312
(610) 964-1900
*Attorneys for Defendant,
PECO Energy Company*

To Plaintiffs and Co-defendants:
You are hereby notified to file a written response to the enclosed **PRELIMINARY OBJECTIONS** within twenty (20) days from service hereof or a judgment may be entered against you.

Attorneys for Defendant
PECO Energy Company

STANLEY FELLERMAN and CAROL
FELLERMAN,

Plaintiffs

v.

PECO ENERGY COMPANY and
COMCAST CORP.,

Defendants

: COURT OF COMMON PLEAS
: OF PHILADELPHIA COUNT

:
: LAW DIVISION

:
: JULY TERM, 2014
: NO.: 02640

:
: **JURY TRIAL DEMANDED**
:
:

**DEFENDANT PECO ENERGY COMPANY'S
PRELIMINARY OBJECTIONS TO PLAINTIFFS' AMENDED COMPLAINT**

Defendant PECO Energy Company ("PECO"), by its undersigned counsel, hereby asserts the following Preliminary Objections to Plaintiffs' Amended Complaint pursuant to Pa. R. Civ. P. 1028(a)(1) and (4).

This action involves injuries that occurred when Plaintiff contacted a downed power line. Plaintiff claims that downed power line, and the pole to which it had been attached, are owned by and the responsibility of PECO. PECO's position is that, under the terms of PECO's Electric Service Tariff, the downed power line and the pole are owned by and are the responsibility of the Plaintiff. The determination of that issue—how does PECO's tariff resolve the issues of ownership of and responsibility for this pole and line—is a matter that is within the special expertise of the Pennsylvania Public Utility Commission. Indeed, the Commission has decided

numerous cases on this precise issue, and has stated to the Pennsylvania Supreme Court that it considers the determination of the dividing line between public utility and private property to be a critical issue of public utility policy. PECO therefore requests that the Court enter an Order dismissing Plaintiffs' Amended Complaint and staying all proceedings until a final determination by the Pennsylvania Public Utility Commission as to the scope of PECO's duties and responsibility, if any, over the subject matter of this lawsuit. In support of this request, PECO states that:

1. Plaintiffs initiated this action against PECO and Defendant, Comcast Corp., by Writ of Summons filed on July 23, 2014, which was served upon PECO on July 25, 2014. A copy of the Writ of Summons is attached hereto as Exhibit A.

2. On August 26, 2014, in response to PECO's Rule to File Complaint, Plaintiffs filed a Complaint against PECO and Comcast.

3. PECO filed timely preliminary objections to the Complaint, and Plaintiffs timely filed an Amended Complaint on September 29, 2014. A copy of the Amended Complaint is attached hereto as Exhibit B.

4. Plaintiffs' Amended Complaint seeks to recover compensatory and punitive damages for harm suffered by Plaintiff-husband when he came into contact with power lines that were on the ground as a result of a pole falling at their residence. *See* Ex. B, Am. Compl. ¶¶ 33-34; *id.* at 10, 14.

5. The Amended Complaint alleges that there are four utility poles "located on Plaintiff's property," (Ex. B., Am. Compl. ¶20); that wires were affixed to the four utility poles "on the Plaintiff's property," Ex. B., Am. Compl. ¶ 21); and that a transformer was mounted "on the last of these four utility poles." (Ex. B., Am. Compl. ¶22).

6. The Amended Complaint further alleges that the incident occurred because the “last pole”—the one “closest to their home”—had fallen “in close proximity to [the Fellerman] residence” (Ex. B., Am. Compl. ¶ 28).

7. Plaintiffs allege negligence, “gross negligence,” and “recklessness” against PECO, averring that PECO “installed, owned, utilized, controlled, and/or maintained” the power lines, transformer, and pole located at Plaintiffs’ residence, 6858 Upper York Road, New Hope, Pennsylvania. Ex. B, Am. Compl. Count I; *id.* ¶¶ 15-17, 45-48.

8. According to Plaintiffs’ Amended Complaint, the “pole fell as a result of severe rot, decay, and deterioration.” Ex. B, Am. Compl. ¶ 32.

9. Plaintiffs allege that PECO was negligent and reckless for its installation, securing, testing, inspection, and maintenance of the subject pole, power lines, and transformers. *See* Ex. B, Am. Compl. ¶ 45(a)-(c), (h), (l).

10. Plaintiffs further allege that PECO was negligent and reckless for failing to alert, inform, educate, and advise customers, and Plaintiffs, about their duties and responsibilities to inspect, repair, and replace utility poles on their property and the danger of falling poles and power lines. *See* Ex. B, Am. Compl. ¶ 45(d), (e), (f), (m).

11. Plaintiffs also allege that PECO failed to train and supervise its employees and agents with regard to installation, maintenance, inspection, and usage of electrical utilities. *See* Ex. B, Am. Compl. ¶ 45(j), (k).

12. Plaintiffs further allege that PECO failed to timely respond to Plaintiffs’ residence on the date of the incident. *See* Ex. B, Am. Compl. ¶ 45(i).

13. Finally, Plaintiffs allege that PECO failed to use the highest degree of care practicable in the provision and supply of high voltage electricity. See Ex. B, Am. Compl. ¶ 45(g).

14. Pursuant to the express language of PECO's electric service tariff, which dictates all matters of PECO's duties and responsibilities, the subject pole and aerial wires are private property belonging to Mr. and Mrs. Fellerman.

15. Rule 1028(a) of the Pennsylvania Rules of Civil Procedure provides that a party may file preliminary objections to a pleading for, *inter alia*, lack of subject matter jurisdiction, or legal insufficiency of a pleading (demurrer). Pa. R.C.P. 1028(a)(1); 1028(a)(4).

16. Pa. R. Civ. P. 1019(a) requires a party to plead material facts on which a cause of action is based.

**PRELIMINARY OBJECTION IN THE NATURE OF A MOTION TO
DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR LACK OF SUBJECT
MATTER JURISDICTION, PURSUANT TO PA. R.C.P. 1028(A)(1)**

17. PECO hereby incorporates by reference all preceding paragraphs as though set forth in full herein.

18. Pennsylvania Rule of Civil Procedure 1028(a)(1) expressly provides that a party may file a preliminary objection based on "lack of jurisdiction over the subject matter of the action." Pa. R.C.P. 1028(a)(1).

19. The question of jurisdiction goes to the power or authority of a court over a matter. *Aronson v. Sprint Spectrum*, 767 A.2d 564, 568 (Pa. Super. 2001).

20. PECO's Electric Service Tariff, which has the force of law and specifically addresses the delineation between public utility facilities and privately-owned facilities, provides that once aerial electric facilities cross the property line, PECO owns the first 100 feet inside the

property line, and that the customer owns the support to which those wires are attached, as well as the remaining wires and poles electrically downstream of that point:

6.1 COMPANY SERVICE-SUPPLY LINES. Where the Company has supply facilities of adequate capacity on the highway or in other trunk line location adjacent to the premises to be served, it will provide, own and maintain standard service-supply lines as follows:

... (b) AERIAL.

A single span of aerial open wire or cable construction to the first suitable support of the Customer, nominally 100 feet inside the property line of the Customer. The Customer's support shall be so located that the service span will be free of obstruction and adequately supported as required by the size and weight of the conductors.

21. The Tariff states that PECO's responsibilities end 100 feet over the property line at the first suitable structure; the Amended Complaint states that this incident was due to the failure of *the last of four utility poles located on the Plaintiff's property*. See Ex. B, Am. Compl. ¶¶ 20-22; para. 5, *supra*.

22. To place responsibility on PECO for four poles that are admittedly located on Plaintiff's property would be directly contrary to PECO's Commission-approved tariff. If any variation from or exception to this Commission-approved tariff rule is to be created, it should only be contemplated by the Commission in the context of a Commission proceeding that can properly balance the various issues of regulatory policy raised by such a request.

23. The Commission has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services. *Elkin v. Bell Telephone Company of Pennsylvania*, 420 A.2d 371, 374 (Pa. 1980); *Behrend v. Bell Telephone Co. of Pennsylvania*, 243 A.2d 346 (Pa. 1968); *Bell Telephone Company of Pennsylvania v. Sanner*, 375 A.2d 93 (Pa. Super. 1977).

24. The Commission has specifically exercised this authority to resolve questions of whether the utility or customer has ownership of responsibility for electrical facilities. See, e.g.,

Norbeck v. Pennsylvania Public Utility Com'n, 2011 WL 10857826 (Pa. Commw. 2011); *Kashuba v. PECO Energy Company*, Opinion and Order by Pennsylvania Public Utility Commission, C-2012-2333019 (Dec. 5, 2013) (hereto attached as Exhibit C).

25. In *Kashuba*, the Commission dismissed a complaint requesting that PECO repair certain utility poles and wires from the complainant's private property and remove a neighbor's power line from the complainant's property. (Ex. C). The Commission relied on the same provisions of PECO's Tariff at issue in this case, specifically holding that, in "deciding the question of who is responsible for repairing the poles and sagging wires at issue in this case, we will rely on the applicable provisions of PECO's tariff." *Id.*, Ex. C, at 9.

26. The Commission ultimately determined that there "is no dispute that these poles are located entirely on private property, and that PECO is not responsible for them pursuant to the applicable provisions of its tariff." Based on the level of similarity to the issues in this case, PECO can expect that the Commission, if ultimately permitted to decide this case, would reach the same result.

27. Moreover, the Commission has recently stated, in brief to the Pennsylvania Supreme Court, that it considers determination of the dividing line between public utility and private property to be a critical issue of public utility policy. *Alderwoods, Inc. v. Duquesne Light Co.*, No. 12 WAP 2013 (appealing 52 A.3d 347 (Pa. Super. 2012) (Commission *amicus* brief attached hereto as Exhibit D).

28. While the Court of Common Pleas exercises jurisdiction over lawsuits for personal injuries, the doctrine of primary jurisdiction requires judicial abstention by this Court until the administrative agency charged with regulating the subject matter of a controversy has adjudicated the issues within its jurisdiction and expertise. *Elkin*, 420 A.2d at 376. *See also*

Poorbaugh v. Pa. Public Utility Commission, 666 A.2d 744 (Pa. Commw. 1995), *petition for allowance of appeal denied*, 678 A.2d 367 (Pa. 1996); *Optimum Image, Inc. v. Philadelphia Electric Co.*, 600 A.2d 553 (Pa. Super. 1991).

29. Because the issues of PECO's alleged ownership of the subject utility pole and aerial lines, and the scope of any duty to maintain, inspect, replace, or repair such poles and/or lines, are dictated by the language and terms of PECO's Tariff, the Pennsylvania Public Utility Commission, rather than the Court of Common Pleas, is the proper forum for interpreting that tariff with regard to determining the scope, if any, of PECO's duty to Plaintiffs. *See Elkin*, 420 A.2d 371, 374 (Pa. 1980); *DeFrancesco v. Western Pa. Water Company*, 453 A.2d 595 (Pa. 1982); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978); *Poorbaugh*, 666 A.2d 744; *Mattes v. Commonwealth*, 503 A.2d 78 (Pa. Commw. 1985).

WHEREFORE, Defendant, PECO Energy Company, respectfully requests that the Court enter an Order dismissing Plaintiffs' Amended Complaint and staying all proceedings until a final determination by the Pennsylvania Public Utility Commission as to the scope of PECO's duties and responsibility, if any, over the subject matter of this lawsuit.

**PRELIMINARY OBJECTION IN THE NATURE OF
A MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT
FOR LEGAL INSUFFICIENCY OF PLEADING (DEMURRER)**

30. PECO hereby incorporates by reference all preceding paragraphs as though set forth in full herein.

31. Pursuant to Pa. R. Civ. P. 1028(a)(4), a party is permitted to file a preliminary objection to any pleading lacking legal sufficiency.

32. A demurrer will be sustained if the face of the pleading shows that the law will not permit recovery, i.e., where it is clear that the plaintiff is not legally entitled to the relief requested. *Williams v. Nationwide Mutual Ins. Co.*, 750 A.2d 881 (Pa. Super. Ct. 2000).

33. Punitive damages are recoverable under Pennsylvania law where a defendant's actions "are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct." *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2003); *SHV Coal Co. v. Continental Grain Co.*, 587 A.2d 702, 704 (Pa. 1991).

34. "Unlike compensatory damages, punitive damages are not intended to fairly compensate the plaintiff but rather are intended to deter and punish egregious behavior Punitive damages are not awarded as additional compensation but are purely penal in nature." *Taylor v. Albert Einstein Med. Ctr.*, 723 A.2d 1027, 1037 (Pa. Super. 1999) (internal quotations omitted), *rev'd in part on other grounds*, 754 A.2d 650 (Pa. 2000).

35. Thus, punitive damages are an "extreme remedy" available in only the most exceptional matters. *Phillips*, 883 A.2d at 445, citing *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 n. 14. (Pa. 1985). Because punitive damages are a "quasi-criminal punishment," their imposition requires "strong procedural safeguards." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting).

36. Punitive damages are not justified where the defendant's mental state rises to no more than gross negligence. *SHV Coal*, 587 A.2d at 705.

37. Moreover, Rule 1019 requires that a party "plead the material facts on which a cause of action is based."

38. It is insufficient to state legal conclusions averring a defendant's conduct was reckless. *Shock v. T.J. Care Inc.*, 65 Pa. D. &C.4th 517, 520 (Fayette Co. 2004). Facts must be pled that support such conclusions. *Id.*

39. Moreover, facts regarding recklessness must be sufficiently and specifically pleaded in the complaint and not developed over the course of discovery. *See id.* at 522. If and when Plaintiffs become aware through discovery of facts sufficient to plead recklessness, then a "properly drafted amended complaint can be filed." *Id.*

40. Plaintiffs allege PECO's failure to, inter alia, inspect, test, maintain, repair, inform, respond, and advise with regard to the alleged dangers of the subject pole and wires. *See* Ex. B, Am. Compl. ¶ 45.

41. The Amended Complaint simply does not allege that PECO undertook any actions or inactions of "such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct." *Phillips*, 883 A.2d 445.

WHEREFORE, Defendant, PECO Energy Co., respectfully requests that the Court enter an Order striking all references to "recklessness," including Count I and paragraphs 45, 46, 47, and 48 of Plaintiffs' Amended Complaint, and dismiss Plaintiffs' claim for punitive damages with prejudice.

Respectfully Submitted,

CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.

Dated: October 20, 2014

By: /s/ Thomas M. Hinchey
William J. Conroy, Esquire
Thomas M. Hinchey, Esquire
Lynda J. Klebanoff, Esquire
*Attorneys for Defendant,
PECO Energy Company*

**CAMPBELL CAMPBELL EDWARDS
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PECO Energy Company*

STANLEY FELLERMAN and CAROL FELLERMAN,	:	COURT OF COMMON PLEAS
	:	OF PHILADELPHIA COUNT
	:	
Plaintiffs	:	LAW DIVISION
	:	
v.	:	JULY TERM, 2014
	:	NO.: 02640
PECO ENERGY COMPANY and COMCAST CORP.,	:	JURY TRIAL DEMANDED
	:	
Defendants	:	

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT PECO ENERGY COMPANY'S PRELIMINARY
OBJECTIONS TO PLAINTIFFS' AMENDED COMPLAINT**

Defendant, PECO Energy Company ("PECO"), by and through its attorneys, Campbell Campbell Edwards & Conroy, hereby files this Memorandum of Law in support of its Preliminary Objections Pursuant to Pa. R.C.P. 1028. PECO moves the Court for an Order dismissing Plaintiffs' Amended Complaint for lack of subject matter jurisdiction and staying the case pending a final determination by the Pennsylvania Public Utility Commission (Commission). In the alternative, PECO moves the Court for an Order striking certain language of Plaintiffs' Amended Complaint.

The electrocution incident in this case did not involve PECO electric utility distribution facilities; rather, it involved a "private pole line" owned by Plaintiffs, who are the owners of the

underlying property at which the incident occurred. PECO's electric service tariff ("Tariff") determines all matters of PECO's rights, responsibilities, and duties with regard to electrical facilities, including whether and under what circumstances PECO exercises ownership or control over a certain electric facility such that it can be subject to liability stemming from that facility. Interpretation of PECO's Tariff is a matter within the specific expertise and jurisdiction of the Commission. The Court should dismiss Plaintiffs' Amended Complaint and stay further proceedings to allow Plaintiffs to file the appropriate documents with the Commission, for a determination whether, pursuant to PECO's Tariff, PECO owed any duty with regard to the subject utility pole or aerial wires. In the alternative, should this Court retain jurisdiction over this case, it should strike all references to "recklessness" in the Amended Complaint and dismiss Plaintiffs' claim for punitive damages, pursuant to Pa. R.C.P. 1028(a)(4) (demurrer).

I. MATTER BEFORE THE COURT

Defendant, PECO Energy Company, has filed Preliminary Objections, seeking an order dismissing this case and staying the instant civil suit for damages pending a determination by the Pennsylvania Public Utility Commission regarding PECO's duties, if any, with regard to a customer's privately owned utility pole or aerial power line.

The Commission has exclusive jurisdiction over matters involving the reasonableness, adequacy and sufficiency of services rendered by a utility. PECO respectfully submits that the Court of Common Pleas lacks subject matter jurisdiction over this action because primary jurisdiction rests with the Commission. Specifically, Plaintiffs' allegations that PECO has any duty to inspect and/or maintain a customer-owned utility pole involve complex issues within the primary jurisdiction of the Commission, including interpretation of PECO's Tariff and the Public Utility Code ("Code"), that requires this Court to stay Plaintiffs' claim for damages and refer the

substantive issues to the Commission for resolution. Further, the Commission has already decided this issue in a nearly identical case; this Court should afford the Commission the opportunity to decide this factually similar matter.

Should the Court determine that it properly exercises jurisdiction over the subject matter of Plaintiffs' Amended Complaint, PECO raises preliminary objections in the nature of a demurrer to references to PECO's "recklessness" and any claim for punitive damages, as the Amended Complaint fails to include any factual averments that rise to the level of intent required to support a finding of recklessness or to support any allegation of punitive damages.

II. QUESTIONS PRESENTED

1. Whether the Court of Common Pleas should dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction and stay this case, to enable the Pennsylvania Public Utility Commission to determine whether PECO has a duty to inspect and/or maintain a customer-owned utility pole or aerial wires, where Plaintiffs' allegations involve complex issues within the primary jurisdiction of the Pennsylvania Public Utility Commission, including interpretation of PECO's tariff and the Public Utility Code, which has exclusive jurisdiction over matters involving the reasonableness, adequacy and sufficiency of services rendered by a utility?

Suggested Answer: Yes.

2. Whether the Court of Common Pleas, if it retains jurisdiction over this case, should strike references in Plaintiffs' Amended Complaint to "recklessness" and any claim for punitive damages, because the factual allegations of the Amended Complaint fail to support such claims?

Suggested Answer: Yes.

III. STATEMENT OF FACTS

Plaintiffs initiated this action against PECO and Defendant, Comcast Corp., by Writ of Summons filed on July 23, 2014, which was served upon PECO on July 25, 2014. A copy of the Writ of Summons is attached hereto as Exhibit A. On August 26, 2014, in response to PECO's Rule to File Complaint, Plaintiffs filed a Complaint against PECO and Comcast. PECO filed timely preliminary objections to the Complaint, and Plaintiffs timely filed an Amended Complaint on September 29, 2014. A copy of the Amended Complaint is attached hereto as Exhibit B.

Plaintiffs' Amended Complaint seeks to recover compensatory and punitive damages for harm suffered by Plaintiff-husband when he came into contact with power lines that were on the ground as a result of a pole falling at their residence. *See* Ex. B, Am. Compl. ¶¶ 33-34; *id.* at 10, 14. The Amended Complaint alleges that there are four utility poles "located on Plaintiff's property," (Ex. B., Am. Compl. ¶20); that wires were affixed to the four utility poles "on the Plaintiff's property," Ex. B., Am. Compl. ¶ 21); and that a transformer was mounted "on the last of these four utility poles." (Ex. B., Am. Compl. ¶22). The Amended Complaint further alleges that the incident occurred because the "last pole"—the one "closest to their home"—had fallen "in close proximity to [the Fellerman] residence" (Ex. B., Am. Compl. ¶ 28).

Plaintiffs allege negligence, "gross negligence," and "recklessness" against PECO, averring that PECO "installed, owned, utilized, controlled, and/or maintained" the power lines, transformer, and pole located at Plaintiffs' residence, 6858 Upper York Road, New Hope, Pennsylvania. Ex. B, Am. Compl. Count I; *id.* ¶¶ 15-17, 45-48. According to Plaintiffs' Amended Complaint, the "pole fell as a result of severe rot, decay, and deterioration." Ex. B,

Am. Compl. ¶ 32. Plaintiffs allege that PECO was negligent and reckless for its installation, securing, testing, inspection, and maintenance of the subject pole, power lines, and transformers. *See* Ex. B, Am. Compl. ¶ 45(a)-(c), (h), (l). Plaintiffs further allege that PECO was negligent and reckless for failing to alert, inform, educate, and advise customers, and Plaintiffs, about their duties and responsibilities to inspect, repair, and replace utility poles on their property and the danger of falling poles and power lines. *See* Ex. B, Am. Compl. ¶ 45(d), (e), (f), (m). Plaintiffs also allege that PECO failed to train and supervise its employees and agents with regard to installation, maintenance, inspection, and usage of electrical utilities. *See* Ex. B, Am. Compl. ¶ 45(j), (k). Plaintiffs further allege that PECO failed to timely respond to Plaintiffs' residence on the date of the incident. *See* Ex. B, Am. Compl. ¶ 45(i). Finally, Plaintiffs allege that PECO failed to use the highest degree of care practicable in the provision and supply of high voltage electricity. *See* Ex. B, Am. Compl. ¶ 45(g).

The subject utility pole and aerial power lines are private property, owned by Mr. and Mrs. Fellerman, pursuant to the express language of PECO's electric service tariff. PECO's Tariff dictates that privately owned facilities, such as utility poles and aerial power lines, are the sole responsibility of the owner.

IV. LEGAL ARGUMENT

A. LEGAL STANDARDS

1. STANDARD FOR LACK OF SUBJECT MATTER JURISDICTION

Pennsylvania Rule of Civil Procedure 1028(a)(1) expressly provides that a party may file a preliminary objection based on "lack of jurisdiction over the subject matter of the action." Pa. R.C.P. 1028(a)(1). The question of jurisdiction goes to the power or authority of a court over a

matter. *Aronson v. Sprint Spectrum*, 767 A.2d 564, 568 (Pa. Super. 2001). The power of a court to review subject matter jurisdiction is founded in Pa.R.Civ.P. 1032(b), which states:

(b) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter or that there has been a failure to join an indispensable party, the court shall order that the action be transferred to a court of the Commonwealth which has jurisdiction or that the indispensable party be joined, but if that is not possible, then it shall dismiss the action.

Pa.R.Civ.P. 1032.

2. STANDARD FOR DEMURRER PURSUANT TO PA. R.C.P. 1028(A)(4)

Pursuant to Rule 1028(a)(4), a party is permitted to file a preliminary objection to any pleading lacking legal sufficiency. A demurrer will be sustained if the face of the pleading shows that the law will not permit recovery, i.e., where it is clear that the plaintiff is not legally entitled to the relief requested. *Williams v. Nationwide Mutual Ins. Co.*, 750 A.2d 881 (Pa. Super. 2000). A demurrer should be sustained only in cases that are clear and free from doubt. *Baker v. Brennan*, 213 A.2d 362 (Pa. 1965). In determining whether to sustain the demurrer, the court must consider as true the well pleaded material facts set forth in the plaintiff's complaint and all reasonable inferences that may be drawn therefrom. *Bower v. Bower*, 611 A.2d 181 (Pa. 1992). The only issue to be resolved is whether the facts in the pleadings are sufficient to entitle a claimant to relief. *International Union of Operating Engineers v. Linesville Construction Co.*, 322 A.2d 353 (Pa. 1974).

B. PRELIMINARY OBJECTION TO SUBJECT MATTER JURISDICTION PURSUANT TO PA. R.C.P. 1028(A)(1)

The Commission has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services. *Elkin v. Bell Telephone Company of Pennsylvania*, 420 A.2d 371, 374 (Pa. 1980); *Behrend v. Bell*

Telephone Co. of Pennsylvania, 243 A.2d 346 (Pa. 1968); *Bell Telephone Company of Pennsylvania v. Sanner*, 375 A.2d 93 (Pa. Super. 1977). In Pennsylvania, the powers of the Commission are outlined in the Code. *See generally* 66 Pa. C.S. §§ 101-3316 (2006). The Commission has extensive statutory responsibility to regulate and supervise all matters of service and facilities provided by public utilities.¹ *See* 66 Pa. C.S. § 501. For example, Section 1501 of the Code requires every utility to “furnish and maintain adequate, efficient, safe, and reasonable service and facilities” and to make any repairs or changes as necessary for the safety of the public. *Id.* § 1501. Additionally, Section 1504 of the Code enables the Commission to prescribe “just and reasonable standards, classifications, regulations and practices to be furnished, imposed, observed and followed by any or all public utilities.” *See* 66 Pa. C.S. § 1504(1).

In spite of the Commission’s extensive jurisdiction, the courts of common pleas have original jurisdiction over suits for damages even against public utilities or insurers, which are subject to the exclusive regulation by an administrative agency.² *DeFrancesco v. Western Pa. Water Company*, 453 A.2d 595 (Pa. 1982); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978); *Poorbaugh v. Pa. Public Utility Commission*, 666 A.2d 744 (Pa. Commw. 1995), *petition for allowance of appeal denied*, 678 A.2d 367 (Pa. 1996); *Mattes v. Commonwealth*, 503 A.2d 78 (Pa. Commw. 1985). In *Elkin v. Bell Telephone Company of Pennsylvania*, however, the Pennsylvania Supreme Court recognized that both the courts and administrative agencies must

¹ The utilities regulated by the Commission include railroads, aircraft, buses, taxis, trucks, ferries, and services such as electric, gas, telephone, water, sewage, and steam heat. *See* 66 Pa. C.S. §§ 101-3316 (2006).

² The courts of common pleas have also retained jurisdiction over common law claims. This issue is addressed in Section 103(c) of the Code, which provides that “nothing in this part shall abridge or alter the existing rights of action or remedies in equity or under common or statutory law of this Commonwealth, and the provisions of this part shall be cumulative and in addition to such rights of action and remedies.” 66 Pa. C.S. § 103(c).

play a role in the adjudication of certain matters. 420 A.2d 371, 375 (Pa. 1980). To accommodate the role of the court with that of the agency, the doctrine of primary jurisdiction requires judicial abstention until the administrative agency charged with regulating the subject matter of a controversy has adjudicated the issues within its jurisdiction and expertise. *Elkin*, 420 A.2d at 376. See also *Poorbaugh, supra*; *Optimum Image, Inc. v. Philadelphia Electric Co.*, 600 A.2d 553 (Pa. Super. 1991).

The doctrine of primary jurisdiction was first espoused by this Commonwealth in *Weston v. Reading Co.*, 282 A.2d 714 (Pa. 1977). Our Supreme Court defined “primary jurisdiction” as follows:

The doctrine “. . . requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.” *United States v. Philadelphia National Bank*, 374 U.S. 321, 353, 83 S. Ct. 1715, 1736, 10 L. Ed. 2d 915 (1963). Such abstention is necessary to promote “. . . proper relationships between the courts and administrative agencies charged with particular regulatory duties . . .” *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956).

Weston, 282 A.2d at 723. See also *Drafto Corp. v. Nat'l Fuel Gas Distribution Corp.*, 806 A.2d 9, 12 (Pa. Super. 2002). Essentially, the doctrine creates a workable relationship between the courts and the administrative agencies wherein, in appropriate circumstances, the courts can have the benefit of the agency's views on issues within the agency's competence. *Elkin*, 420 A.2d at 376-77 (once “the administrative tribunal has determined the issues within its jurisdiction, then the *temporarily suspended civil litigation may continue*, guided in scope and direction by the nature and outcome of the agency determination”). See also *Bean v. Dep't of State, State Bd. of Funeral Dirs. Ass'n*, 855 A.2d 148, 154 (Pa. Commw. 2004).

Our Supreme Court has set forth several considerations to be weighed in determining whether primary jurisdiction over a suit against a public utility rests with the Commission.³ *Elkin*, 420 A.2d at 377. Specifically, the Court stated that where the subject matter is within an

³ A review of the Supreme Court's opinions in *Feingold*, *Elkin* and *DeFrancesco*, *supra*, as well as the Superior Court's opinion in *Optimum*, *supra*, and the Commonwealth Court's opinion in *Poorbaugh*, *supra*, indicate that jurisdiction as to questions of reasonable, adequate, efficient, or safe service remains with the Commission, or should be transferred to the Commission from a civil court, even when questions of liability and damages are also at issue. See *Wood v. West Penn Power Co.*, Pa. PUC, No. C-00956617, 1995 Pa. PUC LEXIS 128, *15 (Oct. 26, 1995). The above authorities provide that the Commission exercises primary jurisdiction when the following factors are present:

- (1) The subject matter of the complaint must be encompassed by the Public Utility Code (*Elkin*, 420 A.2d at 377; and *Poorbaugh*, 666 A.2d at 751), and
- (2) (a) The subject matter of the complaint is a complex or technical matter requiring the special expertise of this Commission in order to resolve it (*Elkin*, 420 A.2d at 375-77; *DeFrancesco*, 453 A.2d at 597; *Optimum*, 600 A.2d at 557; and *Poorbaugh*, 666 A.2d at 751), or
- (b) There is a need for uniformity and consistency of Commission policy (*Elkin*, 420 A.2d at 376-77; *Poorbaugh*, 666 A.2d at 751), or
- (c) The complaint raises questions about how the utility's service or facilities affect the general public (*DeFrancesco*, 453 A.2d at 597; and *Poorbaugh*, 666 A.2d at 751), or
- (d) The complaint raises questions regarding the utility's facilities or its delivery of service over an extended period of time, even if only one ratepayer is involved or affected (*Optimum*, 600 A.2d at 557; *Poorbaugh*, 666 A.2d at 751), or
- (e) The complaint raises questions of the adequacy of a utility's service to or facilities in an entire geographic area (*Feingold*, 383 A.2d at 796, n.7; *Poorbaugh*, 666 A.2d at 751), or
- (f) The complaint draws the general reasonableness, adequacy, efficiency, sufficiency, safety, or convenience of a utility's service or facilities into question (*Elkin*, 420 A.2d at 374; *DeFrancesco*, 453 A.2d at 597; *Poorbaugh*, 666 A.2d at 751), or
- (g) The resolution of the complaint depends upon a rule, regulation, or tariff predicated on the particular expertise of this Commission (*DeFrancesco*, 453 A.2d at 596; *Optimum*, 600 A.2d at 557; *Poorbaugh*, 666 A.2d at 751).

See *Wood v. West Penn Power Co.*, Pa. PUC, No. C-00956617, 1995 Pa. PUC LEXIS 128, *15-18 (Oct. 26, 1995).

agency's jurisdiction, and where it is a complex matter⁴ requiring special competence with which a judge or jury would not or could not be familiar, the proper procedure is for a court of common pleas to refer the matter to the appropriate agency. *Id. See also DeFrancesco*, 453 A.2d at 597; *Optimum*, 600 A.2d at 557; *Poorbaugh*, 666 A.2d at 751. The Court also should weigh the need for uniformity and consistency in the Commission's policy and the legislative intent. *Id. See also Poorbaugh, supra.*

Public Utility Code, 66 Pa. C. S. § 1501, clearly indicates that "every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service." *Id.* A utility compiles its policies, rules and regulations into its tariff, which it submits to the Commission for review. *Brockway Glass Co. v. Public Utility Commission*, 437 A.2d 1067, 1070 (Pa. Commw. 1981); 66 Pa. C.S. § 1302. Once approved, the tariff provisions are legally binding on both the utility and its customers. *Id.* Accordingly, PECO is required to adhere with those tariffs. *See* 66 Pa. C.S. § 1303. *Our courts have already determined that matters relating to tariff, necessity of equipment, deposits and use of various types of services are within the particular expertise of the Pennsylvania Utility Commission. See DeFrancesco*, 453 A.2d at 596; *Optimum*, 600 A.2d at 557; *Poorbaugh*, 666 A.2d at 751; *Morrow v. Bell Telephone Co. of Pennsylvania*, 479 A.2d 548 (Pa. Super. 1984); *Norbeck v. Pennsylvania Public Utility Com'n*, 2011 WL 10857826 (Pa. Commw. 2011). Whether PECO has any duty with regard to a customer's privately owned utility pole or aerial power lines is derived solely from the policies, rules and regulations contained in PECO Energy Company's Electric Service

⁴ Even in non-complex cases the statutory authority to adjudicate claims is vested in the Commission. *See Elkin*, 420 A.2d at 378 (J., Roberts concurring).

Tariff, which is in the exclusive jurisdiction and expertise of the Commission.⁵ Accordingly, judicial abstention is appropriate in this case.

Clearly, the remedial and enforcement powers vested in the Commission by the Public Utility Law were designed to allow the Commission to enforce its orders and regulations. *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 795 (Pa. 1977). The competence of the Commission in this area is substantially greater than the competence of a court, and the need for uniformity of policy is apparent. Since resolution of Plaintiffs' claim depends wholly on the interpretation of PECO's Tariff and the Public Utility Code, the technical expertise of the Commission is required to resolve the present dispute. The issues involving PECO's alleged duty to maintain a customer's privately installed and owned aerial power line must be reviewed and analyzed within the regulatory scheme to maintain uniformity and consistency in the Commission's policy. Neither uniform regulatory policy nor the legislative objective can be achieved if courts and factfinders throughout the Commonwealth are permitted to impose differing service standards in individual cases. *See Elkin*, 420 A.2d at 378 (J., Roberts concurring).

As previously stated herein, the Public Utility Law of Pennsylvania provides that the Commission prescribes, as to service and facilities, just and reasonable standards, classifications, regulations and practices to be furnished, imposed, observed and followed by any and all public utilities. *Optimum Image*, 600 A.2d at 557. Further, the law provides that the Commission may prescribe adequate and reasonable standards for the measurement of quantity, quality, pressure, initial voltage or other condition pertaining to the supply of service. *Id.* In addition, the statute provides that the Commission may prescribe reasonable regulations, specifications and standards

⁵ PECO does not have a duty to maintain customer-owned facilities, and it is not permitted to so, by the Tariff, the Regulations, and the Code. *See Kossman v. PUC*, 894 A. 2d 1147, 1997 Pa. Commw. LEXIS 223 (1997).

to secure the accuracy of all meters and appliances for measurement. 66 Pa. C.S. § 1504. Indeed, in a case raising the similar question of PECO's ownership of and responsibility for an underground line, the Commission and its Administrative Law Judge evaluated PECO's Tariff provisions and the Commission's regulations at great length to determine that the facility in question was privately owned, not owned by PECO, and that PECO therefore did not have responsibility to maintain the line in question. Importantly, in that case, the Commission based its decision in part upon its view of proper public utility policy with respect to forcing other PECO customers to bear the burden of maintaining private facilities, stating that:

We are not inclined to expose PECO's ratepayers to the costs of installing, maintaining or replacing customer-owned service lines that exceed the provisions of our regulations or commission-approved tariffs.⁶

The Commission's determination was later upheld on appeal. *Norbeck v. Pennsylvania Public Utility Com'n*, 2011 WL 10857826 (Pa. Commw. 2011) (interpreting and applying PECO's Tariff and determining that the "point of delivery," for purposes of establishing ownership, was 18 inches within the property line, as set forth in the tariff).

PECO's Electric Service Tariff, which has the force of law and specifically addresses the delineation between public utility facilities and privately-owned facilities, provides that once aerial electric facilities cross the property line, PECO owns the first 100 feet inside the property line, and that the customer owns the support to which those wires are attached, as well as the remaining wires and poles electrically downstream of that point:

6.1 COMPANY SERVICE-SUPPLY LINES. Where the Company has supply facilities of adequate capacity on the highway or in other trunk line location adjacent to the premises to be served, it will provide, own and maintain standard service-supply lines as follows:
... (b) AERIAL.

⁶ *Norbeck v. PECO Energy Company*, Docket No. C-2008-2051267, Opinion and Order entered August 23, 2010, at 14 (hereto attached as Exhibit E).

A single span of aerial open wire or cable construction to the first suitable support of the Customer, nominally 100 feet inside the property line of the Customer. The Customer's support shall be so located that the service span will be free of obstruction and adequately supported as required by the size and weight of the conductors.

The Tariff states that PECO's responsibilities end 100 feet over the property line at the first suitable structure; the Amended Complaint states that this incident was due to the failure of *the last of four utility poles located on the Plaintiff's property*. See Ex. B, Am. Compl. ¶¶ 20-22; para. 5, *supra*. To place responsibility on PECO for four poles that are admittedly located on Plaintiff's property would be directly contrary to PECO's Commission-approved tariff. If any variation from or exception to this Commission-approved tariff rule is to be created, it should only be contemplated by the Commission in the context of a Commission proceeding that can properly balance the various issues of regulatory policy raised by such a request.

Thus, the question of ownership of and responsibility for the subject utility poles and aerial lines should properly be reviewed by the Commission rather than this Court, because any determination of the ownership and responsibility for these lines requires interpretation and application of PECO's Tariff and is, therefore, a matter within the particular expertise of the Commission to evaluate public utility tariffs and to weigh the various public utility policy considerations involved in making such a determination.⁷

There is a case pending before the Pennsylvania Supreme Court, *Alderwoods, Inc. v. Duquesne Light Co.*, No. 12 WAP 2013 (appealing 52 A.3d 347 (Pa. Super. 2012)), that underscores the importance of deferring to the Commission on determinations of ownership of

⁷ Moreover, Plaintiffs' allegation that "[n]either the rates nor the calculations of rates . . . are at issue" (Ex. B, Am. Compl. ¶ 14), is of no import, as the Tariff dictates the full extent of PECO's responsibilities and is not limited to PECO's responsibilities with respect to its service rates. It is equally irrelevant to the issue of subject matter jurisdiction that Plaintiffs allege "[t]his action pertains to the Defendants' actions and omissions with regard to the Plaintiffs, specifically, and not to the provision of these Defendants' services to the general public or to a large geographic area." (Ex. B, Am. Compl. ¶ 19).

public utilities.

Alderwoods involves a fire that destroyed a building. Duquesne Light Company suffered an outage on a portion of its public utility system; that outage caused the loss of electricity to the Alderwoods building. When Duquesne finished its repairs and re-energized its public utility system, the Alderwoods building caught fire and was destroyed. Alderwoods sued Duquesne, claiming that it had a responsibility to inspect the Alderwood facilities before re-energizing the Duquesne Light facilities. The trial court and the Superior Court agreed, and Duquesne Light appealed the matter to the Pennsylvania Supreme Court.

The Commission filed an *amicus* brief in that proceeding on July 24, 2013. (See Ex. D). The Commission's brief made the points that: (1) the "service point" is the dividing line between utility facilities and customer-owned facilities; (2) determination of the "service point" requires detailed review of utility safety codes and related documents; (3) utilities do not have responsibility for facilities that are located on the customer side of the service point, and (4) imposition of new or additional utility responsibilities on the customer side of the service point can be very disruptive to the carefully balanced regulatory framework and could cause extreme poor policy outcomes, such as inadvertently delaying the ability of utilities to restore service after storm outages. Finally, the Commission stated that the Superior Court's decision inappropriately intruded on the Commission's statutory authority to be the sole regulator of public utility services and facilities. The Commission's Statement of Interest succinctly describes its concerns:

The Commission is very concerned that in the Opinion and Order below, the Superior Court imposed a burdensome and unprecedented duty upon electric utilities. This newly imposed duty upon electric utilities will increase costs for all consumers and utilities as well as delay efforts by electric utilities to restore power after storms and other outages. Furthermore, the Superior Court's

ruling intrudes upon the PUC's statutory authority to regulate service, restoration practices, and duties of public utilities.

(Ex. D, *Alderwoods amicus* brief, at 1).

PECO respectfully submits that the instant Court should find the Commission's articulated unease to be a compelling reason to defer to the Commission in this case. This case, like *Alderwoods*, involves the determination of the "service point." This case, like *Alderwoods*, involves the determination of what responsibilities, if any, a utility has for facilities on the customer side of the service point. And this case, like *Alderwoods*, if those matters are decided incorrectly, a "burdensome and unprecedented duty" may be imposed on electric utilities that would intrude upon the Commission's broad jurisdiction to regulate public utilities. And the Commission has clearly stated, to the Pennsylvania Supreme Court, that it believes that these issues should properly be left to the Commission.⁸ PECO respectfully suggests that this Court should avail itself of the opportunity to allow the Commission to make the key decisions that fall within the Commission's expertise.

Significantly, the Commission exercised its subject matter jurisdiction to decide issues nearly identical to the issues presented by PECO's appeal, as recently as December, 2013. *See Kashuba v. PECO Energy Company*, Opinion and Order by Pennsylvania Public Utility Commission, C-2012-2333019 (Dec. 5, 2013) (Ex. C). In that case, the Commission dismissed a complaint requesting that PECO repair certain utility poles and wires from the complainant's private property and remove a neighbor's power line from the complainant's property. The Commission relied on the same provisions of PECO's Tariff at issue in this case, specifically

⁸ The exercise of the Commission's expertise is, of course, later subject to review and oversight by the courts, and parties may later seek judicial review of a Commission determination if they believe that the Commission has exceeded its authority, made an arbitrary decision, or a decision that is not supported by substantial evidence. But the Pennsylvania courts have regularly recognized that it is appropriate to allow the Commission to make that initial determination of issues within its expertise, with later judicial review of that decision, rather than having the decision made by the courts in the first instance.

holding that, in “deciding the question of who is responsible for repairing the poles and sagging wires at issue in this case, we will rely on the applicable provisions of PECO’s tariff.” *Id.* at 9. The Commission ultimately determined that there “is no dispute that these poles are located entirely on private property, and that PECO is not responsible for them pursuant to the applicable provisions of its tariff.” Based on the level of similarity to the issues in this case, PECO can expect that the Commission, if ultimately permitted to decide this case, would reach the same result.

Faced with the averments of Plaintiffs’ Amended Complaint, the expertise, specialized knowledge and competence of the Commission is clearly required to protect the integrity of the regulatory scheme. Accordingly, dismissal of Plaintiffs’ Amended Complaint for lack of subject matter jurisdiction is appropriate, thereby staying the instant civil suit for damages pending a determination by the Pennsylvania Public Utility Commission regarding PECO’s duties with regard to a customer’s privately installed and owned utility pole and aerial power line.

C. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER PURSUANT TO PA. R.C.P. 1028(A)(4)

Punitive damages are recoverable under Pennsylvania law where a defendant’s actions “are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct.” *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2003); *SHV Coal Co. v. Continental Grain Co.*, 587 A.2d 702, 704 (Pa. 1991). “Unlike compensatory damages, punitive damages are not intended to fairly compensate the plaintiff but rather are intended to deter and punish egregious behavior Punitive damages are not awarded as additional compensation but are purely penal in nature.” *Taylor v. Albert Einstein Med. Ctr.*, 723 A.2d 1027, 1037 (Pa. Super. 1999) (internal quotations omitted), *rev’d in part on other grounds*, 754 A.2d 650 (Pa. 2000). Thus, punitive damages are an “extreme remedy” available in only the most exceptional

matters. *Phillips*, 883 A.2d at 445, citing *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1098 n. 14. (Pa. 1985). Because punitive damages are a “quasi-criminal punishment,” their imposition requires “strong procedural safeguards.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O’Connor, J., dissenting). Punitive damages are not justified where the defendant’s mental state rises to no more than gross negligence. *SHV Coal*, 587 A.2d at 705.

Moreover, Rule 1019 requires that a party “plead the material facts on which a cause of action is based.” It is insufficient to state legal conclusions averring a defendant’s conduct was reckless. *Shock v. T.J. Care Inc.*, 65 Pa. D. &C.4th 517, 520 (Fayette Co. 2004). Facts must be pled that support such conclusions. *Id.* Moreover, facts regarding recklessness must be sufficiently and specifically pleaded in the complaint and not developed over the course of discovery. *See id.* at 522. If and when Plaintiffs become aware through discovery of facts sufficient to plead recklessness, then a “properly drafted amended complaint can be filed.” *Id.* However, in its current form, Plaintiffs’ Amended Complaint lacks the required specificity to base a cause of action on “recklessness” or support any claim for punitive damages on that basis. Therefore all references to recklessness, specifically paragraph 45, must be stricken with prejudice.

Even if PECO could be found to owe some duty with regard to the subject utility pole and aerial power lines—which PECO disputes based on its Tariff, *see supra* at 12-13—the allegations in Plaintiffs’ Amended Complaint, even if proven, rise to no more than simple negligence. Plaintiffs allege PECO’s failure to, inter alia, inspect, test, maintain, repair, inform, respond, and advise with regard to the alleged dangers of the subject pole and wires. *See Ex. B, Am. Compl. ¶ 45.* The Amended Complaint simply does not allege that PECO undertook any actions or inactions of “such an outrageous nature as to demonstrate intentional, willful, wanton

or reckless conduct.” *Phillips*, 883 A.2d 445. Accordingly, the Court should sustain PECO’s objection in the nature of a demurrer, strike all references to “recklessness,” and dismiss Plaintiffs’ claim for punitive damages.

V. CONCLUSION

For all the foregoing reasons, Defendant, PECO Energy Co., respectfully requests that the Court enter an Order staying all proceedings until a final determination by the Pennsylvania Public Utility Commission as to the scope of PECO’s duties and responsibility, if any, over the subject matter of this lawsuit. In the alternative, should the Court determine it properly exercises jurisdiction over the subject matter of this case, PECO requests an Order striking all references to “recklessness,” including paragraphs 45, 46, 47, and 48 of Plaintiffs’ Amended Complaint, and dismiss Plaintiffs’ claim for punitive damages with prejudice.

Respectfully Submitted,

CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.

Dated: October 20, 2014

By: /s/ Thomas M. Hinchey
William J. Conroy, Esquire
Thomas M. Hinchey, Esquire
Lynda J. Klebanoff, Esquire
*Attorneys for Defendant,
PECO Energy Company*

CERTIFICATE OF SERVICE

I, Thomas M. Hinchey, Esquire hereby certify that I caused a true and correct copy of the foregoing Preliminary Objections to be served on the 20th day of October, 2014, via electronic filing on all counsel of record.

/s/ Thomas M. Hinchey
Thomas M. Hinchey, Esquire
Attorney for Defendant,
PECO Energy Company



EXHIBIT A

Court of Common Pleas of Philadelphia County
Trial Division

Civil Cover Sheet

For Prothonotary Use Only (Docket Number)

JULY 2014

002640

E-Filing Number: 1407045669

PLAINTIFF'S NAME STANLEY FELLERMAN	DEFENDANT'S NAME PECO ENERGY CO.
PLAINTIFF'S ADDRESS 6858 UPPER YORK RD. NEW HOPE PA 18938	DEFENDANT'S ADDRESS 2301 MARKET ST. PHILADELPHIA PA 19101
PLAINTIFF'S NAME CAROL FELLERMAN	DEFENDANT'S NAME COMCAST CORP.
PLAINTIFF'S ADDRESS 6858 UPPER YORK RD. NEW HOPE PA 18938	DEFENDANT'S ADDRESS 1701 JFK BLVD. PHILADELPHIA PA 19103
PLAINTIFF'S NAME	DEFENDANT'S NAME
PLAINTIFF'S ADDRESS	DEFENDANT'S ADDRESS

TOTAL NUMBER OF PLAINTIFFS 2	TOTAL NUMBER OF DEFENDANTS 2	COMMENCEMENT OF ACTION <input type="checkbox"/> Complaint <input type="checkbox"/> Petition Action <input type="checkbox"/> Notice of Appeal <input checked="" type="checkbox"/> Writ of Summons <input type="checkbox"/> Transfer From Other Jurisdictions
AMOUNT IN CONTROVERSY <input type="checkbox"/> \$50,000.00 or less <input checked="" type="checkbox"/> More than \$50,000.00	COURT PROGRAMS <input type="checkbox"/> Arbitration <input type="checkbox"/> Mass Tort <input type="checkbox"/> Commerce <input type="checkbox"/> Settlement <input checked="" type="checkbox"/> Jury <input type="checkbox"/> Savings Action <input type="checkbox"/> Minor Court Appeal <input type="checkbox"/> Minors <input type="checkbox"/> Non-Jury <input type="checkbox"/> Petition <input type="checkbox"/> Statutory Appeals <input type="checkbox"/> W/D/Survival <input type="checkbox"/> Other: _____	

CASE TYPE AND CODE
2S - PREMISES LIABILITY, SLIP/FALL

STATUTORY BASIS FOR CAUSE OF ACTION

RELATED PENDING CASES (LIST BY CASE CAPTION AND DOCKET NUMBER)	<p style="text-align: center;">FILED PROPROTHY JUL 23 2014 J. OSTROWSKI</p>	IS CASE SUBJECT TO COORDINATION ORDER? YES NO
----------------------------------------------------------------	------------------------------------------------------------------------------------------------	-----------------------------------------------------

TO THE PROTHONOTARY:
Kindly enter my appearance on behalf of Plaintiff/Petitioner/Appellant: STANLEY FELLERMAN , CAROL FELLERMAN
Papers may be served at the address set forth below.

NAME OF PLAINTIFFS/PETITIONERS/APPELLANT'S ATTORNEY LEONARD K. HILL	ADDRESS 123 SOUTH BROAD STREET SUITE 1100 PHILADELPHIA PA 19109
PHONE NUMBER (215) 567-7600	FAX NUMBER (215) 545-1456

SUPREME COURT IDENTIFICATION NO. 81849	E-MAIL ADDRESS ceoc@lkhlaw.com
-------------------------------------------	-----------------------------------

SIGNATURE OF FILING ATTORNEY OR PARTY LEONARD HILL	DATE SUBMITTED Wednesday, July 23, 2014, 11:53 am
-------------------------------------------------------	------------------------------------------------------

FINAL COPY (Approved by the Prothonotary Clerk)

Case ID: 140702640
Control No.: 14091838
Control No.: 14102440

HILL & ASSOCIATES, P.C.
BY: LEONARD K. HILL, ESQUIRE
I.D. NO.: 81849
Suite 1100, 123 S. Broad Street
Philadelphia, PA 19109
(215) 567-7600

Attorney for Plaintiffs



Stanley Fellerman and Carol Fellerman	:	COURT OF COMMON PLEAS
6858 Upper York Rd.	:	PHILADELPHIA COUNTY
New Hope, PA 18938	:	CIVIL TRIAL DIVISION
	:	
Plaintiffs	:	Term, 2014
	:	
vs.	:	No.
	:	
PECO Energy Co.	:	
2301 Market St.	:	
Philadelphia, PA 19101	:	
	:	
Comcast Corp.	:	
Comcast Center	:	
1701 JFK Blvd.	:	
Philadelphia, PA 19103	:	
Defendants	:	

PRAECIPE FOR ISSUANCE OF A WRIT OF SUMMONS

TO THE PROTHONOTARY:

Kindly issue a Writ of Summons in the above-captioned action.

LEONARD K. HILL, ESQUIRE
Attorney for Plaintiffs

Dated:

Case ID: 140702640

Case ID: 140702640
Control No.: 14091838
Control No.: 14102440

CPW

Commonwealth of Pennsylvania
CITY AND COUNTY OF PHILADELPHIA

SUMMONS
CITACION

Stanley Fellerman and Carol Fellerman

COURT OF COMMON PLEAS

Term, 20_____

No. _____

vs.

PECO Energy Co. and Comcast Corporation

To⁽¹⁾

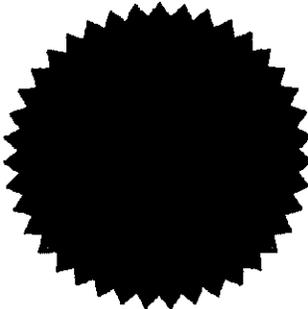
PECO Energy Co.
2301 Market St.
Philadelphia, PA 19101

Comcast Corporation
Comcast Center
1701 JFK Blvd.
Philadelphia, PA 19103

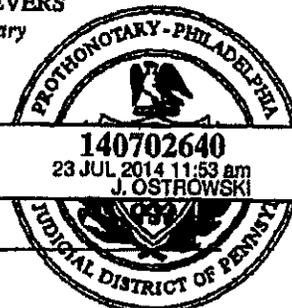
You are notified that the Plaintiff⁽²⁾
Usted esta avisado que el demandante⁽²⁾

Stanley Fellerman and Carol Fellerman
6858 Upper York Rd.
New Hope, PA 18938

Has (have) commenced an action against you.
Ha (han) iniciado una accion en contra suya.



JOSEPH H. EVERS
Prothonotary



By _____

Date _____

⁽¹⁾ Name(s) of Defendant(s)
⁽²⁾ Name(s) of Plaintiff(s)

Case ID: 140702640

Case ID: 140702640
Case ID: 140702640
Control No.: 14091838
Control No.: 14102440

COURT OF COMMON PLEAS

_____ Term, 20 ____ No. _____

Stanley Fellerman and Carol Fellerman

VS.

PECO Energy Co. and Comcast Corporation

SUMMONS

Case ID: 140702640

Case ID: 140702640
Case No.: 140702640
Control No.: 14102440

EXHIBIT B

HILL & ASSOCIATES, P.C.
BY: LEONARD K. HILL, ESQUIRE
SUSAN B. AYRES, ESQUIRE
I.D. NO.: 81849/87562
123 S. Broad Street, Suite 1100
Philadelphia, PA 19109
(215) 567-7600

MAJOR JURY



Attorney for Plaintiffs

Stanley Fellerman	:	COURT OF COMMON PLEAS
Carol Fellerman	:	
	:	
Plaintiff	:	PHILADELPHIA COUNTY
	:	CIVIL TRIAL DIVISION
	:	
vs.	:	
	:	July Term, 2014
	:	No. 2640
PECO Energy Co.	:	
Comcast of Southeast Pennsylvania, LLC	:	
Defendants	:	

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Philadelphia Bar Association
Lawyer Referral and Information
One Reading Center
Philadelphia, PA 19107
(215) 238-1701

ADVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

Asociacion De Licenciado De Filadelfia
One Reading Center
Philadelphia, PA 19107
(215) 238-1701

situated on a heavily wooded lot.

5. Plaintiffs' purchased the subject residence on or about March 11, 2013.

6. Defendant PECO Energy Co. (hereinafter "Defendant PECO") is a for-profit Exelon utility company servicing the Greater Philadelphia area, with a principal place of business at the address shown in the caption.

7. Defendant Comcast of Southeast Pennsylvania, LLC (hereinafter "Defendant Comcast") is a for-profit Pennsylvania company servicing the greater Philadelphia area, with a principal place of business at the address shown in the caption.

8. At all times relevant hereto, Defendant Comcast provided cable service for a fee, through cables mounted on poles to residential customers, including Plaintiffs herein.

9. Defendant Comcast knew or should have known that it shared this utility pole with a PECO transformer and uninsulated PECO power lines.

10. Defendant Comcast installed, owned, possessed and/or maintained the cable lines located at 6858 York Road, New Hope, Pennsylvania that are the subject of this lawsuit.

11. Defendant Comcast installed, utilized, controlled, possessed and/or maintained the pole located at 6858 Upper York Road, New Hope, Pennsylvania that is the subject of this lawsuit.

12. At all times material hereto, Defendant Comcast acted on its own behalf and through its agents, servants, and employees, including actual and apparent agents.

13. At all relevant times hereto, Defendant PECO distributed high voltage electric

current to residential customers for a fee, including Plaintiffs herein, through its distribution system, which is made up of components including, but not limited to, power lines, poles, transformers, and circuit breakers.

14. Neither the rates nor the calculations of the rates charged by Defendant PECO to the Plaintiffs are at issue in this litigation.

15. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the power lines located at 6858 York Road, New Hope, Pennsylvania that are the subject of this lawsuit.

16. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the transformer located at 6858 York Road, New Hope, Pennsylvania that is the subject of this lawsuit.

17. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the utility pole located at 6858 Upper York Road, New Hope, Pennsylvania that is the subject of this lawsuit.

18. At all times material hereto, Defendant PECO acted on its own behalf and through its agents, servants, and employees, including actual and apparent agents.

19. This action pertains to the Defendants' actions and omissions with regard to the Plaintiffs, specifically, and not to the provision of these Defendants' services to the general public or to a large geographic area.

20. At all times material hereto, there were four utility poles located on Plaintiff's property along which, among other components, power and cable lines were affixed so that Defendants PECO and Comcast could service Plaintiffs' property in exchange for fees.

21. Among the lines affixed to the four utility poles on the Plaintiffs'

Property, was an uninsulated primary power line leading to Plaintiff's home.

22. At all times material hereto, on the last of the four utility poles, closest to the Plaintiffs' home, a PECO transformer was mounted.

23. Defendant PECO designed and knew about the manner in which the poles, lines, and transformer were situated on Plaintiffs' property, the amount of electricity flowing through those components, and the potential hazards and risks associated with same; the Plaintiffs did not..

24. On or about December 1, 2013, the Comcast cable service at Plaintiffs' residence stopped working.

25. On or about December 1, 2013, Plaintiffs called Defendant Comcast multiple times to report a problem with the cable service.

26. Defendant Comcast knew or should have known that the problem with its cable service could have been the result of a problem with the utility pole and/or electric service components on that pole that it shared with Defendant PECO.

27. Defendant Comcast did not contact the Plaintiffs or Defendant PECO or any first responders, such as police or fire departments, in response to the Plaintiffs' reports of a problem at the property.

28. On the morning of December 2, 2013, Plaintiffs discovered that the utility pole closest to their home, the one with the transformer mounted to it, had fallen to the ground in front of and in close proximity to their residence. See attached photograph of the fallen pole marked Exhibit "A".

29. On December 2, 2013, prior to the Plaintiff's electrical injuries, Plaintiffs

called Defendant PECO to report a problem with the power pole, advising PECO that the power was still working, but that the pole, lines, and transformer attached thereto were down.

30. Defendant PECO did not shut off the power to the property prior to the incident that forms the basis of this litigation despite the fact that they knew or should have known that the pole was down, the transformer was down, and that the uninsulated primary wire carrying high voltage electricity was down and live in the heavily wooded, residential area just feet from the occupied residence.

31. Defendant PECO did not contact any first responders, such as police or fire departments, in response to the Plaintiffs' report despite the fact that they knew or should have known that the pole was down, and that the uninsulated primary wire carrying high voltage electricity, as well as the transformer, was down and live in the heavily wooded, residential area just feet from the occupied residence.

32. Upon information and belief, the aforementioned pole fell as a result of severe rot, decay, and deterioration, which Defendants knew or should have known was present, and which Defendants knew or should have known would cause the pole to fall creating a substantial risk of serious and possibly deadly harm to people, in particular to the homeowners, such as Plaintiffs.

33. On December 2, 2013, after notifying Defendants of the fallen pole, Plaintiff Stanley Fellerman discovered that the fallen pole, transformer, and power and cable lines had started a fire in the Plaintiffs' heavily wooded and leaf-covered front yard in close proximity to Plaintiffs' home and other nearby wooded residences.

34. While trying to extinguish the fire, Plaintiff Stanley Fellerman was

shocked and burned and severely and permanently injured by the PECO power line.

35. Specifically, Plaintiff Stanley Fellerman suffered injuries which include, but are not limited to, third and fourth degree electrical burns on both hands, requiring multiple surgeries including amputations, as well as a traumatic brain injury, depression, and anxiety. See attached photographs of the injuries taken on May 25, 2014, and September 5, 2014, attached as Exhibit "B".

36. As discussed below, since the date of the injury, Plaintiff Carol Fellerman has been solely and primarily responsible for the day to day care of her husband, and the running of their household.

37. Upon information and belief, the power line that Plaintiff Stanley Fellerman came into contact with was the uninsulated primary.

38. Defendants knew or should have known that the pole was rotted, decayed, or otherwise deteriorated, and in danger of falling, as it supported their equipment, which they were responsible for installing, repairing, and maintaining in a safe condition.

39. Defendants knew or should have known that falling poles, such as the one at issue in this lawsuit, present a great risk of serious (and possibly deadly) danger to persons and property given the nature of the equipment and components mounted thereto.

40. Defendants knew or should have known that power and cable lines, as well as transformers, could cause a utility pole to fall if said pole is deteriorated, decayed, or rotted and thereby expose persons such as Plaintiffs to dangers from the exposed and downed utility lines.

41. Defendants should have installed and maintained their equipment so that it would not cause the utility pole to fall and cause injury to persons such as Plaintiffs.

42. Defendants should have advised and warned their customers, such as Plaintiffs, about the nature and condition of the power and cable equipment, including the pole, and the associated risks.

43. Defendant PECO should have provided standard 120/240V secondary service to the Plaintiffs instead of the high-voltage primary service, and if not practical from an engineering standpoint, then Defendant PECO should have at least provided the primary cable with tree covering or full-rated insulation.

COUNT I

Plaintiff Stanley Fellerman v. Defendant PECO Energy Co.
NEGLIGENCE, GROSS NEGLIGENCE AND RECKLESSNESS

44. Plaintiff hereby incorporates all of the above paragraphs by reference hereto, inclusively, as if the same were fully set forth herein at length.

45. The aforementioned incident was caused solely by the negligence, gross negligence, and recklessness of the Defendant PECO in the design, installation, inspection, and maintenance of its power lines, transformer, and pole in that this Defendant:

- (a) failed to use reasonable care in the design, installation and maintenance of the subject power lines, transformer, and pole so as to avoid the risk of them falling to the ground and causing serious bodily injury;
- (b) failed to use reasonable care in insuring its power lines and transformers were secured safely so as to avoid the risk of them falling and causing seriously bodily injury;

- (c) failed to perform adequate testing, inspection, and maintenance measures as to ensure the safety of the power lines, transformers, and pole to all those in the area of same;
- (d) failed to properly alert the public, including Plaintiffs, to the dangerous propensities of the power lines, transformers, and poles and the possibility of them falling after Defendant PECO knew or should have known about the unsafe condition;
- (e) failed to properly inform, educate, or otherwise advise residential customers, such as Plaintiffs, of their duties responsibilities, if any, to inspect, repair, and/or replace utility poles on their property;
- (f) failed to properly alert Defendant Comcast to the dangerous and unsafe condition of the cable lines and pole, and the possibility of them falling after Defendant PECO knew or should have known about the unsafe condition that existed;
- (g) failed to use the highest degree of care practicable in the provision and supply of high voltage electricity;
- (h) failed to use reasonable care designing, installing, maintaining, utilizing, and inspecting the power lines, transformers, and poles to ensure that they were safe for their intended use;

- (i) failed to timely respond to a problem at Plaintiffs residence so as to prevent harm suffered by Plaintiffs.
- (j) failed to properly train employees, servants, and agents in installation, maintenance, inspection, and usage of power lines, transformers, and poles;
- (k) failed to ensure employees, servants, and agents were following internal procedures, regulations, and specifications with regard to the installation, maintenance, inspection, and usage of power lines, transformers, and poles;
- (l) failed to perform necessary inspection and testing on the pole that was supporting the power lines and transformer at the subject property; and
- (m) failed to alert and warn the customer and Defendant Comcast of the condition of the pole that was supporting the power lines and transformer at the subject property.

46. As a result of the reckless and negligent conduct of Defendant PECO, as set forth herein, Plaintiff Stanley Fellerman suffered severe, disfiguring, and permanent injuries causing excruciating pain and suffering, emotional injury, embarrassment, humiliation, inconvenience, and loss of life's pleasures.

47. As a result of the reckless and negligent conduct of Defendant PECO, as set forth herein, Plaintiff Stanley Fellerman has been caused to expend various sums of money for medicine and medical attention for treatment and/or treatment of these injuries and to

have essential services performed during the duration of the physical impairment, all to great financial detriment and loss and expects to pay additional sums of money for medicine and medical attention in the future all to Plaintiff's great financial detriment and loss.

48. As a result of the reckless and negligent conduct of Defendant PECO, as set forth herein, Plaintiff Stanley Fellerman has been caused to suffer a loss of earnings, loss of future earning capacity, and the ability to engage in his professional activities and earn a livelihood all to his great financial detriment and loss.

Wherefore, Plaintiff Stanley Fellerman hereby demands judgment against all Defendants, jointly and severally, in an amount in excess of Fifty Thousand (\$50,000) Dollars, including compensatory and punitive damages.

COUNT II

Plaintiff Stanley Fellerman v. Defendant Comcast
NEGLIGENCE, GROSS NEGLIGENCE AND RECKLESSNESS

49. Plaintiff hereby incorporates all of the above paragraphs by reference hereto, inclusively, as if the same were fully set forth herein at length.

50. The aforementioned incident was caused solely by the negligence, gross negligence, and recklessness of the Defendant Comcast in the design, installation, inspection, and maintenance of its cable lines in that this Defendant:

- (a) failed to use reasonable care in the design, installation and maintenance of the cable lines and pole so as to avoid the risk of them falling to the ground and causing serious bodily injury;
- (b) failed to use reasonable care in insuring its cable lines were secured safely;

- (c) failed to perform adequate inspection, testing, and maintenance measures as to ensure the safety of the cable lines and pole to all those in the area of same;
- (d) failed to properly alert the public, including Plaintiffs, to the dangerous propensities of the cable lines and pole and the possibility of them falling after Defendant Comcast knew or should have known about the unsafe condition that existed;
- (e) failed to properly inform, educate, or otherwise advise residential customers, such as Plaintiffs, of their duties and responsibilities, if any, to inspect, repair, and/or replace utility poles on their property;
- (f) failed to properly alert Defendant PECO to the dangerous and unsafe condition of the cable lines and pole, and the possibility of them falling after Defendant Comcast knew or should have known about the unsafe condition that existed;
- (g) failed to use the highest degree of care practicable in the provision and supply of cable services;
- (h) failed to use reasonable care designing, installing, maintaining, utilizing, and inspecting the cable lines and pole to ensure that they were safe for their intended use;
- (i) failed to timely respond to a problem at Plaintiffs residence so as to prevent harm suffered by Plaintiffs.
- (j) failed to properly train employees, servants, and agents in installation, inspection, maintenance, and usage of cable lines and poles;

- (k) failed to ensure employees, servants, and agents were following internal procedures, regulations, and specifications with regard to the installation, inspection, maintenance, and usage of cable lines and poles;
- (l) failed to perform necessary inspection and testing on the pole that was supporting the cable lines at the subject property; and
- (m) failed to alert and warn the customer and Defendant PECO of the condition of the pole that was supporting the cable lines at the subject property.

51. As a result of the reckless and negligent conduct of Defendant Comcast as set forth herein, Plaintiff Stanley Fellerman suffered severe, disfiguring, and permanent injuries causing excruciating pain and suffering, emotional injury, embarrassment, humiliation, inconvenience, and loss of life's pleasures.

52. As a result of the reckless and negligent conduct of Defendant Comcast, as set forth herein, Plaintiff Stanley Fellerman has been caused to expend various sums of money for medicine and medical attention for treatment and/or cure of these injuries and to have essential services performed during the duration of the physical impairment, all to great financial detriment and loss and expects to pay additional sums of money for medicine and medical attention in the future all to Plaintiff's great financial detriment and loss.

53. As a result of the reckless and negligent conduct of Defendant Comcast, as set forth herein, Plaintiff Stanley Fellerman has been caused to suffer a loss of earnings, loss of future earning capacity, and the ability to engage in his professional activities and earn a livelihood all to his great financial detriment and loss.

Wherefore, Plaintiff Stanley Fellerman hereby demands judgment against all Defendants, jointly and severally, in an amount in excess of Fifty Thousand (\$50,000) Dollars, including compensatory and punitive damages.

COUNT III
Carol Fellerman v. Defendants PECO Energy Co., and Comcast Corporation
LOSS OF CONSORTIUM

54. Plaintiff Carol Fellerman hereby incorporates all of the above paragraphs by reference hereto, inclusively, as if the same were fully set forth herein at length.

55. The aforementioned incident was caused solely by the negligence and reckless of the Defendants as set forth in the preceding Counts of the Complaint, which are incorporated herein by reference.

56. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was caused to sustain injuries including but not limited to emotional, mental, and physical distress over her husband's electrocution and resulting injuries.

57. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was caused to sustain injuries including but not limited to emotional, mental, and physical distress over having to assume the personal care of her husband, who was previously independent with respect to his own needs.

58. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was caused to sustain injuries including but not limited to emotional, mental, and physical distress over having to take over the management of the household, with which her husband was previously able to assist.

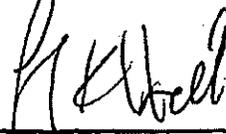
59. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was

caused to sustain injuries including but not limited to emotional, mental, and physical distress over her husband's prognosis for this injury and their future.

60. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was caused to sustain injuries including but not limited to emotional, mental, and physical distress over the shift in her relationship with her husband from daily companion to daily caregiver, as well as her loss of society and affection, all to the detriment of their marital relationship.

Wherefore, Plaintiff Carol Fellerman, hereby demands judgment against all Defendants, jointly and severally, in an amount in excess of Fifty Thousand (\$50,000) Dollars, including punitive and compensatory damages.

HILL & ASSOCIATES, P.C.



LEONARD K. HILL, ESQUIRE
Attorney for Plaintiff

Date: 9/30/14

HILL & ASSOCIATES, P.C.
BY: LEONARD K. HILL, ESQUIRE
SUSAN B. AYRES, ESQUIRE
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123 S. Broad Street, Suite 1100
Philadelphia, PA 19109
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MAJOR JURY



Attorney for Plaintiffs

Stanley Fellerman	:	COURT OF COMMON PLEAS
Carol Fellerman	:	
	:	
Plaintiff	:	PHILADELPHIA COUNTY
	:	CIVIL TRIAL DIVISION
	:	
vs.	:	
	:	July Term, 2014
	:	No. 2640
PECO Energy Co.	:	
Comcast of Southeast Pennsylvania, LLC	:	
Defendants	:	

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Philadelphia Bar Association
Lawyer Referral and Information
One Reading Center
Philadelphia, PA 19107
(215) 238-1701

ADVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademas, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

Asociacion De Licenciado De Filadelfia
One Reading Center
Philadelphia, PA 19107
(215) 238-1701

situated on a heavily wooded lot.

5. Plaintiffs' purchased the subject residence on or about March 11, 2013.

6. Defendant PECO Energy Co. (hereinafter "Defendant PECO") is a for-profit Exelon utility company servicing the Greater Philadelphia area, with a principal place of business at the address shown in the caption.

7. Defendant Comcast of Southeast Pennsylvania, LLC (hereinafter "Defendant Comcast") is a for-profit Pennsylvania company servicing the greater Philadelphia area, with a principal place of business at the address shown in the caption.

8. At all times relevant hereto, Defendant Comcast provided cable service for a fee, through cables mounted on poles to residential customers, including Plaintiffs herein.

9. Defendant Comcast knew or should have known that it shared this utility pole with a PECO transformer and uninsulated PECO power lines.

10. Defendant Comcast installed, owned, possessed and/or maintained the cable lines located at 6858 York Road, New Hope, Pennsylvania that are the subject of this lawsuit.

11. Defendant Comcast installed, utilized, controlled, possessed and/or maintained the pole located at 6858 Upper York Road, New Hope, Pennsylvania that is the subject of this lawsuit.

12. At all times material hereto, Defendant Comcast acted on its own behalf and through its agents, servants, and employees, including actual and apparent agents.

13. At all relevant times hereto, Defendant PECO distributed high voltage electric

current to residential customers for a fee, including Plaintiffs herein, through its distribution system, which is made up of components including, but not limited to, power lines, poles, transformers, and circuit breakers.

14. Neither the rates nor the calculations of the rates charged by Defendant PECO to the Plaintiffs are at issue in this litigation.

15. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the power lines located at 6858 York Road, New Hope, Pennsylvania that are the subject of this lawsuit.

16. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the transformer located at 6858 York Road, New Hope, Pennsylvania that is the subject of this lawsuit.

17. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the utility pole located at 6858 Upper York Road, New Hope, Pennsylvania that is the subject of this lawsuit.

18. At all times material hereto, Defendant PECO acted on its own behalf and through its agents, servants, and employees, including actual and apparent agents.

19. This action pertains to the Defendants' actions and omissions with regard to the Plaintiffs, specifically, and not to the provision of these Defendants' services to the general public or to a large geographic area.

20. At all times material hereto, there were four utility poles located on Plaintiff's property along which, among other components, power and cable lines were affixed so that Defendants PECO and Comcast could service Plaintiffs' property in exchange for fees.

21. Among the lines affixed to the four utility poles on the Plaintiffs'

Property, was an uninsulated primary power line leading to Plaintiff's home.

22. At all times material hereto, on the last of the four utility poles, closest to the Plaintiffs' home, a PECO transformer was mounted.

23. Defendant PECO designed and knew about the manner in which the poles, lines, and transformer were situated on Plaintiffs' property, the amount of electricity flowing through those components, and the potential hazards and risks associated with same; the Plaintiffs did not..

24. On or about December 1, 2013, the Comcast cable service at Plaintiffs' residence stopped working.

25. On or about December 1, 2013, Plaintiffs called Defendant Comcast multiple times to report a problem with the cable service.

26. Defendant Comcast knew or should have known that the problem with its cable service could have been the result of a problem with the utility pole and/or electric service components on that pole that it shared with Defendant PECO.

27. Defendant Comcast did not contact the Plaintiffs or Defendant PECO or any first responders, such as police or fire departments, in response to the Plaintiffs' reports of a problem at the property.

28. On the morning of December 2, 2013, Plaintiffs discovered that the utility pole closest to their home, the one with the transformer mounted to it, had fallen to the ground in front of and in close proximity to their residence. See attached photograph of the fallen pole marked Exhibit "A".

29. On December 2, 2013, prior to the Plaintiff's electrical injuries, Plaintiffs

called Defendant PECO to report a problem with the power pole, advising PECO that the power was still working, but that the pole, lines, and transformer attached thereto were down.

30. Defendant PECO did not shut off the power to the property prior to the incident that forms the basis of this litigation despite the fact that they knew or should have known that the pole was down, the transformer was down, and that the uninsulated primary wire carrying high voltage electricity was down and live in the heavily wooded, residential area just feet from the occupied residence.

31. Defendant PECO did not contact any first responders, such as police or fire departments, in response to the Plaintiffs' report despite the fact that they knew or should have known that the pole was down, and that the uninsulated primary wire carrying high voltage electricity, as well as the transformer, was down and live in the heavily wooded, residential area just feet from the occupied residence.

32. Upon information and belief, the aforementioned pole fell as a result of severe rot, decay, and deterioration, which Defendants knew or should have known was present, and which Defendants knew or should have known would cause the pole to fall creating a substantial risk of serious and possibly deadly harm to people, in particular to the homeowners, such as Plaintiffs.

33. On December 2, 2013, after notifying Defendants of the fallen pole, Plaintiff Stanley Fellerman discovered that the fallen pole, transformer, and power and cable lines had started a fire in the Plaintiffs' heavily wooded and leaf-covered front yard in close proximity to Plaintiffs' home and other nearby wooded residences.

34. While trying to extinguish the fire, Plaintiff Stanley Fellerman was

shocked and burned and severely and permanently injured by the PECO power line.

35. Specifically, Plaintiff Stanley Fellerman suffered injuries which include, but are not limited to, third and fourth degree electrical burns on both hands, requiring multiple surgeries including amputations, as well as a traumatic brain injury, depression, and anxiety. See attached photographs of the injuries taken on May 25, 2014, and September 5, 2014, attached as Exhibit "B".

36. As discussed below, since the date of the injury, Plaintiff Carol Fellerman has been solely and primarily responsible for the day to day care of her husband, and the running of their household.

37. Upon information and belief, the power line that Plaintiff Stanley Fellerman came into contact with was the uninsulated primary.

38. Defendants knew or should have known that the pole was rotted, decayed, or otherwise deteriorated, and in danger of falling, as it supported their equipment, which they were responsible for installing, repairing, and maintaining in a safe condition.

39. Defendants knew or should have known that falling poles, such as the one at issue in this lawsuit, present a great risk of serious (and possibly deadly) danger to persons and property given the nature of the equipment and components mounted thereto.

40. Defendants knew or should have known that power and cable lines, as well as transformers, could cause a utility pole to fall if said pole is deteriorated, decayed, or rotted and thereby expose persons such as Plaintiffs to dangers from the exposed and downed utility lines.

41. Defendants should have installed and maintained their equipment so that it would not cause the utility pole to fall and cause injury to persons such as Plaintiffs.

42. Defendants should have advised and warned their customers, such as Plaintiffs, about the nature and condition of the power and cable equipment, including the pole, and the associated risks.

43. Defendant PECO should have provided standard 120/240V secondary service to the Plaintiffs instead of the high-voltage primary service, and if not practical from an engineering standpoint, then Defendant PECO should have at least provided the primary cable with tree covering or full-rated insulation.

COUNT I

Plaintiff Stanley Fellerman v. Defendant PECO Energy Co.
NEGLIGENCE, GROSS NEGLIGENCE AND RECKLESSNESS

44. Plaintiff hereby incorporates all of the above paragraphs by reference hereto, inclusively, as if the same were fully set forth herein at length.

45. The aforementioned incident was caused solely by the negligence, gross negligence, and recklessness of the Defendant PECO in the design, installation, inspection, and maintenance of its power lines, transformer, and pole in that this Defendant:

- (a) failed to use reasonable care in the design, installation and maintenance of the subject power lines, transformer, and pole so as to avoid the risk of them falling to the ground and causing serious bodily injury;
- (b) failed to use reasonable care in insuring its power lines and transformers were secured safely so as to avoid the risk of them falling and causing seriously bodily injury;

- (c) failed to perform adequate testing, inspection, and maintenance measures as to ensure the safety of the power lines, transformers, and pole to all those in the area of same;
- (d) failed to properly alert the public, including Plaintiffs, to the dangerous propensities of the power lines, transformers, and poles and the possibility of them falling after Defendant PECO knew or should have known about the unsafe condition;
- (e) failed to properly inform, educate, or otherwise advise residential customers, such as Plaintiffs, of their duties responsibilities, if any, to inspect, repair, and/or replace utility poles on their property;
- (f) failed to properly alert Defendant Comcast to the dangerous and unsafe condition of the cable lines and pole, and the possibility of them falling after Defendant PECO knew or should have known about the unsafe condition that existed;
- (g) failed to use the highest degree of care practicable in the provision and supply of high voltage electricity;
- (h) failed to use reasonable care designing, installing, maintaining, utilizing, and inspecting the power lines, transformers, and poles to ensure that they were safe for their intended use;

- (i) failed to timely respond to a problem at Plaintiffs residence so as to prevent harm suffered by Plaintiffs.
- (j) failed to properly train employees, servants, and agents in installation, maintenance, inspection, and usage of power lines, transformers, and poles;
- (k) failed to ensure employees, servants, and agents were following internal procedures, regulations, and specifications with regard to the installation, maintenance, inspection, and usage of power lines, transformers, and poles;
- (l) failed to perform necessary inspection and testing on the pole that was supporting the power lines and transformer at the subject property; and
- (m) failed to alert and warn the customer and Defendant Comcast of the condition of the pole that was supporting the power lines and transformer at the subject property.

46. As a result of the reckless and negligent conduct of Defendant PECO, as set forth herein, Plaintiff Stanley Fellerman suffered severe, disfiguring, and permanent injuries causing excruciating pain and suffering, emotional injury, embarrassment, humiliation, inconvenience, and loss of life's pleasures.

47. As a result of the reckless and negligent conduct of Defendant PECO, as set forth herein, Plaintiff Stanley Fellerman has been caused to expend various sums of money for medicine and medical attention for treatment and/or treatment of these injuries and to

have essential services performed during the duration of the physical impairment, all to great financial detriment and loss and expects to pay additional sums of money for medicine and medical attention in the future all to Plaintiff's great financial detriment and loss.

48. As a result of the reckless and negligent conduct of Defendant PECO, as set forth herein, Plaintiff Stanley Fellerman has been caused to suffer a loss of earnings, loss of future earning capacity, and the ability to engage in his professional activities and earn a livelihood all to his great financial detriment and loss.

Wherefore, Plaintiff Stanley Fellerman hereby demands judgment against all Defendants, jointly and severally, in an amount in excess of Fifty Thousand (\$50,000) Dollars, including compensatory and punitive damages.

COUNT II
Plaintiff Stanley Fellerman v. Defendant Comcast
NEGLIGENCE, GROSS NEGLIGENCE AND RECKLESSNESS

49. Plaintiff hereby incorporates all of the above paragraphs by reference hereto, inclusively, as if the same were fully set forth herein at length.

50. The aforementioned incident was caused solely by the negligence, gross negligence, and recklessness of the Defendant Comcast in the design, installation, inspection, and maintenance of its cable lines in that this Defendant:

- (a) failed to use reasonable care in the design, installation and maintenance of the cable lines and pole so as to avoid the risk of them falling to the ground and causing serious bodily injury;
- (b) failed to use reasonable care in insuring its cable lines were secured safely;

- (c) failed to perform adequate inspection, testing, and maintenance measures as to ensure the safety of the cable lines and pole to all those in the area of same;
- (d) failed to properly alert the public, including Plaintiffs, to the dangerous propensities of the cable lines and pole and the possibility of them falling after Defendant Comcast knew or should have known about the unsafe condition that existed;
- (e) failed to properly inform, educate, or otherwise advise residential customers, such as Plaintiffs, of their duties and responsibilities, if any, to inspect, repair, and/or replace utility poles on their property;
- (f) failed to properly alert Defendant PECO to the dangerous and unsafe condition of the cable lines and pole, and the possibility of them falling after Defendant Comcast knew or should have known about the unsafe condition that existed;
- (g) failed to use the highest degree of care practicable in the provision and supply of cable services;
- (h) failed to use reasonable care designing, installing, maintaining, utilizing, and inspecting the cable lines and pole to ensure that they were safe for their intended use;
- (i) failed to timely respond to a problem at Plaintiffs residence so as to prevent harm suffered by Plaintiffs.
- (j) failed to properly train employees, servants, and agents in installation, inspection, maintenance, and usage of cable lines and poles;

- (k) failed to ensure employees, servants, and agents were following internal procedures, regulations, and specifications with regard to the installation, inspection, maintenance, and usage of cable lines and poles;
- (l) failed to perform necessary inspection and testing on the pole that was supporting the cable lines at the subject property; and
- (m) failed to alert and warn the customer and Defendant PECO of the condition of the pole that was supporting the cable lines at the subject property.

51. As a result of the reckless and negligent conduct of Defendant Comcast as set forth herein, Plaintiff Stanley Fellerman suffered severe, disfiguring, and permanent injuries causing excruciating pain and suffering, emotional injury, embarrassment, humiliation, inconvenience, and loss of life's pleasures.

52. As a result of the reckless and negligent conduct of Defendant Comcast, as set forth herein, Plaintiff Stanley Fellerman has been caused to expend various sums of money for medicine and medical attention for treatment and/or cure of these injuries and to have essential services performed during the duration of the physical impairment, all to great financial detriment and loss and expects to pay additional sums of money for medicine and medical attention in the future all to Plaintiff's great financial detriment and loss.

53. As a result of the reckless and negligent conduct of Defendant Comcast, as set forth herein, Plaintiff Stanley Fellerman has been caused to suffer a loss of earnings, loss of future earning capacity, and the ability to engage in his professional activities and earn a livelihood all to his great financial detriment and loss.

Wherefore, Plaintiff Stanley Fellerman hereby demands judgment against all Defendants, jointly and severally, in an amount in excess of Fifty Thousand (\$50,000) Dollars, including compensatory and punitive damages.

COUNT III
Carol Fellerman v. Defendants PECO Energy Co., and Comcast Corporation
LOSS OF CONSORTIUM

54. Plaintiff Carol Fellerman hereby incorporates all of the above paragraphs by reference hereto, inclusively, as if the same were fully set forth herein at length.

55. The aforementioned incident was caused solely by the negligence and reckless of the Defendants as set forth in the preceding Counts of the Complaint, which are incorporated herein by reference.

56. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was caused to sustain injuries including but not limited to emotional, mental, and physical distress over her husband's electrocution and resulting injuries.

57. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was caused to sustain injuries including but not limited to emotional, mental, and physical distress over having to assume the personal care of her husband, who was previously independent with respect to his own needs.

58. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was caused to sustain injuries including but not limited to emotional, mental, and physical distress over having to take over the management of the household, with which her husband was previously able to assist.

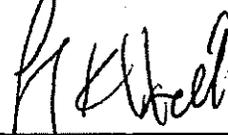
59. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was

caused to sustain injuries including but not limited to emotional, mental, and physical distress over her husband's prognosis for this injury and their future.

60. As a result of the aforementioned incident, Plaintiff Carol Fellerman, was caused to sustain injuries including but not limited to emotional, mental, and physical distress over the shift in her relationship with her husband from daily companion to daily caregiver, as well as her loss of society and affection, all to the detriment of their marital relationship.

Wherefore, Plaintiff Carol Fellerman, hereby demands judgment against all Defendants, jointly and severally, in an amount in excess of Fifty Thousand (\$50,000) Dollars, including punitive and compensatory damages.

HILL & ASSOCIATES, P.C.



LEONARD K. HILL, ESQUIRE
Attorney for Plaintiff

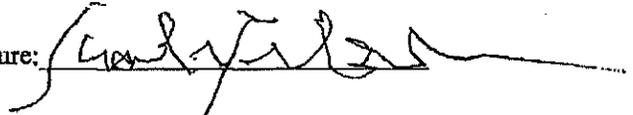
Date: 9/30/14

VERIFICATION

The undersigned state that they are the Plaintiffs herein and verify that the statements made in the foregoing Complaint-Civil Action is true and correct to the best of their knowledge, information and belief; and the this statement is made subject to the penalties if 18 Pa. C.S. 4904 relating to unsworn falsification to authorities.

Dated: 9-29-2014

Signature:



Printed Name:

Stanley Fellerman

Dated: 9-29-2014

Signature:



Printed Name:

Carol M Fellerman



**PLAINTIFF'S
EXHIBIT**

Case ID: 140702640

Case ID: 140702640

Control No.: 14102440

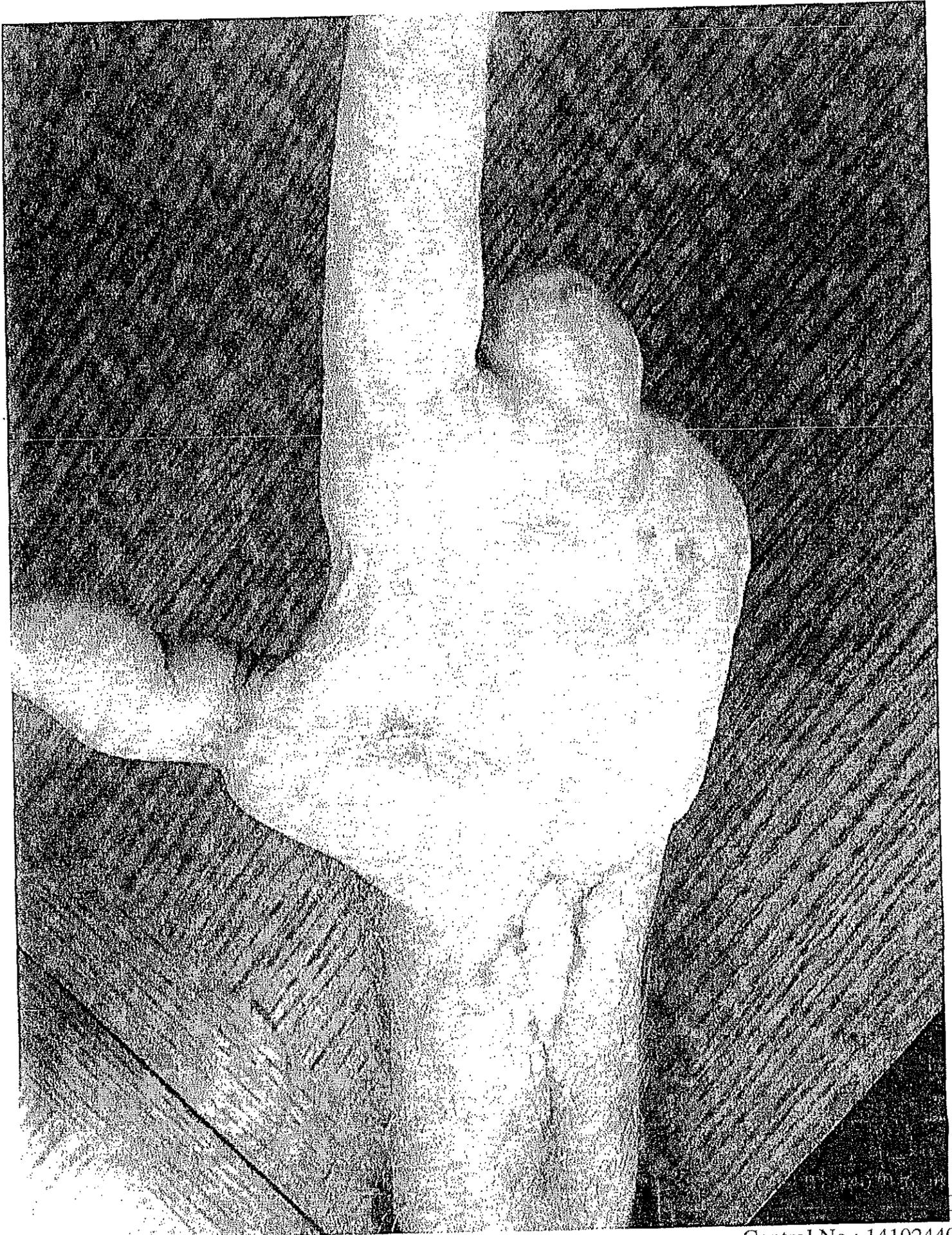


EXHIBIT C

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

Public Meeting held December 5, 2013

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
James H. Cawley
Pamela A. Witmer
Gladys M. Brown

Jeremy Kashuba

C-2012-2333019

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Jeremy Kashuba (Complainant) filed on June 25, 2013, to the Initial Decision of Administrative Law Judge (ALJ) Darlene R. Davis Heep, which was issued on June 6, 2013, in the above-captioned proceeding. Replies to Exceptions were filed by PECO Energy Company (PECO or the Company) on July 8, 2013. For the reasons stated below, we will grant, in part, and deny, in part, the Complainant's Exceptions, and modify the ALJ's Initial Decision.

Case ID: 111202836
Control No.: 14023305
Case ID: 140702640
Control No.: 14091838
Case ID: 140702640
Control No.: 14102440

History of the Proceeding

On October 24, 2012, the Complainant filed a Formal Complaint (Complaint) against PECO,¹ in which he alleged that, after PECO removed a fallen tree near the road on which he lives, he discovered that the power line to his house was hanging dangerously low. The Complainant asserted that eight different PECO employees visited his home to investigate the matter, all of whom informed the Complainant that he needed to fix the problem himself and have his own pole installed. The Complainant averred that the power line in question also provided service to his neighbor's home, and that the Complainant should not be responsible for providing utility service to his neighbor. As relief, the Complainant requested that PECO repair the affected pole and wires, and remove his neighbor's power line from his property.

On November 19, 2012, PECO filed an Answer to the Complaint, in which it denied that it had caused damage to the power line or pole at issue. In addition, PECO averred that its investigation of the matter revealed that the pole and wiring at issue are on private property, and that it informed the Complainant that he is responsible for completing the needed repairs.

On February 13, 2013, an evidentiary hearing was convened. The Complainant appeared *pro se*, testified on his own behalf, and introduced eight exhibits, all of which were admitted into the record. PECO was represented by counsel, and presented the testimony of two witnesses, Clifford Patton and Dwight W. Herbert. PECO also introduced nine exhibits, eight of which were admitted into the record. The hearing generated a transcript of 143 pages. The record was closed on February 27, 2013.

On June 6, 2013, the Commission issued the Initial Decision of ALJ Heep, which dismissed the Complaint. I.D. at 8. On June 25, 2013, the Complainant filed

¹ The Complaint was served on PECO on November 8, 2012.

Exceptions to the ALJ's Initial Decision, but provided no indication that he had served PECO. By Secretarial Letter dated June 26, 2013, the Commission provided a copy of the Complainant's Exceptions to PECO. On July 8, 2013, PECO filed timely Replies to the Complainant's Exceptions.

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 Code, 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that PECO 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 PECO. *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 the 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 Complainant shifts to PECO. If the evidence presented by PECO is of co-equal value or "weight," the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of PECO. *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 Heep made twelve Findings of Fact and reached two Conclusions of Law. I.D. at 3-4, 8. 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 delineate 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).

Positions of the Parties

The Complainant contends that he discovered that the electrical wires on his property were hanging dangerously low for a couple of months after PECO had been in the area to remove a fallen tree on or near his property, sometime in the winter of 2012. Tr. at 9-11. The Complainant wants PECO to remedy the problem, and specifically, to repair a particular pole that stands near a creek on the Complainant's property. *Id.* at 15, 32; PECO Exh. 3B. That pole is leaning and in need of repair, and is the primary reason why the wires are sagging. Tr. at 110, 127, 130; PECO Exh. 4.²

² The pole in question also supports lines for telephone and cable service, which are also sagging. The Complainant testified that the cable line is his, but the telephone line is not. Tr. at 35.

PECO maintains that the Complainant is responsible for repairing the pole in question because it is located on private property, and is not owned by PECO. Tr. at 46-47, 61-62, 64, 72, 112-114; PECO Exh. 4. In addition, PECO's investigation of the matter revealed that another pole, located near the Complainant's house and bearing a PECO transformer, also requires maintenance work in order to bring it up to PECO standards. PECO averred that this pole, too, is the responsibility of the Complainant. *Id.* at, 128-129; PECO Exh. 4. In support of its position, PECO explained that, for aerial service, the Company's tariff provides that PECO will own the first span of wire up to the first support of the customer, nominally 100 feet inside the customer's property line. Beyond that point, the customer is responsible for the service line. Tr. at 60, 64-65, 85-87; PECO Exhs. 6 and 7.

The Complainant does not agree with PECO's determination that it is his responsibility to repair the poles and the sagging wires. The Complainant explained that the power line that serves his home also continues beyond his property to provide electricity to a neighbor's home. Tr. at 9, 21-22. Thus, the Complainant argued that, by holding him responsible for the electrical lines and poles on his property, PECO is requiring him to provide electric service to his neighbor, which the Complainant does not believe is right. *Id.* at 9, 21. The Complainant indicated that he would be willing to replace the bad pole if necessary, but wants PECO to move the power line from his property so that he does not have to provide power to his neighbor. *Id.* at 25.

ALJ's Initial Decision

In her Initial Decision, ALJ Heep found that the Complainant did not establish a *prima facie* case that PECO is providing other than adequate, efficient, safe, and reasonable service. I.D. at 6. The ALJ stated that no immediate danger was established with respect to the sagging wires, and that PECO had not issued any notices to the Complainant indicating that the wires are dangerously low and must be moved

immediately. *Id.* In addition, the ALJ found no evidence to show that PECO's actions caused the wires to sag. *Id.* at 7.

The ALJ also found that the pole that is the cause of the sagging wires is at least 100 feet inside the Complainant's property line,³ and that the Complainant is responsible for the maintenance of the pole and wires, in accordance with PECO's tariff. *Id.* The ALJ asserted that, rather than noting a violation of any sort, PECO has been seeking to work with the Complainant to advise him on what is required in order to raise the wires. *Id.*

With respect to the pole containing the transformer, which PECO identified as also needing maintenance, the ALJ found that this pole provides support for wiring leading to the Complainant's neighbor's home, but provides no benefit to the Complainant. *Id.* at 4, 6.⁴ The ALJ further found that PECO did not request that the Complainant take any action with regard to this pole at the time of the hearing. *Id.* at 7. Therefore, the ALJ dismissed the Complainant's concern that PECO will require him to repair or replace a pole that provides service to his neighbor, finding such a concern to be speculative. *Id.* The ALJ concluded that "[s]uch an anticipatory claim is not ripe for adjudication," and stated that the Complainant may file a future complaint should PECO require him to take action regarding the pole. *Id.* Accordingly, the ALJ dismissed, with

³ In her Finding of Fact No. 7, the ALJ refers to the pole that is the cause of the sagging wires as "the first private pole on Complainant's property." Similarly, in her Finding of Fact No. 8, the ALJ refers to this pole as "the first private pole." *Id.* at 4. However, testimony provided by PECO witness Herbert indicated that the pole that is causing the wires to sag is the second pole located along the pole line on the Complainant's property, and that the first pole on the Complainant's property was in good condition. Tr. at 109-110, 130; PECO Exh. 4.

⁴ In her Finding of Fact No. 10, the ALJ refers to this pole as the "second private pole on Complainant's property." *Id.* at 4. However, evidence provided in this proceeding indicates that this pole is the third pole situated along the pole line located on the Complainant's property. PECO Exh. 4.

prejudice, the Complainant's claim regarding the sagging wires, but dismissed, without prejudice, the claim regarding the second pole. *Id.* at 8.

Although the ALJ did not find evidence of an imminently dangerous condition on the Complainant's property, she directed that a copy of her Initial Decision be provided to the Commission's Bureau of Technical Utility Services "for its consideration of the poles and electrical wires at issue in this case, including those poles and electrical wires on Jeremy Kashuba's property that do not serve Complainant." *Id.*

Complainant's Exceptions

In his Exceptions, the Complainant disputes some of the ALJ's Findings of Fact, and states that the ALJ misunderstood his position. Specifically, the Complainant contends that the ALJ erred in her Finding of Fact No. 10, in which she stated that "[t]he second private pole on Complainant's property provides support for PECO wiring that leads to the neighbor's home and serves no benefit to Complainant." I.D. at 4. The Complaint asserts that both poles at issue in this case provide service to both the Complainant and his neighbor. Exc. at 1. Moreover, the Complainant contends that the ALJ mischaracterized his position when she stated that the Complainant was concerned that PECO may require him to repair or replace the second pole at some point in the future. The Complainant argues that since both poles at issue provide service to both the Complainant and his neighbor, PECO is forcing him to provide power to another property by requiring him to repair or replace either pole. *Id.* Thus, the Complainant asserts that his concern does not apply to something that may or may not happen in the future, as the ALJ appears to believe. *Id.*

The Complainant also disputes the ALJ's Finding of Fact No. 11, which states that "[b]oth the first and second private poles are more than 100 feet inside the property line of the customers." I.D. at 4. The Complainant avers that the first pole is

about seventy feet from the road. Exc. at 1. In addition, the Complainant contends that PECO's witness Herbert lied under oath when he stated that this pole was between 400 and 500 feet from the road, since the witness admitted that he never measured the distance. *Id.* The Complainant also attached copies of maps to his Exceptions, which purport to show the correct distances between a PECO-owned pole along the road bordering the Complainant's property, and various points on his property.

PECO's Replies to Complainant's Exceptions

In its Replies to Exceptions, PECO asserts that the ALJ's Initial Decision should be sustained, stating that the ALJ correctly concluded that PECO did not cause the wires on the Complainant's property to sag, and that the Complainant is responsible for making the repairs because he owns the poles. R. Exc. at 2, 3, 5. PECO contends that the Complainant does not allege that the ALJ committed an error of law or abused her discretion in any way, but that he excepts to the Initial Decision simply because he disagrees with it, and because he believes he provided adequate proof to support his position. R. Exc. at 2.

With respect to the Complainant's dispute of the ALJ's Finding of Fact No. 10 regarding the function of the second pole, PECO argues that, since that pole does not contain the sagging lines that are at issue, it is irrelevant to the outcome of this proceeding. *Id.* at 3. As for the Complainant's contention that PECO is forcing him to provide power to his neighbor by requiring him to replace either of the poles in question, PECO argues that the Complainant purchased the property that contains these poles, and reiterates its position that the Company is not responsible for them. *Id.* at 4.

With regard to the Complainant's challenge of Finding of Fact No. 11, and his allegation that PECO's witness Herbert lied under oath regarding the distance of the poles from the road, PECO contends that this distance is also irrelevant, as it does not

change the fact that the poles are private property poles that PECO does not own. *Id.* at 3. Moreover, PECO argues that Mr. Herbert visited the Complainant's property, investigated the poles and sagging lines, took photographs, and wrote a detailed report on his findings. Thus, PECO concludes that Mr. Herbert clearly documented his observations at the Complainant's premises to substantiate what he saw there, and had no reason to lie. *Id.* at 4.

Disposition

Upon consideration of the record evidence in this proceeding, we conclude that the Complainant has not met his burden of proof, and we will, therefore, uphold the ALJ's Initial Decision concerning dismissal of the Complaint. Initially, we find no evidence to support the Complainant's suggestion that PECO may have been the cause of the sagging electrical lines on the Complainant's property. According to the Complainant's testimony, he did not notice the sagging wires until "a couple months" after PECO had been in the area of his property to remove a fallen tree. Tr. at 10-11. In addition, the Complainant stated that the wires "were somewhat low to begin with" when he first moved to the property in September of 2011, though not as low as he later found them to be. *Id.* at 9. Thus, we find no evidence of a direct connection between the sagging wires and any work that PECO may have performed in the area of the Complainant's property.

In deciding the question of who is responsible for repairing the poles and sagging wires at issue in this case, we will rely on the applicable provisions of PECO's tariff. In doing so, we note that Commission-approved tariff provisions have the force of law and are binding on both the public utility and its customers. *Brockway Glass Co. v. Pa. PUC*, 437 A.2d 1067, 1070 (Pa. Cmwlth. 1981). Moreover, tariff provisions that have been approved by the Commission are *prima facie* reasonable. *Lynch v. Pa. PUC*, 594 A.2d 816, 819 (Pa. Cmwlth. 1991).

With regard to facilities located on private property, PECO's tariff provides
in part:

6. PRIVATE PROPERTY CONSTRUCTION

6.1 COMPANY'S SERVICE LINES. Where the Company has distribution facilities of adequate capacity on the highway or in other trunk line location (*sic*) adjacent to the premises to be served, it will provide, own and maintain standard service-supply lines as follows:

* * *

(b) AERIAL: A single span of aerial open wire or cable construction to the *first suitable support of the customer*, nominally 100 feet inside the property line of the customer. The customer's support shall be so located that the service span will be free of obstruction and adequately supported as required by the size and weight of the conductors.

* * *

6.3 CUSTOMER'S SERVICE EXTENSION. The customer shall provide, own and maintain the service extension from the Company's service-supply lines to the receiving equipment.

PECO Exh. 7 (emphasis added).

There is no dispute that the poles identified as needing to be repaired or replaced are located entirely on the Complainant's property. However, the Complainant appears to believe that the pole that was specifically determined to be the cause of the sagging wires is located less than 100 feet within his property line, and, therefore, should

be PECO's responsibility in accordance with the applicable tariff provision.⁵ While the Complainant may challenge PECO's assertion that this pole is located beyond the 100-foot limit designated in the tariff, the exact distance of this pole from the Complainant's property line is irrelevant, because this pole does not represent the "first suitable support of the customer," as required by the tariff language.

According to evidence provided by PECO, the first span of wire extending from PECO's pole to the Complainant's property terminates at a pole that is in good condition and in no need of repair. Tr. at 109-110; PECO Exh. 4. That pole at which the first span terminates is the first pole on the Complainant's property, and thus, represents the "first suitable support of the customer." According to PECO's tariff, the Company is responsible for the first span of wire up to that first private property pole, as PECO's witness Herbert admitted. Tr. at 109. However, the leaning pole and sagging wires are located *beyond* that first span of wire and first customer support. *Id.* at 110; PECO Exh. 4. Thus, regardless of the distance of the leaning pole from the Complainant's property line, that pole is not the "first suitable support of the customer," and, therefore, is not PECO's responsibility. Accordingly, we will deny the Complainant's Exceptions

⁵ In her Finding of Fact No. 11, the ALJ states: "Both the first and second private poles are more than 100 feet inside the property line of the customers." I.D. at 4. However, the record is not entirely clear on the exact distance of these poles from the Complainant's property line. PECO's witness Herbert appeared to assume that all the poles designated as private property poles on PECO's maps were, by definition, located beyond 100 feet of the Complainant's property line. Tr. at 118-119; PECO Exhs. 2A and 4. Mr. Herbert also estimated that the sagging wires were located between 400 and 500 feet beyond PECO's pole, which is situated near the Complainant's property line. Tr. at 135. However, the record does not reflect that PECO definitively measured these distances during the course of its investigation. In addition, although the Complainant attached maps to his Exceptions that purport to show the correct distances between various points on his property, this information was not introduced as evidence during the proceeding, and therefore, can be given no weight in our consideration of the matter. It is axiomatic that this Commission must base its decisions on the evidence of record, and we are prohibited from looking beyond the record for evidence not previously supplied to support a desired finding of fact and/or conclusion of law.

to the extent that they attempt to argue that PECO should be responsible for repairing the pole and the sagging wires.

With respect to the pole containing the PECO transformer, we agree with the Complainant that the ALJ appears to have misunderstood the function of this pole and the Complainant's position with regard to it. While the ALJ's Finding of Fact No. 10 states that this pole "serves no benefit to Complainant," we find that determination to be mistaken. Testimony provided by the Complainant, as well as evidence provided by PECO, indicates that this pole supports electric service to both the Complainant and his neighbor, as does the pole identified as being the cause of the sagging wires. Tr. at 9, 22-23; PECO Exh. 4.

In addition, we find that the ALJ was mistaken in her conclusion that the Complainant's concern regarding the pole with the transformer was speculative because PECO had not yet required the Complainant to take any action to repair or replace it. While it is true that PECO did not direct the Complainant to take any specific action with regard to this pole, PECO clearly informed the Complainant that he would be responsible for making any necessary repairs to the pole, as well as to the pole that is causing the wires to sag, as discussed above. Thus, we find PECO's position to be the same with respect to both poles at issue, and the Complainant's objection to PECO's holding him responsible for repairing facilities that serve both the Complainant and his neighbor applies equally to both poles. For this reason, we find no reason to distinguish between the issues surrounding the two poles in rendering a final disposition on the Complaint, as the ALJ has done. Accordingly, we will grant the Complainant's Exceptions with respect to the ALJ's determination of the function of the pole containing the transformer, and with regard to her characterization of the Complainant's position regarding this pole.

Notwithstanding our granting of the Complainant's Exceptions as set forth above, we find that PECO is not responsible for the repair or replacement of either pole at

issue in this proceeding, despite the fact that both poles support a power line that serves the Complainant's neighbor as well as the Complainant. As we stated above, there is no dispute that these poles are located entirely on private property, and that PECO is not responsible for them pursuant to the applicable provisions of its tariff.

Finally, we are concerned with regard to the potential safety hazard represented by the substandard condition of certain facilities identified in this proceeding. Specifically, the evidence indicates that the pole situated near the creek on the Complainant's property is in poor condition, is leaning badly, and contains hardware that is in need of repair. Tr. at 114; PECO Exh. 4. Moreover, the base of this pole appears to have been embedded in a type of concrete barrel, which PECO witness Herbert indicated did not conform to PECO standards. Tr. at 19, 134; PECO Exh. 3B. In addition, Mr. Herbert testified that the pole near the Complainant's residence that contains the transformer, as well as the configuration of the wires beyond that pole, may also be cause for concern. Mr. Herbert stated that, while the pole itself was in good condition, the connections were not current. Tr. at 128-129. In addition, Mr. Herbert noted that there are secondary wires that extend from this pole and proceed underground to serve the Complainant's house, and also pass underneath the house and become aerial once more in order to continue on to the neighbor's residence. Tr. at 103-104, 129; PECO Exh. 4. Mr. Herbert averred that such an arrangement was not consistent with PECO's construction standards. Tr. at 104, 129. Due to our concerns about the operational and safety issues relating to the condition of the poles and related facilities as identified in this proceeding, we shall refer these matters to the Commission's Bureau of Investigation and Enforcement (I&E) for whatever further action may be warranted.

Conclusion

In light of the above discussion, we shall: (1) grant, in part, and deny, in part, the Complainant's Exceptions; (2) modify the ALJ's Initial Decision, consistent with the above discussion; (3) dismiss the Complaint; and (4) refer the operational and safety matters identified above to I&E for whatever further action may be warranted; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Jeremy Kashuba, filed on June 25, 2013, to the Initial Decision of Administrative Law Judge Darlene R. Davis Heep, are granted, in part, and denied, in part, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Darlene R. Davis Heep, issued on June 6, 2013, is modified, consistent with this Opinion and Order.
3. That the Formal Complaint against PECO Energy Company, filed by Jeremy Kashuba on October 24, 2012, is dismissed, consistent with this Opinion and Order.
4. That the operational and safety matters identified in this Opinion and Order are referred to the Commission's Bureau of Investigation and Enforcement for whatever further action may be warranted, consistent with this Opinion and Order.

5. That the proceeding at Docket No. C-2012-2333019 shall be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: December 5, 2013

ORDER ENTERED: December 5, 2013



EXHIBIT D

IN THE SUPREME COURT OF PENNSYLVANIA

Alderwoods (Pennsylvania), Inc., :
Appellee :
 :
v. : **No. 12 WAP 2013**
 :
Duquesne Light Company, :
Appellant :
 :
 :

**BRIEF OF AMICUS CURIAE PENNSYLVANIA PUBLIC UTILITY
COMMISSION IN SUPPORT OF
APPELLANT DUQUESNE LIGHT COMPANY**

On Petition for Allowance of Appeal from the Order of the Superior Court of Pennsylvania dated July 27, 2012 at No. 1967 WDA 2010, Reversing the Order of the Court of Common Pleas of Allegheny County, Civil Division, at No. GD-09-14720, dated March 8, 2011.

Kenneth R. Stark
Assistant Counsel

Patricia T. Wiedt
Assistant Counsel

Robert F. Young
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Bohdan R. Pankiw
Chief Counsel

Counsel for Pennsylvania
Public Utility Commission

P.O. Box 3265
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Dated: July 24, 2013

Case ID: 140702640
Case ID: 140702640
Control No.: 14091858
Control No.: 14102440

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STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, the Pennsylvania Public Utility Commission ("Commission" or "PUC") files this brief *amicus curiae* to explain its statutory role in regulating electric utilities regarding service outage and restoration practices and issues pursuant to the Public Utility Code. The Commission is very concerned that in the Opinion and Order below, the Superior Court imposed a burdensome and unprecedented duty upon electric utilities. This newly imposed duty upon electric utilities will increase costs for consumers and utilities as well as delay efforts by electric utilities to restore power after storms and other outages. Furthermore, the Superior Court's ruling intrudes upon the PUC's statutory duty to regulate service, restoration practices, and duties of public utilities. See 66 Pa. C.S. §§ 501, 1501.

STATEMENT OF ISSUES AS RAISED BY PETITIONER

1. Whether the Superior Court erred in imposing upon electric utilities a burdensome and unprecedented duty to enter customers' premises and inspect customers' electrical facilities before restoring power after an outage?

Suggested answer: yes.

2. Whether the Superior Court overlooked the deleterious effects of its ruling upon public health and safety, in that by requiring utilities to inspect customers' premises before restoring power, the new duty created by the Superior Court will delay utilities' efforts to restore power after storms and other outages?

Suggested answer: yes.

3. Whether the Superior Court overlooked undisputed facts of record that undermine the rationale of its decision?

Suggested answer: The PUC will not address this question in this amicus brief.

STATEMENT OF THE CASE

The Commission, the *amicus curiae*, incorporates by reference and adopts the Statement of the Case as set forth in the brief of Appellant Duquesne Light (Duquesne).

SUMMARY OF ARGUMENT

The Superior Court has imposed a burdensome and unprecedented duty upon electric utilities to inspect customer equipment after storms and outages. This new duty will increase consumer costs and delay efforts to restore electric service. An electric utility does not have a duty to enter a customer's premises and inspect customer equipment under the Public Utility Code. As the expert in utility law, the PUC is charged with administering the Code and regulating electric utilities in Pennsylvania.

An electric utility only has a duty to inspect its own transmission and distribution facilities. An electric utility's maintenance responsibility and legal duties end at the point of delivery, *i.e.*, service point, to the customer. The service point is where the utility's wiring ends and the customer's wiring begins. Beyond the service point, the customer is responsible for maintenance of its internal wiring and electrical equipment.

The Superior Court mistakenly found a duty in its analysis of the negligence claim in this case. Prompt restoration of power has great social utility and is expected by customers. Duty should only be imposed when there is a *reasonable foreseeability* that a party's conduct creates an unreasonable risk of harm to others. Requiring the electric utility to only inspect its *own* facilities prior to service restoration does not create an unreasonable risk of harm. Imposing this new duty

of inspection on electric utilities is not in the public interest because it is both severely burdensome and costly to utilities and customers. Accordingly, the new and unprecedented duty of inspection imposed by the Superior Court is contrary to the Public Utility Code, relevant case law, and the public interest.

ARGUMENT

Pursuant to Rule 531 of the Pennsylvania Rules of Appellate Procedure, the PUC files this brief *amicus curiae* to inform this Honorable Court as to the PUC's role in regulating electric utilities and the effect of the Superior Court's decision on electric utilities and electric utility customers throughout Pennsylvania.

I. Introduction: The Regulatory Purview And Expertise Of The Commission

The PUC's mission entails ensuring safe and reliable utility service at reasonable rates, protecting the public interest, and fostering new technologies and competitive markets in an environmentally sound manner. The Commission's administrative expertise in public utility law includes the interpretation of its regulations and its governing statute, the Public Utility Code. *Aronson v. Pa. Public Utility Commission*, 740 A.2d 1208, 1211, *appeal denied*, 751 A.2d 193 (Pa. 2000). The Commission regulates public utilities in Pennsylvania, including Duquesne, an electric distribution company (EDC). *See* 66 Pa. C.S. §§ 501, 1501.

A. Service Outage And Restoration Under The Public Utility Code

Under the Public Utility Code, an electric utility in Pennsylvania has a legal duty to maintain safe and reasonable service and facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. 66 Pa. C.S.

§ 1501. Pursuant to its statutory powers, the Commission is authorized to adopt and enforce rules to ensure that EDCs, i.e., electric utilities, provide safe, adequate, and reliable service. 66 Pa. C.S. § 501. The Commission must ensure that electric utilities adhere to the established industry standards and practices, such as the standards of the National Electrical Safety Code (NESC)¹, regarding the installation and maintenance of transmission and distribution facilities. 66 Pa. C.S. § 2804(1); 52 Pa. Code §§ 57.194(b), 57.198(b). Commission staff may initiate an investigation, or may do so upon complaint by an affected party, to determine whether an electric utility is providing utility service in accordance with such standards. 52 Pa. Code § 57.197(a).

In performing its mission to serve the public interest and all customers of the Commonwealth, the Commission strives to balance the reliability of utility service with affordability of utility service. *See Prevention and Mitigation of Extended Service Outages*, Commission Order, Docket No. I-2011-2271989 (Nov. 10, 2011). As to restoration of electric service after an outage, the Commission emphasizes the speed of restoration since customers expect their power to be restored as quickly as possible. *See* 52 Pa. Code § 67.1 (requiring utilities to report certain

¹ The NESC is maintained and published by the Institute of Electrical and Electronics Engineers, Inc. The current edition of the NESC is the 2012 Edition, approved as an American National Standard on June 3, 2011 by the American National Standards Institute. General references to the NESC in this brief will be to the "NESC" while specific citations to the NESC will be to the "2012 NESC."

outages when service is not restored within specified times).² The Commission has also enacted policies to encourage utilities to provide better public notification to customers regarding service outages and estimated restoration times. *See* 52 Pa. Code § 69.1901 (providing guidelines for electric utilities).³ However, for sound reasons of policy and law, the Public Utility Code and established industry standards and practices do not impose a duty upon electric utilities, beyond the maintenance of utilities' own transmission and distribution facilities, to enter customers' premises and inspect customers' electrical equipment before restoring power after an outage. *See* 66 Pa. C.S. § 2804(1) (adopting the NESC).

B. The Service Point Of Electricity Separates Ownership And Maintenance Responsibility Between The Electric Utility And The Customer

The Commission and courts have long recognized that the ownership and maintenance responsibility of an electric utility ends at the point of delivery to the customer. *Hineline v. Metro. Edison Co.*, 1990 Pa. PUC LEXIS 156, at *6 (Pa. PUC 1990); *Norris v. Phila. Elec. Co.*, 5 A.2d 114, 116 (Pa. 1939) (holding that electric utility companies do not have a duty to inspect customer equipment).

Under the standards of the NESC, adopted by the Public Utility Code, the point of delivery is known as the service point. 2012 NESC, § 2: Definitions, at p. 15

² *See also Proposed Rulemaking for Revision of 52 Pa Code Chapters 57, 59, 65, and 67 Pertaining to Utilities' Service Outage Response and Restoration Practices*, Final Rulemaking Order, Docket No. L-2009-2104274 (Sep. 22, 2011).

³ *See also Policy Statement Regarding Utility Service Outage Public Notification Guidelines*, Final Policy Statement, Docket No. M-2008-2065532 (Dec. 15, 2011).

(2012).⁴ The service point is the point of connection between the distribution facilities of the serving utility delivering the electricity and the premises wiring system of the customer. *Id.* The premises are the land and buildings located on the user (customer) side of the service point. *Id.* The premises wiring system is the “[i]nterior and exterior wiring, including power, lighting, control, communication, and other signal circuit wiring together with all their associated hardware, fittings, and wiring devices, both permanently and temporarily installed...from the service point or the premises power source to the outlets.” *Id.* In other words, the service point is the point on the wiring system where the utility’s wiring ends and the customer’s wiring begins.⁵ *See id.* (explanatory note).

The service point is also the jurisdictional line of demarcation between two national codes: (1) the NESC and (2) the National Electrical Code (NEC).⁶ *See* Appendix A (2012 NESC Figure 011-1 – Service point – General illustration of what is covered and not covered by the NESC). The Public Utility Code adopts the standards of the NESC and requires electric utilities to adhere to the NESC

⁴ The NESC standards and definitions cited in this brief were revised in the 2012 Edition. “The Scope, Application, and Definition rules were extensively revised in 2012 to better reflect the historical application of the NESC versus the NEC. The changes in Rules 010 – Purpose and 011 – Scope are not changes in either scope of purpose; they are clear statements of the almost 100-year application of the requirements of the NESC to the specified circumstances.... 2012 NESC, Foreword at p. iv (emphasis added).

⁵ The serving electric utility generally specifies the location of the service point based on the utility’s condition of service. Exact locations for a service point vary from utility to utility and from premises to premises, but service points are often located on the rooftop of a premises. *See* 2012 NESC, § 2: Definitions, at p. 15.

⁶ The National Electrical Code (“NEC”) is published and maintained by the National Fire Protection Association. The NEC is also an American National Standard.

maintenance and installation standards for transmission and distribution facilities. 66 Pa. C.S. § 2804(1). The NEC, which governs electricians and building contractors and not public utilities, provides standards for the safe installation of electrical wiring inside the premises (*i.e.*, the premises wiring system).⁷ The 2012 NESC clarifies the relative applicability of the NESC versus the NEC. 2012 NESC Standard 011.B.1 at p. 2 (“NESC Rules do not cover: 1. [u]tilization equipment or premises wiring located beyond the service points to buildings or outdoor installations....”).

Beyond the service point, the customer owns and assumes the responsibility for the maintenance and security of the premises wiring. *See Hineline*, 1990 Pa. PUC LEXIS 156, at *6; NESC definition of premises wiring at p. 13 (“[S]uch wiring does not include ... utility equipment and wiring on the utility side of the service point.”). Requiring utilities to perform inspections of customer wiring prior to service restoration after an outage would increase costs to both utilities and customers. *Hineline* at *7-8. An electric utility may provide a customer with a list of recommended electricians, but utility jurisdiction and responsibility do not extend to inspection of customer equipment and wiring. *See e.g.*, Duquesne Light: Construction and Renovation, <https://www.duquesnelight.com/forYour->

⁷ See <http://www.nfpa.org/codes-and-standards/document-information-pages?mode=code&code=70> (last accessed Jul. 2, 2013); see also <http://www.nema.org/Technical/FieldReps/Pages/National-Electrical-Code.aspx> (last accessed Jul. 2, 2013).

Home/Customerservice/ConstructionandRenovation.cfm (offering to work with builders and licensed electricians to assist customers) (last accessed Jul. 2, 2013). Indeed, as more fully explained below, the time and expense of a newly imposed obligation on electric utilities to inspect the internal wiring of all premises impacted by a major storm, such as Hurricane Sandy, would be substantial, and would further and unreasonably delay the restoration of power to all affected customers. There is no such existing obligation on electric utilities in the Public Utility Code, the NESC or Commission regulations, nor should such a new obligation be created by the Superior Court ruling below.

Accordingly, the ownership and maintenance responsibility and legal duties of an electric utility end at the service point of electricity to the customer.

C. Commission Regulation Of Electric Utility Service And Reliability

Under Section 1501 of the Public Utility Code the Commission has long regulated electric utilities to ensure they provide safe, adequate and reliable electric service to the public. 66 Pa. C.S. § 1501. The Commission must also balance the reliability of service with affordability of service; an electric distribution system completely immune to outages would not be affordable for most customers. When the Electricity Generation Customer Choice and Competition Act became effective January 1, 1997, the Commission began examining the electric utilities' inspection, maintenance, repair and replacement internal standards. 66 Pa.C.S §2802. In 1998

the Commission adopted a Final Rulemaking Order, Docket No. L-00970120, setting forth various reporting requirements designed to ensure the continuing safety, adequacy, and reliability of the generation, transmission, and distribution of electricity in the Commonwealth. *See* 52 Pa. Code §§ 57.191-57.197. These reporting requirements included, *inter alia*, descriptions of each major event affecting reliability, the achieved values on various reliability indices monitored by the Commission, analysis of major outages during the study, and a list of remedial efforts taken for the electric utility's worst performing 5% of circuits. *See id.*

On June 12, 2002, the Legislative Budget and Finance Committee (LB&FC) issued a Report entitled, *Assessing the Reliability of Pennsylvania's Electric Transmission and Distribution Systems*. Available at <http://bfc.legis.state.pa.us/re-ports/2002/144.PDF>. The LB&FC Report made several recommendations regarding the issue of reliability, including revising and enhancing electric utility reliability reporting requirements and performance monitoring standards, clarifying reporting requirements regarding the exclusion of data for major events, requiring formal waivers for electric utilities unable to comply with all reporting requirements, and completing the pending inspection and maintenance study by Commission staff. *Id.*

On July 18, 2002, at Docket No. M-00021619, the Commission adopted its Bureau of Conservation Economics and Energy Planning's (CEEP) *Inspection and*

Maintenance Study of Electric Distribution Systems dated July 3, 2002. CEEP, in part, recommended that the annual reliability reporting requirements be revised to include the causes of outages and percentages categorized by type as well as the annual reporting of each company's planned inspection and maintenance activities including: (1) vegetation management; (2) distribution and substation maintenance activity; and (3) capital improvement projects.

On June 27, 2003, at Docket No. L-00030161, the Commission adopted proposed regulations governing the reliability of electric service in Pennsylvania. On May 7, 2004, a final rulemaking order was entered in *Rulemaking Re Amending Electric Service Reliability Regulations at 52 Pa. Code Chapter 57*. Docket No. L-00030161. On April 20, 2006, the Commission adopted a proposed rulemaking order seeking to implement proposed minimum inspection, maintenance, repair and replacement ("I&M") standards on electric utilities. Docket No. L-00040167. The Proposed Rulemaking Order added a regulation at 52 Pa. Code § 57.198 which proposed minimum standards regarding vegetation maintenance, pole, line, reclosers, sub-station inspections, maintenance, and repair standards as well as directing electric utilities to file biannually plans with annual updates in compliance with the minimum standards. *Id.* On May 22, 2008, the Commission adopted a Final-Form Rulemaking Order which implemented minimum inspection, maintenance, repair and replacement standards on electric utilities operating in the

Commonwealth. Docket No. L-00040167. These regulations became effective on September 27, 2008. See 52 Pa. Code § 57.198.

D. Duty Of Electric Utilities Regarding The Inspection Of Neutral Connections

In February 2010, the Commission initiated a proceeding to consider whether to amend its inspection and maintenance standards to require electric utilities to inspect neutral connection wires. *Advance Notice of Proposed Rulemaking for Revision of 52 Pa. Code Chapter 57*, Commission Order, Docket No. L-2008-2044821 (Feb. 25, 2010) (hereinafter Chapter 57 Rulemaking Investigation). In the Chapter 57 Rulemaking Investigation, the Commission evaluated the necessity of additional standards requiring electric utilities to inspect, maintain, repair, and replace damaged neutral connections.⁸ *Id.*

Given that the continued reliability of electric service depends on adequate generation and on conscientious inspection and maintenance of transmission and distribution systems, the Commission must set and enforce appropriate regulatory standards to ensure reliable electric service. 66 Pa. C.S. § 2802(20). The Public Utility Code also requires electric utilities to comply with the NESC standards

⁸ A neutral connection is a wire that provides a return path to complete the flow of electricity so that all appliances can operate. A damaged neutral connection can cause an uneven flow of electricity that results in voltage fluctuations and power surges that have the potential to cause damage to a home and appliances in the home. Weather related oxidation can damage a neutral connection. *Advance Notice of Proposed Rulemaking for Revision of 52 Pa. Code Chapter 57*, Advanced Notice of Proposed Rulemaking Order, Docket No. L-2008-2044821, at p. 2. and fn. 2 (Jul. 17, 2008).

regarding the installation and maintenance of transmission and distribution facilities. 66 Pa. C.S. § 2804(1)(ii). Section 214A of the 2012 NESC provides that lines and equipment should be inspected and tested as necessary. Additionally, lines and equipment with recorded defects that could reasonably be expected to endanger life or property must be promptly repaired, disconnected, or isolated. 2012 NESC, § 214A.

In the Chapter 57 Rulemaking Investigation, the numerous commenting parties, from which the Commission solicited comments, were generally opposed to the Commission adopting specific inspection and maintenance standards at transformers and lines for neutral connections. Chapter 57 Rulemaking Investigation. The Commission concluded that adopting specific standards for neutral connections would be unnecessary, cost prohibitive, and of minimal value in comparison to the significant cost of over \$85 million per year in the aggregate to the electric utilities for compliance. *Id.* These significant compliance costs to the electric utilities would result in increased rates for customers with minimal increased benefits regarding service reliability. *Id.* The Commission noted that neutral connection failures are low in number compared to other common causes of outages that require more Commission tracking and oversight. *Id.* Accordingly, the Commission withdrew and discontinued the Chapter 57 Rulemaking Investigation.

Even though these neutral connections are located at lines and transformers as part of an electric utility's transmission and distribution facilities, the Commission determined that imposing a heightened duty for electric utilities to inspect these neutral connections was not in the public interest. In this instant case, imposing a duty on the electric utility to inspect customer wiring/equipment prior to service restoration after an outage is not only also cost-prohibitive and not in the public interest, but also is beyond the utility's jurisdiction and responsibility. The Commission did not impose a duty on electric utilities to inspect neutral connections that are a part of the utilities' own wiring and facilities. By requiring an electric utility to inspect inside the customer's premises beyond the service point, the Superior Court has gone even further than the Commission regarding a utility's duty of inspection.

II. The New And Unprecedented Duty Imposed By The Superior Court On Electric Utilities Is Burdensome And Contrary To The Public Interest

The Commission respectfully contends that the Superior Court erred in imposing upon electric utilities a burdensome and unprecedented duty to enter customers' premises and inspect customers' electrical equipment before restoring power after an outage. This new duty is contrary to the public interest as it will increase costs for electric utilities and consumers and delay utilities' efforts to restore power after storms and other outages. *See Craft v. Pa. Elec. Co.*, 1976 Pa. PUC LEXIS 95, at *7-8 (Pa. PUC 1976).

A. Case Law And Regulatory Practice Demonstrate That An Electric Utility Has No Duty To Inspect Customer Equipment Before Restoring Power After An Outage

In its Opinion and Order below, the Superior Court specifically erred by deciding to apply the duty factors from *Althaus v. Cohen*, 756 A.2d 1166, 1168 (Pa. 2000), to the facts of this case. While the existence of a duty is a question of law for the court to decide, *see R.W. v. Manzek*, 888 A.2d 740, 746 (Pa. 2005), a court may provide deference to the expertise and determinations of a regulatory agency when regulatory practice and case law already clearly provide a line of demarcation between the duties of two parties. *See Popowsky v. Pa. Public Utility Commission*, 706 A.2d 1197 (Pa. 1997) (providing deference to PUC determinations based on PUC's expertise in utility regulation); *see also Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (observing the importance of utilizing an administrative "agency's special experience and expertise in complex areas with which judges and juries have little familiarity").

As discussed *supra*, the ownership and maintenance responsibility of an electric utility ends at the point of delivery, *i.e.*, the service point, to the customer. *See Hine*, 1990 Pa. PUC LEXIS 156, at *6; *Norris*, 5 A.2d at 116. This Court has held that after an electric utility properly installs and maintains its lines, there is "no continuing duty of inspection" upon the utility. *Reed v. Duquesne Light Co.*, 47 A.2d 136, 139 (Pa. 1946) (observing that imposing a duty here would require

"constant surveillance" by the utility). An electric utility's duty of inspection only applies to its own facilities. *Dunnaway v. Duquesne Light Co.*, 423 F.2d 66, 70 (3d Cir. 1970) (citing *Reed*, 47 A.2d at 139); *Luketich v. Duquesne Light Co.*, 132 A.2d 268, 270 (Pa. 1957).

B. The Superior Court Erred In Its Application Of The *Althaus* Duty Factors

Even if this Honorable Court still wants to investigate any potential duty for purposes of a negligence claim, the Commission contends that the Superior Court erred in finding a legal duty when applying the *Althaus* factors to the facts of this case. See *Alderwoods v. Duquesne Light Co.*, 52 A.3d 347 (Pa. Sup. Ct. 2012). In *Althaus*, this Honorable Court explained that a court weighs the following discrete factors in determining whether a duty exists in a particular case: "(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution." 756 A.2d at 1169. In *Althaus*, this Court stressed that a reviewing court must carefully weigh the risk, foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the actor. *Id.*

1. Nature Of Relationship Between Customer And Utility

In discussing the first duty factor, relationship between the parties, the Superior Court merely stated that Duquesne provided electricity to the Hirsch Funeral Home (Hirsch). Without expounding upon the nature of the relationship, especially with respect to the specific facts of the case, the Superior Court generally concluded that this factor weighed in favor of imposing a duty upon Duquesne. *Alderwoods*, 52 A.3d at 353.

Duquesne's duty and relationship to Hirsch extends to maintaining safe and reasonable service of its transmission and distribution facilities and to make repairs, changes, and improvements that are necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. *See* 66 Pa. C.S. §§ 1501, 2804. Duquesne is Hirsch's electric utility; however, Duquesne is not Hirsch's electrician. Accordingly, since Duquesne does not have a relationship to Hirsch with respect to the inspection of Hirsch's damaged electrical panel box where the fire began, this factor weighs in favor of not imposing a duty upon Duquesne.⁹

⁹ As discussed earlier in this Brief, electric utilities must maintain their distribution and transmission facilities in compliance with the NESC, rather than the NEC which governs in-premises wiring. While an electric utility's field employees are likely competent to work with in-premises wiring, the electric utilities do not generally train their employees for NEC compliance, much less obtain the licenses and certifications necessary to routinely inspect in-premises wiring. There is nothing in the Public Utility Code or Commission regulations that requires electric utilities to train their employees in the NEC.

2. Prompt Restoration Of Electric Service And Power Has Great Social Utility

The Superior Court found that requiring the electric utility to inspect a customer's electrical power panel box prior to service restoration outweighs the social utility of prompt restoration of power. *Alderwoods*, 52 A.3d at 353. In supporting its finding, the Superior Court found persuasive Hirsch's averments that an inspection by Duquesne was feasible and would have prevented the destruction caused by the resulting fire. *Id.*

In its analysis of social utility, the Superior Court only weighed the feasibility of Duquesne to inspect Hirsch's damaged electrical panel box in this case and not the social utility of an electric utility's obligation to promptly restore power for all customers in all outage situations throughout the Commonwealth of Pennsylvania. Since customers want their power restored as quickly as possible after an outage, Commission policies and regulations emphasize the speed of restoration after an outage. *See* 52 Pa. Code § 67.1 (requiring utilities to report certain outages within specified times when service is not restored); *see also Proposed Rulemaking for Revision of 52 Pa Code Chapters 57, 59, 65, and 67 Pertaining to Utilities' Service Outage Response and Restoration Practices*, Final Rulemaking Order, Docket No. L-2009-2104274 (Sep. 22, 2011). The Commission's reliability indices require each electric utility to track the frequency

and duration of outages.¹⁰ Accordingly, given the great social utility of prompt restoration of electric service and power to customers generally, this factor weighs in favor of not imposing a duty upon Duquesne.

3. Any Potential Harm Or Risk Is Not Sufficiently Concrete Or Foreseeable To Require Imposing A Duty Of Inspection

In finding that this factor weighed in favor of imposing a duty, the Superior Court determined that “the nature of risk and harm resulting from a power surge, following contact between the primary and secondary conductors was reasonably foreseeable” because Duquesne had “actual knowledge...that the restoration of power under such circumstances could cause a fire.” *Alderwoods*, 52 A.3d at 355.

However, duty only arises and should only be imposed when there is a *reasonable foreseeability* that a party’s conduct creates an unreasonable risk of harm to others. *Alderwoods*, 52 A.23d at 353 (citing *Manzek*, 888 A.2d at 747). An electric utility’s knowledge of a potential power surge after contact between primary and secondary conductors creates a general possibility, plausibility, or

¹⁰ Per 52 Pa.Code §57.191 the reliability indices are:

(i) *CAIDI—Customer Average Interruption Duration Index*—The average interruption duration of sustained interruptions for those customers who experience interruptions during the analysis period...

(ii) *MAIFI—Momentary Average Interruption Frequency Index*—The average frequency of momentary interruptions per customer occurring during the analysis period. ...

(iii) *SAIDI—System Average Interruption Duration Index*—The average duration of sustained customer interruptions per customer occurring during the analysis period. It is the average time customers were without power. ...

(iv) *SAIFI—System Average Interruption Frequency Index*—The average frequency of sustained interruptions per customer occurring during the analysis period.

conceivability of harm. This general plausibility is not the same as reasonable foreseeability to the specific factual situation; otherwise, the doctrine of foreseeability would know no bounds, for a fire occurring somewhere after a downed electrical line was restored to service would always be generally plausible. Furthermore, Duquesne did not inspect the electrical equipment of the other nearby customers before restoring power and the fact that those customers did not experience any problems goes against the finding that Hirsch's fire was reasonably foreseeable.

In relying on the facts of *Poorbaugh v. Pa. Public Utility Commission*, 666 A.2d 744 (Pa. Cmwlth. 1995), the Superior Court observed that the facts of *Poorbaugh* were similar to the facts of this case and thereby demonstrated foreseeability of harm. First, the Superior Court's reliance on *Poorbaugh* is improper and misplaced because the court in *Poorbaugh* did not draw legal conclusions in applying those facts to the rules of duty and foreseeability; rather, the *Poorbaugh* court only discussed a jurisdictional issue and did not conduct an analysis of the duty of an electric utility to its customer.¹¹ Second, the *Poorbaugh* opinion does not provide enough facts to determine whether the facts of the two cases are sufficiently analogous. Third, factual distinctions between the cases can

¹¹ In *Poorbaugh*, the Commonwealth Court evaluated the doctrine of primary jurisdiction and whether the case should have been transferred from the Court of Common Pleas to the Public Utility Commission. 666 A.2d at 750 ("The overriding issue is whether *Poorbaugh's* allegations against West Penn required judicial abstention and transfer of the matter from the trial court to the PUC. We conclude that they did not.").

be made. The *Poorbaugh* court noted the allegations of negligence were directed at the utility's maintenance of its own facilities. 666 A.2d at 745-46.

In sum, requiring the electric utility to only inspect its *own* facilities does not create an unreasonable risk of harm. Accordingly, this factor weighs in favor of not imposing a duty upon Duquesne.

4. The Detrimental Consequences Of Imposing A Duty On The Electric Utility To Inspect A Customer's Electrical Panel Box Before Restoring Power

The Superior Court found that the consequences of imposing a duty upon Duquesne to inspect or warn a customer "under the facts alleged [did] not place an undue burden upon Duquesne." *Alderwoods*, 52 A.3d at 355. The Superior Court surmised that inspecting a single customer's electrical equipment prior to restoring electric service would not create an undue burden. *Id.* While imposing this duty on the electric utility for a single customer in an isolated incident does not on its surface appear to create an undue burden, the Superior Court did not take into account the full consequences of imposing this duty on an electric utility with respect to *all* customers throughout the Commonwealth.

In discussing this fourth duty factor, the Superior Court kept referring to "the defendant's conduct" instead of "the actor's conduct," as the factor is described in *Althaus*. See *Alderwoods*, 52 A.3d at 352. The Superior Court established new legal precedent in imposing a duty of inspection on an actor, *i.e.*, the electric

utility, before restoration of power. In its simplified analysis, the Superior Court did not fully appreciate the consequences of placing this severe burden on *all* similarly situated actors, *i.e.*, all electric utilities in Pennsylvania, to inspect customer electrical equipment before restoration of electric service after *all* storms and outages.

In its opinion, the Superior Court did not curtail or limit the imposition of this duty of inspection to small storms or specific types of outages. Requiring electric utilities to field electricians to inspect customer equipment before service restoration after all storms and outages would drastically increase costs, resources, and manpower. For example, during Hurricane Sandy of October 2012, PPL Electric Utilities Corporation ("PPL") estimated an expected need of 437 company linemen, approximately 400 contracted linemen, 300 vegetation management personnel, and 1,144 other personnel. Summary Report of Outage Information Submitted by Electric Distribution Companies Affected by Hurricane Sandy October 29-31, 2012, p. 58 (prepared by PUC Bureau of Technical Utility Services, May 2013). During the storm, PPL actually utilized 2,274 linemen resources. *Id.* at 52. As a result of Hurricane Sandy, PPL had to replace 619 poles, 501 transformers, and 1,494 crossarms. *Id.* at 32. Seventy-six miles of spans of wire were also damaged. *Id.* In total, 523,936 PPL customers were affected by Hurricane Sandy. *Id.* at 31.

If utilities were required to hire or subcontract electricians to inspect the interior of all residential, business, and industrial premises before service restoration, even simple outages could take days to weeks to address. Every customer within a circuit or section of the area affected by the outage would have to provide the utility with an electrician's certificate ensuring that the customer's electrical box is safe before the electric utility could restore power to the entire affected area. If a customer is on vacation for two weeks, the utility would have to wait to get permission to enter that customer's premises before restoring power to the customer. Consequently, power restoration after storms and other outages would be significantly delayed to the detriment of customers who expect prompt restoration in order to turn back on appliances, to preserve food in refrigerators and freezers, or to conduct other business operations.

Accordingly, this factor weighs in favor of not imposing a duty upon Duquesne.

5. The Overall Public Interest In Not Imposing A Duty

Without conducting a thorough analysis, the Superior Court found that weighing the public interest in restoring electric service safely against the prompt restoration of power did not tip the scales in favor of either party. *Alderwoods*, 52 A.3d at 355-56.

As discussed, imposing a duty of inspection on electric utilities would significantly delay restoration after storms and other outages to the detriment of customers who expect prompt restoration at reasonable costs in order to turn back on appliances, to preserve food in refrigerators and freezers, or to conduct other business operations. Furthermore, due to increased costs of inspection, customers/ratepayers would realize increased rates in their electric bills. Under Section 1301 of the Public Utility Code, utility rates for customers must be "just and reasonable." 66 Pa. C.S. § 1301.

The overall public interest goals of prompt restoration of power and reasonable rates for customers easily outweigh imposing a duty on electric utilities to inspect individual customer electrical equipment before service restoration. Accordingly, this factor weighs in favor of not imposing a duty upon Duquesne.

III. Conclusion Of Argument And The Commission's Regulatory Role

The Commission adopts and enforces rules to ensure that electric utilities provide safe, adequate, and reliable service at just and reasonable rates for its customers. 66 Pa. C.S. §§ 1301, 1501. The PUC actively regulates electric utilities with respect to utilities' service outage response and restoration

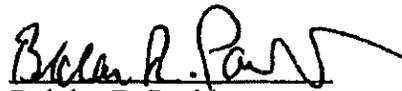
practices.¹² While the PUC has been actively regulating utilities on service restoration, the Commission has not imposed a duty on electric utilities to enter the interior of the premises beyond the service point to inspect customer equipment and wiring. In its opinion below in this case, the Superior Court intruded on the PUC's statutory duty to regulate service duties of public utilities. *See* 66 Pa. C.S. §§ 501, 1501.

¹² *See Prevention and Mitigation of Extended Service Outages*, Commission Order, Docket No. I-2011-2271989 (Nov. 10, 2011); *see also Proposed Rulemaking for Revision of 52 Pa Code Chapters 57, 59, 65, and 67 Pertaining to Utilities' Service Outage Response and Restoration Practices*, Final Rulemaking Order, Docket No. L-2009-2104274 (Sep. 22, 2011); *see also Policy Statement Regarding Utility Service Outage Public Notification Guidelines*, Final Policy Statement, Docket No. M-2008-2065532 (Dec. 15, 2011); *see also Advance Notice of Proposed Rulemaking for Revision of 52 Pa. Code Chapter 57*, Commission Order, Docket No. L-2008-2044821 (Feb. 25, 2010) (hereinafter Chapter 57 Rulemaking Investigation).

CONCLUSION

For the foregoing reasons, the Pennsylvania Public Utility Commission, acting as *Amicus Curiae*, respectfully request this Honorable Court to reverse the July 27, 2012 Order of the Superior Court.

Respectfully submitted,



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Chief Counsel
Attorney ID #24825

Robert F. Young
Deputy Chief Counsel

Kenneth R. Stark
Assistant Counsel

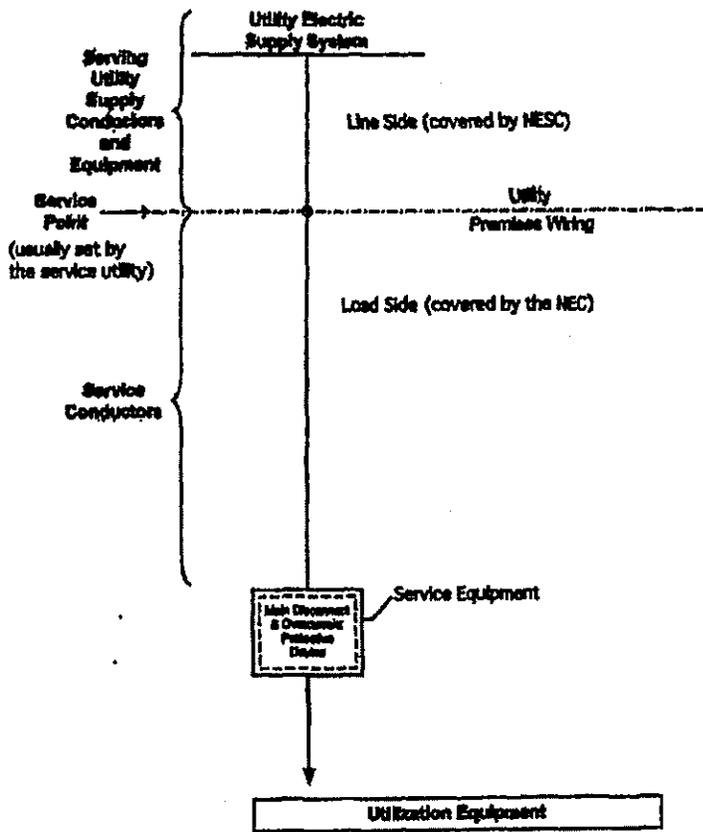
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Date: July 24, 2013

Appendix A



**ILLUSTRATION
UTILITY ELECTRIC SUPPLY AND
PREMISES WIRING**

Figure 011-1—Service point—General illustration of what is covered and not covered by the NESC

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document, Brief of *Amicus Curiae* In Support of Appellant, upon the persons listed and in the manner indicated below:

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Dated: July 24, 2013

EXHIBIT E

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

Public Meeting held August 18, 2010

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman
John F. Coleman, Jr.
Wayne E. Gardner
Robert F. Powelson

John Norbeck, Director, Bureau of State Parks,
Pennsylvania Department of Conservation and
Natural Resources

C-2008-2051267

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration are the Exceptions filed on behalf of John Norbeck, Director, Bureau of State Parks, Pennsylvania Department of Conservation Natural Resources (Complainant or DCNR¹) on May 12, 2010, to the Initial Decision (I.D.) of Administrative Law Judge Cynthia Williams Fordham (ALJ or ALJ Fordham), issued on April 22, 2010. Reply

¹ DCNR will also be used to denote one of its predecessor agencies, the Department of Forests and Waters.

Exceptions were filed by PECO Energy Company (Respondent or PECO) on May 21, 2010.

Background

In 1966 the Commonwealth of Pennsylvania acquired the land in Delaware County on which Ridley Creek State Park (Park) was built. The Park was completed in 1972. Prior to 1972, electric service was provided by an aerial line within the Park. PECO offered to provide electric service through the Park using aerial facilities, but the Bureau of Parks requested underground service for aesthetic reasons. After PECO refused to install an underground cable, the Bureau of Parks hired a contractor to install an underground cable. The underground cable is a 5,000 volt (4,160 volt) primary cable that provides service to several structures within the Park. The underground cable runs from the Park boundary on Gradyville Road to transformers and meters within the Park that are owned and maintained by PECO. The underground cable provides service to four accounts; two general service commercial accounts that serve DCNR facilities, one residential account that serves a residence leased from DCNR and a commercial general service account for the equestrian concession leased from DCNR. The residence and the concession are responsible for their own accounts with PECO. Findings of Fact Nos. 15, 19, 21-26, 38-44; I.D. at 10-14. DCNR M.B. at iv-v.

On August 3, 2007, there was an electric service outage at the Park and at other PECO customers in the vicinity located outside of the Park. The Park Ranger contacted PECO prior to 8:00 a.m. Sometime before 4:00 p.m., service to the other PECO customers outside of the Park had been restored, but not the four accounts within the Park. The PECO service crew notified DCNR staff that they located a break in the underground cable and DCNR staff gave PECO permission to repair the cable. Subsequently, PECO determined there were other breaks in the cable. Because the

PECO service crew was unable to complete the repairs before the end of their shift at 11:00 p.m., the PECO crew advised the DCNR staff to call an electrician. Findings of Fact Nos. 55, 56, 65-68; I.D. at 16-17.

On August 4, 2007, the electrician that had initially installed the cable in 1972, confirmed that there were multiple breaks in the cable. Also, on August 4, 2007, a PECO foreman gave DCNR staff documentation indicating that PECO did not own the cable. DCNR later had the electrician replace the entire cable. Findings of Fact Nos. 71-73; I.D. at 17. DCNR paid the electrician \$107,000 to repair the cable and paid to have a generator installed for interim use so that the Park could function. DCNR Formal Complaint (Complaint) at 2.

History of the Proceeding

On July 11, 2008, DCNR filed a Complaint against PECO. In the Complaint, DCNR argued, *inter alia*, that under PECO's tariff and the Commission's Regulations, the underground cable is used for general distribution to multiple customers and, therefore, is part of PECO's distribution system. Complaint at 5-10. DCNR requested that the Commission find, *inter alia*: 1) that PECO has always owned the underground cable; 2) that PECO's refusal to acknowledge responsibility for maintaining and repairing the cable is in violation of the Public Utility Code, the Commission's Regulations and PECO's tariff; 3) that PECO's actions on August 3, 2007, to determine the location of breaks in the cable exacerbated damage to the cable; and 4) that PECO is liable for the cost of replacing the underground cable and the cost of the generator. DCNR averred that if the Commission finds that PECO does not own the underground cable, DCNR requested that the Commission find that PECO has been trespassing in its use of the cable to serve metered customers since 1972. *Id.* at 10-11.

DCNR also stated in its Complaint that "PECO has indicated that it may cease serving by way of underground cable four metered customers and require them to install customers' extensions from their meters to the pole on Gradyville Road." *Id.* at 10. DCNR requested that PECO's indication that it may require its four customers to provide their own service lines is a violation of PECO's legal duty as a utility to provide service. *Id.* at 11.

On August 7, 2008, PECO filed an Answer and New Matter (Answer) and a Preliminary Objection.² In its Answer, PECO argued, *inter alia*, that its facilities end eighteen inches inside the Park's property line and that each of the four customers utilizes a customer-owned buried cable as its method of connecting to the public utility system. PECO averred that the cable is owned by the Park and, therefore, it does not have responsibility for its maintenance. In its Answer and Preliminary Objection, PECO also argued that the Commission does not have the authority to award damages or adjudicate matters of trespass. Answer at 17-19. Preliminary Objection at 1-4. PECO submitted that DCNR's request for a finding regarding PECO's statement that separate service lines may be required for each customer at the Park is a hypothetical question that is not ripe for determination. Answer at 19-20. Preliminary Objection at 4-6.

Following discovery and a pre-hearing conference before ALJ Guy M. Koster, an evidentiary hearing was held before ALJ Fordham on October 14, 2009 in Philadelphia. DCNR was represented by Counsel and presented the testimony of two witnesses. DCNR submitted prefiled testimony of twelve witnesses and placed 17 exhibits and 18 cross exhibits into the record. PECO was represented by counsel and presented the testimony of one witness. In addition to the prefiled testimony of PECO's

² On August 12, 2008, PECO filed a corrected version of its Answer and Preliminary Objection

witness, PECO placed four cross exhibits and one redirect exhibit on the record. The hearing resulted in a transcript of 196 pages.

Main Briefs were filed by PECO on December 3, 2009, and DCNR on December 4, 2009. Both Parties filed Reply Briefs on December 22, 2009.

By Initial Decision issued on April 22, 2010, the ALJ recommended that the Complaint be dismissed because DCNR failed to sustain its burden of proof. The ALJ found, *inter alia*, that DCNR owned the underground cable and PECO was not responsible for maintaining or repairing the cable. The ALJ also found that DCNR failed to present evidence that PECO damaged the cable. I.D. at 31.

DCNR filed Exceptions to the Initial Decision on May 12, 2010. PECO filed Reply Exceptions on May 24, 2010.

Discussion

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. 66 Pa. C.S. § 332(a). To satisfy this burden, the Complainant must demonstrate that the Respondent was responsible for the issues alleged in the Complaint through a violation of the Public Utility Code or a Regulation or Order of the Commission. This must be shown by a preponderance of the evidence. 66 Pa. C.S. §701; *Patterson v. Bell Telephone Company of Pennsylvania*, 72 PA PUC 196 (1990). Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602(Pa. Cmwlth1990), *alloc. denied*. 529 Pa. 654,602 A.2d 863 (1992). In addition, the Commission's findings of fact must be supported by "substantial evidence,"

which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. *Norfolk and Western Railway v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the 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 Complainant shifts to PECO. If the evidence presented by PECO is of co-equal weight, the Complainant has not satisfied its burden of proof. The Complainant now has to provide some additional evidence to rebut that of PECO. *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 persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

Any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In her Initial Decision, the ALJ made eighty-nine Findings of Fact and reached four Conclusions of Law. 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.

After reviewing the record evidence, the ALJ concluded that DCNR hired a contractor to install the underground cable in 1972. The ALJ found, *inter alia*, that based on the Commission's Regulations, PECO's tariff and its design practices, DCNR owns the facilities that are eighteen inches inside the Park's property line and PECO was not responsible for maintaining or repairing the facilities. I.D. at 31.

Point of Delivery

In its Exceptions, DCNR states that "[t]he outcome of this case turns on the determination of the point at which PECO's supply line ends and the service lines for the customers within the Park, including DCNR, begin." DCNR Exc. at 3. In her Findings of Fact No. 82, the ALJ states:

82. PECO's Tariff defines the point at which the supply line and the customer installation connect as being the "point of delivery": "The single point at which the service supply lines of the Company terminate and the customer's facilities for receiving service begin." Since the service in this case is underground cable, the point of delivery is 18 inches across the property line of the Park. (PECO Statement No. 1 at 10 – Neumann; PECO Cross Ex. 2).

I.D. at 19.

DCNR avers that the ALJ relied on Section 6.1 of PECO's tariff to conclude that the point of delivery in this case is the underground cable located eighteen inches inside the Park boundary. DCNR Exc. at 3. When the underground cable was installed in 1972, PECO's tariff Rule 6.1 stated:

6.1 Company's Service-Supply Lines. Where the Company has supply facilities of adequate capacity on the highway or in other trunk line location adjacent to the premises to be served, it will provide, own and maintain standard service-

supply lines for new a new connection or a change in connection or for a change in contract as follows: (a) a single span of open wire construction to the first suitable support of the Customer, nominally 100 feet inside the property line of the Customer. The Customer's support shall be so located that the service span will be free of obstruction, and adequately supported as required by the size and weight of the conductors; (b) overhead or underground cable construction to a point approximately 18 inches inside the property line of the Customer. In new residential subdivisions of five or more lots, or to new apartment buildings containing at least five apartments, underground cable construction will be extended to a meter location or connection box located at the building or buildings, as designed by the Company and in accordance with Rule 7.3.

PECO St. No. 1 at 8.

PECO's current tariff Rule 6.1 has essentially the same elements and provides in pertinent part:

6.1 COMPANY'S SERVICE LINES. Where the Company has distribution facilities of adequate capacity on the highway or in other trunk line location adjacent to the premises to be served, it will provide, own and maintain standard service-supply lines as follows: (a) **UNDERGROUND.** Underground cable construction to a point approximately 18 inches inside the property line of the customer [with exceptions not relevant here] (b) **AERIAL.** A single span of aerial open wire or cable construction to the first suitable support of the customer, nominally 100 feet inside the property line of the customer.

PECO Statement No. 1 at 8.

PECO's witness Neumann noted that the definition of service line in PECO's tariff was drawn from the Commission's Regulations at 52 Pa. Code §57.1. PECO Statement No. 1 at 9. The Commission's Regulations define service line as:

Service line – The wires or cables and appurtenances which connect the electric supply line of the public utility with the customer's installation which comply with either of the following:

(i) If overhead-open-wire or cable construction, the span, normally 100 feet, extending to a suitable support provided by the customer.

(ii) If the electric supply is of underground construction, the underground facilities extending to but not exceeding 18 inches inside the property line of the customer.

52 Pa. Code §57.1.

In its Exceptions, DCNR argues that the Park boundary at Gradyville Road is not the property line for the four separate customers within the Park being served by PECO. DCNR submits that the definitions of the terms "customer" and "property line" in PECO's tariff are key to analyzing the point of delivery, but are not considered in the Initial Decision. DCNR states that "customer" is defined as "any person, partnership, or corporation, lawfully receiving service at a single meter location from the Company." DCNR also states that PECO's tariff defines "property line" as the "division line between land held for private use, and land in which the public or company has the right to use, or, the division line between separately owned or occupied land." DCNR argues that the four customers each separately occupy land within the Park and under Rule 6.1 of PECO's tariff. Therefore, the appropriate point of delivery is 18 inches inside the division lines between the separately occupied land of each customer, not the Park boundary. DCNR Exc. at 3-4.

In his direct testimony, PECO witness Neumann stated that DCNR had an opportunity in 1972 to obtain utility service to the edge of the individual property lines within the Park and that service would have been aerial. PECO St. No. 1 at 27. DCNR

witness Forrey testified that PECO refused to install an underground cable within the Park, so DCNR got a contractor to install the cable. DCNR St. No. 1 at 2.

Both the Commission's Regulations and PECO's tariff provide for either 100 feet of overhead line or eighteen inches of underground cable inside the property line of the customer. If PECO would have been permitted by DCNR to create points of delivery within the Park, PECO would have run an aerial supply line into the Park. From that supply line, each of the four metered customers within the Park would have been entitled to service lines that were either 100 feet of overhead line or up to eighteen inches of underground cable. However, DCNR determined that the entire Park needed to be served by an underground line. Therefore, we find that in 1972, DCNR determined that the point of delivery would be eighteen inches inside the Park boundary at Gradyville Road when it elected to construct its own underground cable in lieu of receiving aerial service within the Park. Accordingly, DCNR's Exceptions related to the point of delivery are denied.

Ownership of the Underground Cable

In its Exceptions, DCNR contends that the underground cable in the Park is a "line extension" to PECO's energy supply line, and therefore, owned by PECO. In support of its argument, DCNR points to the following definitions of "line extension," "electric supply line" and "customer" in the Commission's Regulations at 52 Pa. Code § 57.1.

Line extension – An addition to the public utility electric supply line necessary to serve the premises of a customer which addition is so located that it cannot be supplied by means of a service line from the existing electric supply line.

Electric supply line – The wires or cables, with the necessary supporting or containing structures and

appurtenances, used in connection with an overhead or underground system of a public utility, providing electric power, located on a public highway or utility right of way and used to transmit or distribute electric energy.

Customer – A party supplied with electric service by a public utility.

52 Pa. Code § 57.1

DCNR argues that the function of the underground cable in question is exactly that of a line extension as defined in the Commission's Regulations. DCNR points out that the underground cable connects to PECO's overhead supply line at a pole along Gradyville Road. DCNR avers that the supply line was necessary because the premises of the customers that needed to be served were not along Gradyville Road and the customer service lines could not connect to the existing supply line along Gradyville Road. DCNR submits that PECO has an easement that allows it to extend its electric supply line by radiating an extension from poles along Gradyville Road to serve buildings on Park property. DCNR Exc. at 10-11.

DCNR also avers the fact that it constructed the line extension in 1972 rather than disputing PECO's refusal to do so and delaying completion of park improvements does not mean the underground cable was no longer a supply line extension under the Commission regulations. DCNR argues that there is nothing in the Commission's Regulations that allows PECO to transfer ownership of a supply line extension by refusing to construct it and forcing the customer to do so. DCNR also argues that PECO's tariff and Commission's Regulations at 52 Pa. Pa. Code § 57.19 include provisions that allow PECO to pass the cost of construction of a line extension to its customers; however, doing so does not transfer ownership of the line extension to the customer.

We do not concur with DCNR that the function of the underground cable in question is exactly that of a "line extension" as defined in the Commission's regulations. The definition of a line extension is "[a]n addition to the public utility electric supply line *necessary* to serve the premises of a customer which addition is so located that it cannot be supplied by means of a service line from the existing electric supply line." 52 Pa. Code § 57.1. The underground cable was not *necessary* to serve the four metered customers in the Park. Had DCNR requested that PECO install an aerial supply line into the Park, the underground cable would not have been necessary.

As indicated by the ALJ's Findings of Facts 7 – 14, there was considerable amount of evidence placed on the record regarding easements available to PECO to install supply lines to serve customers within the Park. I.D. at 8 – 9. However, since DCNR elected to receive service through its own underground cable instead of an aerial supply line provided by PECO, PECO did not need to utilize any of these easements. While the availability of these easements may demonstrate that PECO had the capability to install an aerial supply line to serve customers in the Park, these easements are not relevant to the issues related to the ownership and maintenance of the underground cable. The availability of these easements *alone* does not obligate PECO to install, own or maintain a supply line in the Park.

We also do not concur with DCNR that its construction of the underground cable is akin to customer contributions for line extensions governed by 52 Pa. Code § 57.19 and that PECO has transferred ownership of the supply line to DCNR by refusing to build, repair or replace an underground line. Section 57.19 applies to line extensions *undertaken by utilities* where the customer may incur a portion of the costs based on revenue guarantees by the customers to be served by the line extension. 52 Pa. Code § 57.19. As discussed *supra*, the underground line was not *undertaken by PECO* because an underground cable of that nature was beyond the service requirements

of PECO's tariff and the Commission's Regulations. Moreover, there is no evidence on the record that PECO agreed to take financial responsibility or ownership of the cable.

Based on the foregoing discussion, we deny DCNR's Exceptions related to the ownership of the underground cable.

Reasonable Service

In its Exception, the DCNR argues that the ALJ failed to reach conclusions of law that PECO did not meet its requirements under 66 Pa. C.S. §§ 1303 and 1501. DCNR submits that PECO failed to make the necessary repairs to the underground cable in the Park as required by 66 Pa. C.S. § 1501. DCNR avers that PECO's refusal to make these repairs resulted in a cost to one of its customers, DCNR. DCNR states that 66 Pa. C.S. §§ 1303 prohibits a public utility from imposing a cost on a customer other than as specified in its tariff. DCNR Exc. at 2-3.

Section 1501 of the Public Utility Code provides in pertinent part that "[s]uch service and facilities shall be in conformity with the regulations and orders of the commission." 66 Pa. C.S. § 1501. As discussed *supra*, consistent with our regulations and PECO's commission-approved tariff, PECO does not own the underground cable, and consequently, has no responsibility to maintain the cable. Accordingly, DCNR's Exceptions regarding the PECO's responsibility to maintain the cable or costs associated with maintaining the cable are denied.

Costs and Benefits to PECO's Ratepayers

The ALJ's third Conclusions of Law states:

3. An approved tariff is binding on the public utility and its customers. *Kossman v. Pa Public Utility Commission*, 694 A. 2d 1147 (Pa. Cmwlth. 1997), *Brockway Glass Company v. Pa Public Utility Commission*, 63 Pa. Cmwlth. 238, 437 A. 2d 1067 (1981).

In its Exceptions, DCNR stated that in *Kossman*, the court observed that supply line costs become part of the utility's rate base paid for by all of the utility's customers because the customers receive benefits from these lines. DCNR noted that in *Kossman*, the court did not believe that the lines serving a developer's commercial shopping centers should be paid by all of a utility's customers. DCNR avers that unlike the developer in *Kossman*, DCNR is a state agency managing a park for the benefit of the public. DCNR submits that the public policy implications present in *Kossman* are not present here. DCNR argues that that cost of the supply line extension serving the customers within the Park should be paid by all of PECO's customers because they live near to the Park and can enjoy the benefits that the Park has to offer. DCNR also argues that to conclude otherwise requires that taxpayers of the entire Commonwealth pay the costs of the line rather than the citizens most likely to receive the benefits of this public resource. DCNR Exc. at 7 – 8.

As discussed, *supra*, had DCNR requested that PECO provide supply and service lines within the Park consistent with PECO's tariff, the costs of providing electric supply lines with the Park, and the subsequent maintenance costs, would have been incurred by PECO. However, since DCNR determined that it required more costly underground facilities beyond the provisions of PECO's tariff, DCNR elected to utilize funds available to the Commonwealth to pay the costs of the installation of the

underground cable. We are not inclined to expose PECO's ratepayers to the costs of installing, maintaining or replacing customer-owned service lines that exceed the provisions of our regulations or commission-approved tariffs. Therefore, DCNR's Exceptions related to the recovery of costs from PECO and its ratepayers are denied.

Conclusion

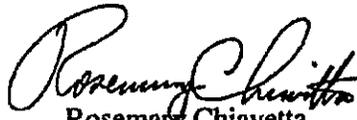
Based on the foregoing discussion, we find, *inter alia*, that DCNR owned the underground electric cable serving the four customers within the Park and PECO was not responsible for maintaining or repairing the cable. Accordingly, we shall deny the Exceptions of DCNR and adopt the Recommended Decision of ALJ Fordham;
THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed on behalf of John Norbeck, Director, Bureau of State Parks, Department of Conservation and Natural Resources on May 12, 2010, are denied.
2. That the Recommended Decision of Administrative Law Judge Cynthia Williams Fordham is adopted.
3. The Complaint filed by John Norbeck, Director, Bureau of State Parks, Department of Conservation and Natural Resources filed on July 11, 2008, is dismissed.

4. That this docket be market closed.

BY THE COMMISSION


Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 18, 2010

ORDER ENTERED: August 23, 2010

CERTIFICATE OF SERVICE

I, Thomas M. Hinchey, Esquire, do hereby certify that a true and correct copy of the foregoing, *Defendant, PECO Energy Company's Preliminary Objections to Plaintiffs' Complaint*, was filed this date via Electronic Filing through the First Judicial District of Pennsylvania, Court of Common Pleas, Philadelphia County, and on all counsel through electronic filing through Philadelphia's Electronic website. Parties are as follows:

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Respectfully Submitted:

CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.

By: /s/ Thomas M. Hinchey
Thomas M. Hinchey, Esquire
*Attorney for Defendant,
PECO Energy Company*

Dated: September 15, 2014

Case ID: 140702640
Control No.: 14091838
Case ID: 140702640
Control No.: 14102440

STANLEY FELLERMAN and
CAROL FELLERMAN,

Plaintiffs,

vs.

PECO ENERGY CO., and COMCAST CORP.,

Defendants.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

CIVIL ACTION
LAW DIVISION

JULY TERM, 2014

NO.: 02640



ORDER

AND NOW, this ___ day of _____, 2014, upon consideration of Defendant PECO Energy Company's Preliminary Objections to Plaintiffs' Complaint, and all responses thereto, it is hereby **ORDERED** that the objections are **SUSTAINED**.

It is hereby **ORDERED** that Plaintiffs' Complaint is hereby **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that this case is hereby **STAYED** pending a final determination by the Pennsylvania Public Utility Commission. Plaintiffs may file the appropriate documents to bring their claims in the Pennsylvania Public Utility Commission.

BY THE COURT:

, J.

Case ID: 140702640
Case ID: 140702640
Control No.: 14091838
Control No.: 14102440

STANLEY FELLERMAN and CAROL FELLERMAN,	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
Plaintiffs,	CIVIL ACTION LAW DIVISION
vs.	JULY TERM, 2014
PECO ENERGY CO., and COMCAST CORP.,	NO.: 02640
Defendants.	JURY TRIAL DEMANDED

ORDER

AND NOW, this ___ day of _____, 2014, upon consideration of Defendant PECO Energy Company's Preliminary Objections to Plaintiffs' Complaint, and all responses thereto, it is hereby **ORDERED** that the objections are **SUSTAINED IN PART**.

It is hereby **ORDERED** that this Court will retain jurisdiction over this case.

It is further **ORDERED** that all averments of "recklessness" on the part of PECO, specifically, paragraphs 29, 30, 31, and 32 of Plaintiffs' Complaint, are hereby **STRICKEN**.

It is further **ORDERED** that Plaintiffs' claim for punitive damages is hereby **DISMISSED WITH PREJUDICE**.

BY THE COURT:

, J.

Stanley Fellerman	:	COURT OF COMMON PLEAS
Carol Fellerman	:	
	:	
Plaintiffs	:	PHILADELPHIA COUNTY
	:	CIVIL TRIAL DIVISION
	:	
vs.	:	
	:	July Term, 2014
PECO Energy Co.	:	No. 2640
Comcast of Southeast Pennsylvania, LLC	:	
Defendants	:	

ORDER

AND NOW, this day of , 2014, upon consideration of the Preliminary Objections of Defendant PECO Energy Co. to Plaintiffs' Amended Complaint, and Plaintiffs' Response thereto, it is ORDERED that the Preliminary Objections are OVERRULED in their entirety.

Defendant PECO Energy Co., is hereby ORDERED to file an Answer to the Amended Complaint within twenty (20) days of the date of this Order.

BY THE COURT:

_____ J.

HILL & ASSOCIATES, P.C.
BY: LEONARD K. HILL, ESQUIRE
SUSAN B. AYRES, ESQUIRE
I.D. NO.: 81849/87562
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MAJOR JURY

Attorney for Plaintiffs

Stanley Fellerman	:	COURT OF COMMON PLEAS
Carol Fellerman	:	
	:	
Plaintiffs	:	PHILADELPHIA COUNTY
	:	CIVIL TRIAL DIVISION
	:	
vs.	:	
	:	July Term, 2014
PECO Energy Co.	:	No. 2640
Comcast of Southeast Pennsylvania, LLC	:	
Defendants	:	

**PLAINTIFFS' RESPONSE IN OPPOSITION TO THE PRELIMINARY OBJECTIONS
OF DEFENDANT PECO ENERGY CO. TO PLAINTIFFS' AMENDED COMPLAINT**

Plaintiffs, Stanley and Carol Fellerman, by and through their counsel, Hill & Associates, P.C., hereby respond in opposition to the Preliminary Objections of Defendant PECO Energy Co. to their Amended Complaint.

This is a "straightforward tort suit requiring a trier of fact, with the aid expert testimony¹, to determine whether a public utility is responsible for damages sustained by one individual (and his wife) on one particular date due to [a downed power line]." Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 748 (Pa. Cmwlth. Ct. 1995)(finding that the Trial Court erred in transferring case to PUC where it was alleged that a barn fire was caused by West Penn Power Co. supplying overvoltage of electricity). The issue in this case is whether Defendant PECO owed the Plaintiffs a duty, whether Defendant PECO breached that duty, and whether the Plaintiffs were proximately harmed by that breach. The existence of a duty is a question of law

¹ As recognized by the court in Poorbaugh, courts daily resolve disputes such as those for medical malpractice and products liability which involve equally technical and complex subject matters. Poorbaugh, 666 A.2d at 748.

for the court to decide. Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved², the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id.

Defendant PECO seeks to have this court invoke the doctrine of primary jurisdiction, which requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 749 (Pa. Cmwlth. Ct. 1995). The Supreme Court of Pennsylvania has repeatedly emphasized that the court of common pleas should not be too hasty in referring a matter to an agency, or develop a dependence on an agency, or be quick to abdicate its responsibility to preside over actions involving utilities. Id. (citing Elkin v. Bell Telephone Company of Pennsylvania, 420 A.2d 371 (Pa. 1980); DeFrancesco v. Western Pennsylvania Water Company, 453 A. 2d 595, 597 (Pa. 1982); and Feingold v. Bell of Pennsylvania, 383 A.2d 791, 795 (Pa. 1977)). The purpose of the doctrine of primary jurisdiction includes the ability to make use of the agency's special expertise in complex areas, and the promotion of consistency and uniformity in certain areas of administrative policy. Neither of these purposes are served in this action.

This case does not involve the type of complexity that would require the special expertise of the PUC, and does not involve the interpretation of the tariff as Defendant PECO suggests. "Where the matter is not one peculiarly within the agency's area of expertise, but is one in which

² The Pennsylvania Supreme Court has previously held that a transmission line is a dangerous instrumentality. No matter where located it is a source of grave peril and the law requires that the possessor of such an instrumentality exercise a high degree of care: 'Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question. Alderwoods, 52 A.3d at 356 (citing Yoffee v. Pennsylvania Power & Light Co., 123 A.2d 636, 645 (Pa. 1956)).

the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility. In such cases, it would be wasteful to employ the bifurcated procedure of referral to the PUC, as no appreciable benefits would be forthcoming.” DeFrancesco v. Western Pennsylvania Water Company, 453 A. 2d 595, 597 (Pa. 1982)(finding referral to PUC was not warranted in a case where it was alleged that a utility failed to provide adequate water to extinguish a fire)).

Like DeFrancesco, this controversy is “not one in which the general reasonableness, adequacy or sufficiency of a public utility’s service [is] drawn into question. Resolution of [Plaintiffs’] claims depend[s] on no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC.” Id. at 750.

This case is not about the manner in which Defendant PECO provides electricity to the general public, or the way Defendant PECO maintains its facilities that service the general public or have anything to do with the rates charged by Defendant PECO to the general public. This case is about an individual and his wife who have been catastrophically injured as a consequence of Defendant PECO’s failure to maintain the electrical components on the Plaintiffs’ property.³ The Pennsylvania Supreme Court has recognized that the remedial and enforcement powers vested in the PUC by the Utility Code were designed to allow the PUC to enforce its orders and regulations, but not to empower the PUC to award damages or to litigate a private action for damages on behalf of a complainant. Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 748 (Pa. Cmwlth. Ct. 1995) (citing Feingold v. Bell of Pennsylvania, 383 A.2d 791, 795

³ The Feingold court did recognize that raising questions of the adequacy of utility service to an entire geographic area, rather than to one individual, could present problems which should be addressed by the PUC. Id. However, the adequacy of PECO’s utility service to the general public or even a specific geographic area is not at issue in this litigation.

(Pa. 1977). The PUC is responsible for ensuring the adequacy, efficiency, safety and reasonableness of public utility services, facilities and/or rates. Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 748 (Pa. Cmwlth. Ct. 1995). “Nevertheless, the court of common pleas has original jurisdiction to entertain a suit for damages against a public utility, based on its asserted failure to provide adequate services....” Id. (citing Feingold v. Bell of Pennsylvania, 383 A.2d 791, 794-96 (Pa. 1977)).

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted that these selected phrases of the Amended Complaint are accurately cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.
6. Admitted that these selected phrases of the Amended Complaint are accurately cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.
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cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.

8. Admitted that these selected phrases of the Amended Complaint are accurately cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.
9. Admitted that these selected phrases of the Amended Complaint are accurately cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.
10. Admitted that these selected phrases of the Amended Complaint are accurately cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.

11. Admitted that these selected phrases of the Amended Complaint are accurately cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.
12. Admitted that these selected phrases of the Amended Complaint are accurately cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.
13. Admitted that these selected phrases of the Amended Complaint are accurately cited. However, when evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). The Amended Complaint is a document that speaks for itself.
14. Denied that the tariff “dictates all matters of PECO’s duties and responsibilities.” The issue in this case is whether Defendant PECO owed the Plaintiffs a duty, whether Defendant PECO breached that duty, and whether the Plaintiffs were proximately harmed by that breach. The existence of a duty is a question of law for the court to decide. Alderwoods v. Duquense Light Co., 52 A.3d 347, 353

(Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id. Moreover, a "Tariff" is defined by the Public Utility Code as "all schedules of rates, all rules, regulations, practices or contracts involving any rate or rates." Alderwoods, Inc. v. Duquesne Light Company, 52 A.3d 347, n.4 (Pa. Super. Ct. 2012). This case has nothing to do with rates.

15. Admitted. By way of further response, this honorable court has subject matter jurisdiction and the complaint is legally sufficient. As such, the Preliminary Objections should be overruled.
16. Admitted. By way of further response, all material facts are plead in the Amended Complaint attached as Exhibit B of the Preliminary Objections of Defendant PECO.
17. Plaintiffs incorporate by reference all preceding responses to the Preliminary Objections.
18. Admitted. By way of further response, this honorable court has subject matter jurisdiction over this matter. As such, the Preliminary Objections should be overruled.
19. Admitted. By way of further response, this honorable court has subject matter jurisdiction over this matter. As such, the Preliminary Objections should be overruled.
20. Admitted in part, denied in part. It is admitted only that the Tariff referred to is

accurately quoted. By way of further response, the Tariff also states:

- a. "The Company shall keep in repair and maintain its own property installed on the premises of the customer." **Section 10.1 Company Maintenance.**
- b. "Any changes made to the customer's premises after the Company completes its service and meter installation that, in the opinion of the Company, creates an unsafe condition, shall be the customer's responsibility to pay any costs associated with remedying the unsafe condition including, but not limited to, any required protective measures and/or relation of Company property." **Section 10.2 Customer's Responsibility (emphasis added).**

It is denied, however, that this case involves an interpretation of the referenced tariff. The issue in this case is whether Defendant PECO owed the Plaintiffs a duty, whether Defendant PECO breached that duty, and whether the Plaintiffs were proximately harmed by that breach. The existence of a duty is a question of law for the court to decide. Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id.

21. Admitted in part, denied in part. It is admitted only that the Tariff referred to is accurately quoted. By way of further response, the Tariff also states:

- a. "The Company shall keep in repair and maintain its own property installed

on the premises of the customer.” **Section 10.1 Company Maintenance.**

- b. “Any changes made to the customer’s premises after the Company completes its service and meter installation that, in the opinion of the Company, creates an unsafe condition, shall be the customer’s responsibility to pay any costs associated with remedying the unsafe condition including, but not limited to, any required protective measures and/or relation of Company property.” **Section 10.2 Customer’s Responsibility (emphasis added).**

It is denied, however, that this case involves an interpretation of the referenced tariff. The issue in this case is whether Defendant PECO owed the Plaintiffs a duty, whether Defendant PECO breached that duty, and whether the Plaintiffs were proximately harmed by that breach. The existence of a duty is a question of law for the court to decide. Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant’s conduct, the nature of the risk involved, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id.

22. Denied. To the contrary, the issue in this case is whether Defendant PECO owed the Plaintiffs a duty, whether Defendant PECO breached that duty, and whether the Plaintiffs were proximately harmed by that breach. The existence of a duty is a question of law for the court to decide. Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the

relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id. Furthermore, even if the Court is to look to the Tariff for guidance, the Tariff states:

- a. "The Company shall keep in repair and maintain its own property installed on the premises of the customer." **Section 10.1 Company Maintenance.**
- b. "Any changes made to the customer's premises after the Company completes its service and meter installation that, in the opinion of the Company, creates an unsafe condition, shall be the customer's responsibility to pay any costs associated with remedying the unsafe condition including, but not limited to, any required protective measures and/or relation of Company property." **Section 10.2 Customer's Responsibility (emphasis added).**

23. Denied as stated. The Supreme Court of Pennsylvania has repeatedly emphasized that the court of common pleas should not be too hasty in referring a matter to an agency, or develop a dependence on an agency, or be quick to abdicate its responsibility to preside over actions involving utilities. Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 749 (Pa. Cmwlth. Ct. 1995). (citing Elkin v. Bell Telephone Company of Pennsylvania, 420 A.2d 371 (Pa. 1980); DeFrancesco v. Western Pennsylvania Water Company, 453 A. 2d 595, 597 (Pa. 1982); and Feingold v. Bell of Pennsylvania, 383 A.2d 791, 795 (Pa. 1977)). Moreover, the existence of a duty is a question of law for the court to decide.

Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id.

24. Denied as stated. Most recently, in 2012, the Pennsylvania Superior Court decided as a matter of law whether the power company owed the Plaintiffs a duty with regard to the alleged failure to perform its services properly. Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012); see also Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 748 (Pa. Cmwlth. Ct. 1995)(finding that the Trial Court erred in transferring case to PUC where it was alleged that a barn fire was caused by West Penn Power Co. supplying overvoltage of electricity); DeFrancesco v. Western Pennsylvania Water Company, 453 A. 2d 595, 597 (Pa. 1982)(finding referral to PUC was not warranted in a case where it was alleged that a utility failed to provide adequate water to extinguish a fire)).
25. Admitted only that a pro se complaint was dismissed as there was no "imminently dangerous" condition on the property, there was no evidence that Defendant PECO created the sagging wires that were at issue, and that the PUC relied on the tariff in doing so. Denied, however, that this Kashuba opinion is relevant as it did not involve a personal injury in which monetary damages, compensatory and punitive, were being sought. Furthermore, a downed live primary wire is undeniably an imminently dangerous condition on the property. Also, this

decision is irrelevant because in the instant case the allegation is that Defendant PECO did not notify the Plaintiffs of the need for repair, unlike in the cited decision by Defendants where PECO had in fact notified the residents of the problems. Finally, in Kashuba, there was no evidence that Defendant PECO had caused the sagging wires, such is not the case herein, where it is alleged that Defendant PECO's actions and inactions caused the rotted pole to ultimately fall. Furthermore, the Kashuba opinion is not precedential on this Honorable Court.

26. Admitted only that a pro se complaint was dismissed as there was no "imminently dangerous" condition on the property, there was no evidence that Defendant PECO created the sagging wires that were at issue, and that the PUC relied on the tariff in doing so. Denied, however, that this Kashuba opinion is relevant as it did not involve a personal injury in which monetary damages, compensatory and punitive, were being sought. Furthermore, a downed live primary wire is undeniably an imminently dangerous condition on the property. Also, this decision is irrelevant because in the instant case the allegation is that Defendant PECO did not notify the Plaintiffs of the need for repair, unlike in the cited decision by Defendants where PECO had in fact notified the residents of the problems. Finally, in Kashuba, there was no evidence that Defendant PECO had caused the sagging wires, such is not the case herein, where it is alleged that Defendant PECO's actions and inactions caused the rotted pole to ultimately fall. Furthermore, the Kashuba opinion is not precedential on this Honorable Court.
27. Denied that an Appellant's brief is precedential authority. To the contrary, until reversed, the Superior Court's decision in Alderwoods, Inc., is mandatory

authority. In that case, the Court decided whether the utility company owed a duty based on an analysis of factors including the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution.

28. Denied. To the contrary, the Supreme Court of Pennsylvania has repeatedly emphasized that the court of common pleas should not be too hasty in referring a matter to an agency, or develop a dependence on an agency, or be quick to abdicate its responsibility to preside over actions involving utilities. Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 749 (Pa. Cmwlth. Ct. 1995). (citing Elkin v. Bell Telephone Company of Pennsylvania, 420 A.2d 371 (Pa. 1980); DeFrancesco v. Western Pennsylvania Water Company, 453 A. 2d 595, 597 (Pa. 1982); and Feingold v. Bell of Pennsylvania, 383 A.2d 791, 795 (Pa. 1977)). Moreover, the existence of a duty is a question of law for the court to decide. Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id.

29. Denied. To the contrary, the Supreme Court of Pennsylvania has repeatedly emphasized that the court of common pleas should not be too hasty in referring a matter to an agency, or develop a dependence on an agency, or be quick to abdicate its responsibility to preside over actions involving utilities. Poorbaugh v.

PA Public Utility Commission, 666 A.2d 744, 749 (Pa. Cmwlth. Ct. 1995), (citing Elkin v. Bell Telephone Company of Pennsylvania, 420 A.2d 371 (Pa. 1980); DeFrancesco v. Western Pennsylvania Water Company, 453 A. 2d 595, 597 (Pa. 1982); and Feingold v. Bell of Pennsylvania, 383 A.2d 791, 795 (Pa. 1977)).

Moreover, the existence of a duty is a question of law for the court to decide.

Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id.

30. Plaintiffs incorporate by reference their responses to the preceding paragraphs of the Preliminary Objections of Defendant PECO.

31. Admitted. By way of further response, the Amended Complaint is legally sufficient.

32. Admitted. By way of further response, a court should sustain preliminary objections in the nature of a demurrer *only* where "the complaint is insufficient to establish the pleader's right to relief." Willet v. Pennsylvania Medical Catastrophe Loss Fund, 549 Pa. 613, 619, 702 A.2d 850, 853 (1997). For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts and every inference fairly deducible from those facts. Id. Since sustaining the demurrer results in a denial of the pleader's claim or dismissal of his suit, a preliminary objection in the nature of a demurrer *should be sustained*

only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. Wiernik v. PHH U.S. Mortgage Corporation, 736 A.2d 616 (Pa. Super. 1999)(emphasis added).

33. Admitted. By way of further response, it is well settled that in Pennsylvania, punitive damages may be awarded for “conduct that is outrageous, because of defendant’s evil motive *or* his **reckless indifference to the rights of others.**” Hutchison v. Luddy, 582 Pa. 114, 121, 870 A.2d 766, 770 (2005). In other words, Plaintiffs do not have to establish that Defendant PECO intended for Plaintiff Stanley Fellerman to be shocked and injured. “A defendant acts recklessly when ‘his conduct creates an unreasonable risk of physical harm to another and such risk is substantially greater than that which is necessary to make his conduct negligent.’ ” Scampono v. Grane Healthcare Co., 11 A.3d 967 (Pa. Super. Ct. 2010)(citing Phillips v. Cricket Lighters, 584 Pa. 179, 883 A.2d 439, 445 (2005) and affirming the Trial Court’s decision to submit the issue of punitive damages to the jury); Weiley v. Albert Einstein Medical Center, et al, 51 A.3d 202, 219 (Pa. Super. Ct. 2012)(finding that punitive damages could be awarded based on the reckless conduct of Defendant that was alleged in the Complaint by Plaintiff); Hall v. Episcopal Long Term Care, 54 A.3d 381 (Pa. Super. Ct. 2012) (finding that the Trial Court erred by not submitting the issue of punitive damages to the jury). The purpose of punitive damages is **to punish the tortfeasor and deter them and others like them from similar conduct.** Id.

34. Admitted.

35. Admitted.

36. Admitted.

37. Admitted. By way of further response, the Amended Complaint contains all material facts on which the causes of action are based.

38. Admitted. By way of further response, the Amended Complaint is factually and legally sufficient and does not contain mere conclusions of law.

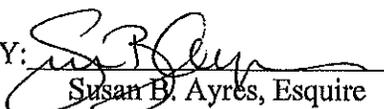
39. Admitted. By way of further response, the Amended Complaint is factually and legally sufficient and does not contain mere conclusions of law. If, after discovery, Defendant PECO continues to believe the facts and evidence do not warrant an award of punitive damages, it may seek dismissal of that claim at that time vis a vis a Motion for Summary Judgment. As no discovery has been conducted, and the facts as plead support a claim for punitive damages, it is respectfully submitted that the Preliminary Objections must be overruled.

40. Denied as representing the cumulative allegations in the Amended Complaint. By way of further response, the Amended Complaint is a written document that speaks for itself and specifically alleges that Defendant PECO knew about the potentially deadly dangers associated with the live primary being down and yet failed to take any actions to prevent the tragedy that forms the basis of this litigation. See Exhibit B to the Preliminary Objections of Defendant PECO in its entirety.

41. Denied.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court overrule the Preliminary Objections in their entirety and enter an Order requiring the Defendant PECO to Answer the Amended Complaint.

HILL & ASSOCIATES, P.C.

BY: 
Susan B. Ayres, Esquire
Counsel for Plaintiffs

Date: 11-7-14

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Stanley Fellerman	:	COURT OF COMMON PLEAS
Carol Fellerman	:	
	:	
Plaintiffs	:	PHILADELPHIA COUNTY
	:	CIVIL TRIAL DIVISION
	:	
vs.	:	
	:	July Term, 2014
PECO Energy Co.	:	No. 2640
Comcast of Southeast Pennsylvania, LLC	:	
Defendants	:	

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR RESPONSE IN OPPOSITION TO
DEFENDANT PECO'S PRELIMINARY OBJECTIONS TO THE AMENDED
COMPLAINT**

Plaintiffs, Stanley and Carol Fellerman, by and through their counsel, Hill & Associates, P.C., submit this Brief in Support of their Response in Opposition the Preliminary Objections of Defendant PECO to their Amended Complaint.

I. MATTER BEFORE THE COURT

Preliminary Objections of Defendant PECO to Plaintiffs' Amended Complaint, and Plaintiffs' Response in Opposition thereto.

II. STATEMENT OF QUESTION INVOLVED

1) Whether this Court should decline to exercise jurisdiction in this catastrophic personal injury case which seeks monetary damages, compensatory and punitive, from the Defendant PECO as a result of Defendant PECO's breach of its duties to Plaintiffs on a particular day, for a particular incident, and does not involve the manner in which Defendant PECO provides electrical service to the general public.

(Suggested Answer: No).

2) Whether punitive damages should be dismissed this early in the litigation, prior to any discovery having been conducted, where Plaintiffs have alleged that Defendant PECO knew or should have known that the pole on Plaintiffs' property was severely rotted and in danger of collapse, that Defendant PECO knew that there was a serious risk of significant and possibly fatal injury to people, such as Plaintiff, if the pole carrying extremely high voltage electricity on which its (Defendant PECO's) lines, transformer, and other power equipment was mounted fell, and that Defendant PECO, in this particular instance, had actual knowledge that there was a problem with its service to Plaintiffs' property, and that this problem could have been the result of a fallen utility pole and/or electric service components.

(Suggested Answer: No).

III. FACTUAL BACKGROUND

This case arises from an incident that occurred on December 2, 2013, when Plaintiff Stanley Fellerman was shocked and burned by PECO power lines, and that the Plaintiff Carol Fellerman has asserted a claim for loss of consortium. In fact, Plaintiff Stanley Fellerman suffered injuries which include, but are not limited to, third and fourth degree electrical burns on both hands, requiring multiple surgeries including amputations of both hands, as well as a traumatic brain injury, depression, and anxiety. The following facts relevant to Defendant PECO are directly from the Amended Complaint attached as Exhibit B to the objecting Defendant's Preliminary Objections:

13. At all relevant times hereto, Defendant PECO distributed high voltage electric current to residential customers for a fee, including Plaintiffs herein, through its distribution system, which is made up of components including, but not limited to, power lines, poles, transformers, and circuit breakers.

14. Neither the rates nor the calculations of the rates charged by Defendant PECO to the Plaintiffs are at issue in this litigation.

15. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the power lines located at 6858 York Road, New Hope, Pennsylvania that are the subject of this lawsuit.

16. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the transformer located at 6858 York Road, New Hope, Pennsylvania that is the subject of this lawsuit.

17. Defendant PECO installed, owned, utilized, controlled, possessed and/or maintained the utility pole located at 6858 Upper York Road, New Hope, Pennsylvania that is the subject of this lawsuit.

18. At all times material hereto, Defendant PECO acted on its own behalf and through its agents, servants, and employees, including actual and apparent agents.

19. This action pertains to the Defendants' actions and omissions with regard to the Plaintiffs, specifically, and not to the provision of these Defendants' services to the general public or to a large geographic area.

20. At all times material hereto, there were four utility poles located on Plaintiff's property along which, among other components, power and cable lines were affixed so that Defendants PECO and Comcast could service Plaintiffs' property in exchange for fees.

21. Among the lines affixed to the four utility poles on the Plaintiffs' Property, was an uninsulated primary power line leading to Plaintiff's home.

22. At all times material hereto, on the last of the four utility poles, closest to the Plaintiffs' home, a PECO transformer was mounted.

23. Defendant PECO designed and knew about the manner in which the poles, lines, and transformer were situated on Plaintiffs' property, the amount of electricity flowing through those components, and the potential hazards and risks associated with same; the Plaintiffs did not.

24. On or about December 1, 2013, the Comcast cable service at Plaintiffs' residence stopped working.

25. On or about December 1, 2013, Plaintiffs called Defendant Comcast multiple times to report a problem with the cable service.

26. Defendant Comcast knew or should have known that the problem with its cable service could have been the result of a problem with the utility pole and/or electric service components on that pole that it shared with Defendant PECO.

27. Defendant Comcast did not contact the Plaintiffs or Defendant PECO or any first responders, such as police or fire departments, in response to the Plaintiffs' reports of a problem at the property.

28. On the morning of December 2, 2013, Plaintiffs discovered that the utility pole closest to their home, the one with the transformer mounted to it, had fallen to the ground in front of and in close proximity to their residence. See attached photograph of the fallen pole marked Exhibit "A".

29. On December 2, 2013, prior to the Plaintiff's electrical injuries, Plaintiffs called Defendant PECO to report a problem with the power pole, advising PECO that the power was still working, but that the pole, lines, and transformer attached thereto were down.

30. Defendant PECO did not shut off the power to the property prior to the incident

that forms the basis of this litigation despite the fact that they knew or should have known that the pole was down, the transformer was down, and that the uninsulated primary wire carrying high voltage electricity was down and live in the heavily wooded, residential area just feet from the occupied residence.

31. Defendant PECO did not contact any first responders, such as police or fire departments, in response to the Plaintiffs' report despite the fact that they knew or should have known that the pole was down, and that the uninsulated primary wire carrying high voltage electricity, as well as the transformer, was down and live in the heavily wooded, residential area just feet from the occupied residence.

32. Upon information and belief, the aforementioned pole fell as a result of severe rot, decay, and deterioration, which Defendants knew or should have known was present, and which Defendants knew or should have known would cause the pole to fall creating a substantial risk of serious and possibly deadly harm to people, in particular to the homeowners, such as Plaintiffs.

33. On December 2, 2013, after notifying Defendants of the fallen pole, Plaintiff Stanley Fellerman discovered that the fallen pole, transformer, and power and cable lines had started a fire in the Plaintiffs' heavily wooded and leaf-covered front yard in close proximity to Plaintiffs' home and other nearby wooded residences.

34. While trying to extinguish the fire, Plaintiff Stanley Fellerman was shocked and burned and severely and permanently injured by the PECO power line.

35. Specifically, Plaintiff Stanley Fellerman suffered injuries which include, but are not limited to, third and fourth degree electrical burns on both hands, requiring multiple surgeries including amputations, as well as a traumatic brain injury, depression, and anxiety. See

attached photographs of the injuries taken on May 25, 2014, and September 5, 2014, attached as Exhibit "B".

36. As discussed below, since the date of the injury, Plaintiff Carol Fellerman has been solely and primarily responsible for the day to day care of her husband, and the running of their household.

37. Upon information and belief, the power line that Plaintiff Stanley Fellerman came into contact with was the uninsulated primary.

38. Defendants knew or should have known that the pole was rotted, decayed, or otherwise deteriorated, and in danger of falling, as it supported their equipment, which they were responsible for installing, repairing, and maintaining in a safe condition.

39. Defendants knew or should have known that falling poles, such as the one at issue in this lawsuit, present a great risk of serious (and possibly deadly) danger to persons and property given the nature of the equipment and components mounted thereto.

40. Defendants knew or should have known that power and cable lines, as well as transformers, could cause a utility pole to fall if said pole is deteriorated, decayed, or rotted and thereby expose persons such as Plaintiffs to dangers from the exposed and downed utility lines.

41. Defendants should have installed and maintained their equipment so that it would not cause the utility pole to fall and cause injury to persons such as Plaintiffs.

42. Defendants should have advised and warned their customers, such as Plaintiffs, about the nature and condition of the power and cable equipment, including the pole, and the associated risks.

IV. ARGUMENT

a. Standard of Review

The law to be applied in ruling on preliminary objections challenging the legal sufficiency of a complaint is clear. A court should sustain preliminary objections in the nature of a demurrer *only* where “the complaint is insufficient to establish the pleader's right to relief.” Willet v. Pennsylvania Medical Catastrophe Loss Fund, 549 Pa. 613, 619, 702 A.2d 850, 853 (1997) (quoting The County of Allegheny v. The Commonwealth of Pennsylvania, 507 Pa. 360, 372, 490 A.2d 402, 408 (1985)). For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts and every inference fairly deducible from those facts. Id.

Since sustaining the demurrer results in a denial of the pleader's claim or dismissal of his suit, a preliminary objection in the nature of a demurrer *should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted.* Wiernik v. PHH U.S. Mortgage Corporation, 736 A.2d 616 (Pa. Super. 1999)(emphasis added). If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected. Id.

When doubt exists as to whether a demurrer should be sustained, the doubt should be resolved in favor of overruling it. Mahoney v. Furches, 503 Pa. 60, 468 A.2d 458 (1983). Any doubt should be resolved by refusing to sustain the preliminary objections. See Ellenbogen v. PNC Bank N.A., 731 A.2d 175 (Pa. Super. 1999).

b. This Honorable Court Must Retain Jurisdiction Over this Personal Injury Action

This is a “straightforward tort suit requiring a trier of fact, with the aid expert testimony⁴, to determine whether a public utility is responsible for damages sustained by one individual (and his wife) on one particular date due to [a downed power line].” Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 748 (Pa. Cmwlth. Ct. 1995)(finding that the Trial Court erred in transferring case to PUC where it was alleged that a barn fire was caused by West Penn Power Co. supplying overvoltage of electricity). The issue in this case is whether Defendant PECO owed the Plaintiffs a duty, whether Defendant PECO breached that duty, and whether the Plaintiffs were proximately harmed by that breach. The existence of a duty is a question of law for the court to decide. Alderwoods v. Duquense Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant’s conduct, the nature of the risk involved⁵, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id.

Defendant PECO seeks to have this court invoke the doctrine of primary jurisdiction, which requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 749 (Pa. Cmwlth. Ct. 1995). The Supreme Court of Pennsylvania has repeatedly emphasized that the court of common pleas should not be too hasty in referring a matter to an agency, or develop a dependence on an agency, or be quick to

⁴ As recognized by the court in Poorbaugh, courts daily resolve disputes such as those for medical malpractice and products liability which involve equally technical and complex subject matters. Poorbaugh, 666 A.2d at 748.

⁵ The Pennsylvania Supreme Court has previously held that a transmission line is a dangerous instrumentality. No matter where located it is a source of grave peril and the law requires that the possessor of such an instrumentality exercise a high degree of care: “Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question. Alderwoods, 52 A.3d at 356 (citing Yoffee v. Pennsylvania Power & Light Co., 123 A.2d 636, 645 (Pa. 1956)).

abdicate its responsibility to preside over actions involving utilities. Id. (citing Elkin v. Bell Telephone Company of Pennsylvania, 420 A.2d 371 (Pa. 1980); DeFrancesco v. Western Pennsylvania Water Company, 453 A. 2d 595, 597 (Pa. 1982); and Feingold v. Bell of Pennsylvania, 383 A.2d 791, 795 (Pa. 1977)). The purpose of the doctrine of primary jurisdiction includes the ability to make use of the agency's special expertise in complex areas, and the promotion of consistency and uniformity in certain areas of administrative policy. Neither of these purposes are served in this action.

This case does not involve the type of complexity that would require the special expertise of the PUC, and does not involve the interpretation of the tariff as Defendant PECO suggests. "Where the matter is not one peculiarly within the agency's area of expertise, but is one in which the courts or jury are equally well-suited to determine, the court must not abdicate its responsibility. In such cases, it would be wasteful to employ the bifurcated procedure of referral to the PUC, as no appreciable benefits would be forthcoming." DeFrancesco v. Western Pennsylvania Water Company, 453 A. 2d 595, 597 (Pa. 1982)(finding referral to PUC was not warranted in a case where it was alleged that a utility failed to provide adequate water to extinguish a fire)).

Like DeFrancesco, this controversy is "not one in which the general reasonableness, adequacy or sufficiency of a public utility's service [is] drawn into question. Resolution of [Plaintiffs'] claims depend[s] on no rule or regulation predicated on the peculiar expertise of the PUC, no agency policy, no question of service or facilities owed to the general public, and no particular standard of safety or convenience articulated by the PUC." Id. at 750. The issue in this case is whether Defendant PECO owed the Plaintiffs a duty, whether Defendant PECO breached that duty, and whether the Plaintiffs were proximately harmed by that breach. The

existence of a duty is a question of law for the court to decide. Alderwoods v. Duquesne Light Co., 52 A.3d 347, 353 (Pa. Super. Ct. 2012). It is based upon an analysis of the relationship between the parties, the social utility of the defendant's conduct, the nature of the risk involved⁶, the foreseeability of the harm, the consequences of imposing the duty, and the overall public interest in the proposed solution. Id. Moreover, a "Tariff" is defined by the Public Utility Code as "all schedules of rates, all rules, regulations, practices or contracts involving any rate or rates." Alderwoods, Inc. v. Duquesne Light Company, 52 A.3d 347, n.4 (Pa. Super. Ct. 2012). This case has nothing to do with rates.

Second, this case is not about the manner in which Defendant PECO provides electricity to the general public, or the way Defendant PECO maintains its facilities that service the general public or have anything to do with the rates charged by Defendant PECO to the general public. This case is about an individual and his wife who have been catastrophically injured as a consequence of Defendant PECO's failure to maintain the electrical components on the Plaintiffs' property.⁷ The Pennsylvania Supreme Court has recognized that the remedial and enforcement powers vested in the PUC by the Utility Code were designed to allow the PUC to enforce its orders and regulations, but not to empower the PUC to award damages or to litigate a private action for damages on behalf of a complainant. Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 748 (Pa. Cmwlth. Ct. 1995) (citing Feingold v. Bell of

⁶ The Pennsylvania Supreme Court has previously held that a transmission line is a dangerous instrumentality. No matter where located it is a source of grave peril and the law requires that the possessor of such an instrumentality exercise a high degree of care: 'Vigilance must always be commensurate with danger. A high degree of danger always calls for a high degree of care. The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question. Alderwoods, 52 A.3d at 356 (citing Yoffee v. Pennsylvania Power & Light Co., 123 A.2d 636, 645 (Pa. 1956)).

⁷ The Feingold court did recognize that raising questions of the adequacy of utility service to an entire geographic area, rather than to one individual, could present problems which should be addressed by the PUC. Id. However, the adequacy of PECO's utility service to the general public or even a specific geographic area is not at issue in this litigation.

Pennsylvania, 383 A.2d 791, 795 (Pa. 1977). The PUC is responsible for ensuring the adequacy, efficiency, safety and reasonableness of public utility services, facilities and/or rates. Poorbaugh v. PA Public Utility Commission, 666 A.2d 744, 748 (Pa. Cmwlth. Ct. 1995). “Nevertheless, the court of common pleas has original jurisdiction to entertain a suit for damages against a public utility, based on its asserted failure to provide adequate services....” Id. (citing Feingold v. Bell of Pennsylvania, 383 A.2d 791, 794-96 (Pa. 1977)). It is respectfully submitted that this matter should remain in the Court of Common Pleas and that the Preliminary Objections should be overruled in their entirety. This is not a case about broad regulation, it is a case about a specific incident that caused catastrophic personal injuries. It is a case that belongs with this Honorable Court for the purpose of deciding whether Plaintiffs are entitled to monetary damages, compensatory and punitive, relief which the P.U.C. is incapable of awarding.

c. Allegations in Amended Complaint Support Punitive Damage Award

When evaluating the specificity of a particular paragraph in a complaint, such paragraphs must be read in context with all other allegations in that complaint. Yacoub v. Lehigh Valley Medical Associates, P.C., 2002 Pa. Super 251, 805 A.2d 579, 589 (2002). It is well settled that in Pennsylvania, punitive damages may be awarded for “conduct that is outrageous, because of defendant’s evil motive *or* his **reckless indifference to the rights of others.**” Hutchison v. Luddy, 582 Pa. 114, 121, 870 A.2d 766, 770 (2005). In other words, Plaintiffs do not have to establish that Defendant PECO intended for Plaintiff Stanley Fellerman to be shocked and injured.

“A defendant acts recklessly when ‘his conduct creates an unreasonable risk of physical harm to another and such risk is substantially greater than that which is necessary to make his conduct negligent.’ ” Scampono v. Grane Healthcare Co., 11 A.3d 967 (Pa. Super. Ct.

2010)(citing Phillips v. Cricket Lighters, 584 Pa. 179, 883 A.2d 439, 445 (2005) and affirming the Trial Court's decision to submit the issue of punitive damages to the jury); Weiley v. Albert Einstein Medical Center, et al, 51 A.3d 202, 219 (Pa. Super. Ct. 2012)(finding that punitive damages could be awarded based on the reckless conduct of Defendant that was alleged in the Complaint by Plaintiff); Hall v. Episcopal Long Term Care, 54 A.3d 381 (Pa. Super. Ct. 2012) (finding that the Trial Court erred by not submitting the issue of punitive damages to the jury). The purpose of punitive damages is **to punish the tortfeasor and deter them and others like them from similar conduct.** Id.

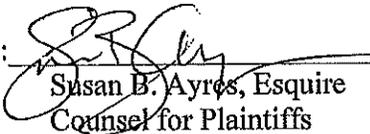
In this case, it is alleged that Defendant PECO knew or should have known that the pole on Plaintiffs' property was severely rotted and in danger of collapse. Moreover, Defendant PECO knew that there was a serious risk of significant and possibly fatal injury to people, such as Plaintiff, if the pole carrying extremely high voltage electricity on which electrical components mounted fell. Defendant PECO, in this particular instance, had actual knowledge that there was a problem with its service to Plaintiffs' property, and that this problem could have been the result of a fallen utility pole and/or electric service components. This knowledge and expertise of Defendant PECO, coupled with their inaction as described in the Amended Complaint in failing to warn, protect, notify, correct, or otherwise address the problem so as to prevent this tragedy from occurring, provides ample support for a reasonable jury to award punitive damages against it.

Of course, should discovery fails to reveal evidentiary support for these specific allegations, Defendant PECO may certainly seek to remove the punitive damages at that time. However, given the allegations in the Amended Complaint, the punitive damages at this time must remain a part of this action.

V. **CONCLUSION**

Plaintiffs respectfully request that this Honorable Court overrule the Preliminary Objections of Defendant PECO to the Plaintiffs' Amended Complaint, and Order Defendant PECO to file an Answer to the Amended Complaint within twenty (20) days of the date of the Order.

HILL & ASSOCIATES, P.C.

BY: 
Susan B. Ayres, Esquire
Counsel for Plaintiffs

Date: 11-7-14

HILL & ASSOCIATES, P.C.
BY: SUSAN B. AYRES, ESQUIRE
Identification No. 87562
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(215) 567-7600

Attorney for Plaintiff

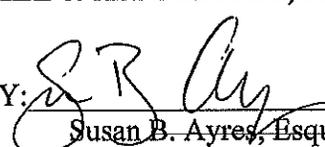
Stanley Fellerman	:	COURT OF COMMON PLEAS
Carol Fellerman	:	
	:	
Plaintiffs	:	PHILADELPHIA COUNTY
	:	CIVIL TRIAL DIVISION
	:	
vs.	:	
	:	July Term, 2014
PECO Energy Co.	:	No. 2640
Comcast of Southeast Pennsylvania, LLC	:	
Defendants	:	

I, Susan B. Ayres, Esquire, hereby certify that a true and correct copy of Plaintiff's Response to Defendant, Peco's Preliminary Objections to Plaintiff's Amended Complaint was served by sending via court e-filing to counsel on the below mentioned date:

Lynda J. Klebanoff
Campbell Campbell Edwards & Conroy P.C.
1205 Westlakes Drive, Suite 330
Berwyn, PA 19312

Alan C. Promer, Esquire
Hangley Aronchick Segal Pudlin & Schiller
One Logan Square
27th Floor
Philadelphia, PA 19103

HILL & ASSOCIATES, P.C.

BY: 

Susan B. Ayres, Esquire
Attorney for Plaintiff

Date: 11-7-14

PL
Commonwealth
Court

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

<p>STANLEY FELLERMAN and CAROL FELLERMAN,</p> <p style="text-align: center;">Plaintiffs-Appellees,</p> <p style="text-align: center;">vs.</p> <p>PECO ENERGY CO.,</p> <p style="text-align: center;">Defendant-Appellant,</p> <p>and COMCAST CORP.,</p> <p style="text-align: center;">Defendant-Appellee.</p>	<p>No.: 2384 CD 2014</p>
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**APPELLANT, PECO ENERGY COMPANY'S PRAECIPE FOR DISCONTINUANCE
WITHOUT PREJUDICE**

TO THE CLERK:

Defendant-Appellant, PECO Energy Company, hereby discontinues its appeal of the Order entered in the Court of Common Pleas of Philadelphia County, July Term, 2014, Number 02640, at Control Number 40-14102440, without prejudice to raise all issues raised in this appeal at any later stage of the proceedings in the Court of Common Pleas.

CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.

BY: s/Thomas M. Hinchey
William J. Conroy, Esquire
Thomas M. Hinchey, Esquire
*Attorneys for Appellant,
PECO Energy Company*

Date: February 18, 2015



CERTIFICATE OF SERVICE

I, Thomas M. Hinchey, Esquire, do hereby certify that a true and correct copy *Appellant*, *PECO Energy Company's Praecipe for Discontinuance*, was served on all counsel of record via U.S. mail.

Leonard K. Hill, Esquire
Susan B. Ayres, Esquire
Hill & Associates, P.C.
123 S. Broad Street, Suite 1100
Philadelphia, PA 19109
Attorneys for Plaintiffs

Ronald P. Schiller, Esquire
Alan C. Promer, Esquire
Jacqueline R. Dungee, Esquire
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One Logan Square, 27th Floor
Philadelphia, PA 19103
Attorneys for Defendant,
Comcast Corp.

s/Thomas M. Hinchey
Thomas M. Hinchey

Dated: February 18, 2015

COMMONWEALTH COURT OF PENNSYLVANIA

Stanley Fellerman : 2384 CD 2014
and Carol Fellerman :
v. :
PECO Energy Co., :
and Comcast Corp. :

Appeal of: PECO Energy Company

PROOF OF SERVICE

I hereby certify that this 18th day of February, 2015, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served: Alan C. Promer
Service Method: First Class Mail
Service Date: 2/18/2015
Address: Hangley Aronchick ET AL
1 Logan Sq Fl 27
Philadelphia, PA 191036995
Phone: 215-496-7044
Representing: Appellee Comcast Corp.

Served: Alan C. Promer
Service Method: First Class Mail
Service Date: 2/18/2015
Address: Hangley Aronchick ET AL
1 Logan Sq Fl 27
Philadelphia, PA 191036995
Phone: 215-496-7044
Representing: Appellee Comcast Corp.

Served: Jacqueline Richelle Dungee
Service Method: First Class Mail
Service Date: 2/18/2015
Address: Hangley Aronchick Segal Pudlin
1 Logan Sq 27th Fl
Philadelphia, PA 191036995
Phone: 215-496-7026
Representing: Appellee Comcast Corp.

COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Jacqueline Richelle Dungee
Service Method: First Class Mail
Service Date: 2/18/2015
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1 Logan Sq 27th Fl
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Phone: 215-496-7026
Representing: Appellee Comcast Corp.

Served: Leonard Keith Hill
Service Method: First Class Mail
Service Date: 2/18/2015
Address: 123 S. Broad Street, Suite 1100
Philadelphia, PA 19109
Phone: 215-567-7600
Representing: Appellee Carol Fellerman
Appellee Stanley Fellerman

Served: Leonard Keith Hill
Service Method: First Class Mail
Service Date: 2/18/2015
Address: 123 S. Broad Street, Suite 1100
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Appellee Stanley Fellerman

Served: Ronald Paltin Schiller
Service Method: First Class Mail
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1 Logan Sq Fl 27
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Representing: Appellee Comcast Corp.

COMMONWEALTH COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Served: Ronald Paltin Schiller
Service Method: First Class Mail
Service Date: 2/18/2015
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Appellee Stanley Fellerman

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Service Date: 2/18/2015
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123 S Broad St Ste 1100
Philadelphia, PA 191091018
Phone: 215-567-7600
Representing: Appellee Carol Fellerman
Appellee Stanley Fellerman

COMMONWEALTH COURT OF PENNSYLVANIA

/s/ Thomas M. Hinchey

(Signature of Person Serving)

Person Serving: Hinchey, Thomas M.
Attorney Registration No: 046628
Law Firm: Campbell Campbell Edwards & Conroy, P.C.
Address: Campbell Edwards ET AL
1205 Westlakes Dr Ste 330
Berwyn, PA 193122405
Representing: Appellant PECO Energy Company



IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL

FELLERMAN ETAL

July Term 2014

VS

No. 02640

PECO ENERGY CO. ETAL

REVISED CASE MANAGEMENT ORDER

Be advised that the Case Management Order issued for the above-captioned action has been revised as follows:

1. All discovery shall be completed not later than 07-AUG-2017.
2. Plaintiff shall submit expert reports not later than 07-AUG-2017.
3. Defendant shall submit expert reports not later than 05-SEP-2017.
4. All pre-trial motions other than motions in limine shall be filed not later than 05-SEP-2017.
5. A settlement conference will be scheduled any time after 05-SEP-2017.
6. A pre-trial conference will be scheduled at any time after 06-JUL-2017.
7. It is expected that this case shall be ready for trial by 04-DEC-2017.

All other terms and conditions on the original Case Management Order will remain in full force and effect.

BY THE COURT:

Date: _____

LISA RAU, J.
TEAM LEADER

FJB30384(9/4/03)

Fellerman Etal Vs Peco -RVCMO



14070264000200

PLAINTIFF'S
EXHIBIT

C

CAMPBELL CAMPBELL EDWARDS CONROY, P.C.

By: William J. Conroy, Esquire
Thomas M. Hinchey, Esquire
Lynda J. Klebanoff, Esquire
Attorney I.D. Nos.: 36433/46628/30893
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klebanoff@campbell-trial-lawyers.com

*Attorneys for Defendant,
PECO Energy Company*

STANLEY FELLERMAN and CAROL FELLERMAN, Plaintiffs, vs. PECO ENERGY CO., and COMCAST CORP., Defendants.	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL ACTION LAW DIVISION JULY TERM, 2014 NO.: 02640 JURY TRIAL DEMANDED
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**DEFENDANT PECO ENERGY COMPANY'S
ANSWERS TO PLAINTIFFS' REQUEST FOR ADMISSIONS**

Defendant PECO Energy Company (hereafter, "PECO" and/or "Answering Defendant"), by and through its attorneys, Campbell Campbell Edwards & Conroy, P.C., hereby responds to Plaintiffs' Request for Admissions:

REQUEST FOR ADMISSION 1: Admit that on December 2, 2013, the utility pole pictured in Exhibit "A" to the Amended Complaint had mounted to it a transformer, an uninsulated primary wire, and cable lines.

RESPONSE: Admitted in part. Denied in part. It is admitted that a PECO transformer was mounted to a customer-owned private property pole. It is denied as stated. Plaintiffs incorrectly refer to the subject pole as a utility pole, in

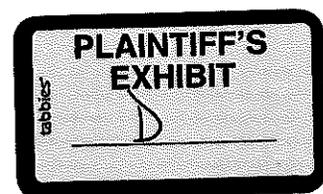


Exhibit "A" to the Amended Complaint. By way of further answer, the uninsulated primary wire is also private property. Furthermore, Exhibit "A" to the Amended Complaint does not show an accurate depiction of the attachments to the pole. By way of further response, this Request seeks information and knowledge of persons or entities other than Answering Defendant.

INTERROGATORY 1: If the Request for Admission No. 1 is anything other than an unqualified admission, state all facts upon which the denial or partial denial is based.

RESPONSE: The subject pole is a customer-owned private property pole. The subject primary wire is also customer-owned.

REQUEST FOR PRODUCTION OF DOCUMENTS 1: Identify and produce all documents related to your response to Interrogatory No. 1.

RESPONSE: See Circuit Map Solebury-2 and Secondary Quad Map 05-EF78 as well as the PECO Electric Service Tariff, included in PECO's document production as Exhibits O and P.

REQUEST FOR ADMISSION 2: Admit that on December 2, 2013, Defendant PECO owned the utility pole pictured in Exhibit "A" to the Amended Complaint:

RESPONSE: Denied. Furthermore, Plaintiffs incorrectly refer to the subject pole as a utility pole, in Exhibit "A" to the Amended Complaint. The subject pole is a customer-owned private property pole.

INTERROGATORY 2: If the Request for Admission No. 2 is anything other than an unqualified admission, state the correct identity of the owner(s), and all facts upon which the denial or partial denial is based.

RESPONSE: The subject pole is owned by the owner(s) of the subject property.

REQUEST FOR PRODUCTION OF DOCUMENTS 2: Identify and produce all documents related to your response to Interrogatory No. 2.

RESPONSE: See Circuit Map Solebury-2 and Secondary Quad Map 05-EF78 as well as the PECO Electric Service Tariff, included in PECO's document production as Exhibits O and P.

REQUEST FOR ADMISSION 3: Admit that on December 2, 2013, Defendant PECO owned the transformer mounted to and supported by the utility pole pictured in Exhibit "A" to the Amended Complaint.

RESPONSE: Admitted in part. Denied in part. It is admitted that PECO owned the transformer mounted to the subject pole. It is denied as stated. Plaintiffs incorrectly refer to the subject pole as a utility pole, in Exhibit "A" to the Amended Complaint. Furthermore, Exhibit "A" to the Amended Complaint does not show an accurate depiction of the attachments to the pole. By way of further response, the subject pole is a customer-owned private property pole.

INTERROGATORY 3: If the Request for Admission No. 3 is anything other than an unqualified admission, state the correct identity of the owner(s), and all facts upon which the denial or partial denial is based.

RESPONSE: PECO owned the transformer mounted to the subject pole. The subject pole is a customer-owned private property pole.

REQUEST FOR PRODUCTION OF DOCUMENTS 3: Identify and produce all documents related to your response to Interrogatory No. 3.

RESPONSE: See Transformer records, Circuit Map Solebury-2 and Secondary Quad Map 05-EF78 as well as the PECO Electric Service Tariff, included in PECO's document production as Exhibits I, O and P.

REQUEST FOR ADMISSION 4: Admit that on December 2, 2013, Defendant PECO owned the uninsulated primary wire mounted to and supported by the utility pole pictured in Exhibit "A" to the Amended Complaint.

RESPONSE: Denied. Plaintiffs incorrectly refer to the subject pole as a utility pole, in Exhibit "A" to the Amended Complaint. Furthermore, Exhibit "A" to the Amended Complaint does not show an accurate depiction of the attachments to the pole. By way of further response, the subject pole is a customer-owned private property pole. The subject wire is customer-owned.

INTERROGATORY 4: If the Request for Admission No. 4 is anything other than an unqualified admission, state the correct identity of the owner(s), and all facts upon which the denial or partial denial is based.

RESPONSE: The subject pole and the subject wire are owned by the owner(s) of the subject property.

REQUEST FOR PRODUCTION OF DOCUMENTS 4: Identify and produce all documents related to your response to Interrogatory No. 4.

RESPONSE: See Transformer records, Circuit Map Solebury-2 and Secondary Quad Map 05-EF78 as well as the PECO Electric Service Tariff, included in PECO's document production as Exhibits I, O and P.

REQUEST FOR ADMISSION 5: Admit that on December 2, 2013, Defendant PECO provided service to the Plaintiffs in exchange for a fee.

RESPONSE: Denied as stated. It is admitted only that Answering Defendant provided electric utility service to the Plaintiffs to the first suitable support of the customer, nominally 100 feet inside the property line of the customer. Beginning at the first suitable support of the customer, and continuing across the customer's property and into the residence, the customer owned the remaining poles, wires, brackets, etc., and PECO did not provide any service over those facilities. PECO transformed power to 240/120 volts through its transformer, located on the customer-owned pole. Admitted that PECO charged for the electric utility service as described; denied that PECO provided any service over the customer-owned poles or wires.

INTERROGATORY 5: If the Request for Admission No. 5 is anything other than an unqualified admission, state all facts upon which the denial or partial denial is based.

RESPONSE: N/A.

REQUEST FOR PRODUCTION OF DOCUMENTS 5: Identify and produce all documents related to your response to Interrogatory No. 5.

RESPONSE: N/A.

REQUEST FOR ADMISSION 6: Admit that Defendant PECO utilized the transformer affixed to the utility pole pictured in Exhibit "A" to the Amended Complaint to provide Plaintiffs' electric service.

RESPONSE: Admitted in part. Denied in part. It is admitted that PECO provided electric utility service to the first suitable support of the customer, nominally 100 feet inside the property line of the customer. Beginning at the first suitable support of the customer, and continuing across the customer's property and into the residence, the customer owned the remaining poles, wires, brackets, etc., and PECO did not provide any service over those facilities. PECO transformed power to 240/120 volts through its transformer, located on the customer-owned pole. Plaintiffs incorrectly refer to the subject pole as a utility pole, in Exhibit "A" to the Amended Complaint. The subject pole is a customer-owned private property pole. Furthermore, Exhibit "A" to the Amended Complaint does not show an accurate depiction of the attachments to the pole. It is further denied, as Answering Defendant does not know what Plaintiffs mean by "utilized".

INTERROGATORY 6: If the Request for Admission No. 6 is anything other than an unqualified admission, state what purpose the transfer [sic] mounted to the utility pole marked as Exhibit A to the Amended Complaint served, and all facts upon which the denial or partial denial is based.

RESPONSE: Plaintiffs incorrectly refer to the subject pole as a utility pole, in Exhibit “A” to the Amended Complaint. The subject pole is a customer-owned private property pole. Furthermore, Exhibit “A” to the Amended Complaint does not show an accurate depiction of the attachments to the pole. It is further denied as Answering Defendant does not know what Plaintiffs mean by “the transfer [sic]”. Notwithstanding, a transformer transforms power from higher voltage to lower voltage – in this case, to 120/240 volts.

REQUEST FOR PRODUCTION OF DOCUMENTS 6: Identify and produce all documents related to your response to Interrogatory No. 6.

RESPONSE: N/A.

REQUEST FOR ADMISSION 7: Admit that Defendant PECO utilized the uninsulated primary wire affixed to the utility pole pictured in Exhibit “A” to the Amended Complaint to provide Plaintiffs’ electric service.

RESPONSE: Admitted in part. Denied in part. It is admitted that PECO provided electric utility service to the first suitable support of the customer, nominally 100 feet inside the property line of the customer. Beginning at the first suitable support of the customer, and continuing across the customer’s property and into the residence, the customer owned the remaining poles, wires, brackets, etc., and PECO did not provide any service over those facilities. PECO transformed power to 240/120 volts through its transformer, located on the customer-owned pole. Plaintiffs

incorrectly refer to the subject pole as a utility pole, in Exhibit "A" to the Amended Complaint. The subject pole is a customer-owned private property pole. Furthermore, Exhibit "A" to the Amended Complaint does not show an accurate depiction of the attachments to the pole. It is further denied, as Answering Defendant does not know what Plaintiffs mean by "utilized".

INTERROGATORY 7: If the Request for Admission No. 7 is anything other than an unqualified admission, state what purpose the uninsulated primary wire affixed to the utility pole pictured in Exhibit A to the Amended Complaint served, and all facts upon which the denial or partial denial is based.

RESPONSE: Plaintiffs incorrectly refer to the subject pole as a utility pole, in Exhibit "A" to the Amended Complaint. The subject pole is a customer-owned private property pole. Furthermore, Exhibit "A" to the Amended Complaint does not show an accurate depiction of the attachments to the pole. By way of further response, the subject customer-owned wire provides the pathway for electric service from the point of delivery (nominally 100 feet inside the customer's property line) to the customer's residence.

REQUEST FOR PRODUCTION OF DOCUMENTS 7: Identify and produce all documents related to your response to Interrogatory No. 7.

RESPONSE: See Circuit Map Solebury-2 and Secondary Quad Map 05-EF78 as well as the PECO Electric Service Tariff, included in PECO's document production as Exhibits O and P.

REQUEST FOR ADMISSION 8: Admit that on December 2, 2013, Defendant PECO was notified by Plaintiffs that the utility pole had fallen but that the power was still working to the property, Defendant PECO did not contact any first responders to report that the information related to it [sic].

RESPONSE: Denied as stated. Plaintiffs incorrectly refer to the subject pole as a utility pole. The subject pole is a customer-owned private property pole. It is unclear what is meant by the phrase “first responders”. It is admitted that PECO was notified that the subject pole was down and that Plaintiffs still had power. PECO dispatched appropriate personnel.

INTERROGATORY 8: If the Request for Admission No. 8 is anything other than an unqualified admission, state the correct identity of the person(s) and/or entity(s) that were contacted, and all facts upon which the denial or partial denial is based.

RESPONSE: See Customer Account records and Event Information and Event Chronology No. B13120200006, included in PECO’s document production as Exhibits G and K.

REQUEST FOR PRODUCTION OF DOCUMENTS 8: Identify and produce all documents related to your response to Interrogatory No. 8.

RESPONSE: See Customer Account records and Event Information and Event Chronology No. B13120200006, included in PECO’s document production as Exhibits G and K.

REQUEST FOR ADMISSION 9: Admit that on December 2, 2013, after Defendant PECO was notified by Plaintiffs that the utility pole had fallen but that the power was still working to the property, Defendant PECO did not immediately shut off power to the property.

RESPONSE: Denied as stated. Plaintiffs incorrectly refer to the subject pole as a utility pole. The subject pole is a customer-owned private property pole. PECO further denies this Request as the term “immediately” is ambiguous. It is admitted that PECO was notified that the subject pole was down and that Plaintiffs still had power. PECO dispatched appropriate personnel. PECO did shut off power to the property.

INTERROGATORY 9: If the Request for Admission No. 9 is anything other than an unqualified admission, state when the power was shut off, and all facts upon which the denial or partial denial is based.

RESPONSE: N/A.

REQUEST FOR PRODUCTION OF DOCUMENTS 9: Identify and produce all documents related to your response to Interrogatory No. 9.

RESPONSE: See Event Records, included in PECO’s document production as Exhibit K.

REQUEST FOR ADMISSION 10: Admit that Defendant Comcast reimbursed or provided some benefit, financial or otherwise, to Defendant PECO in exchange for the benefit of putting its cable lines on the utility pole on Plaintiffs’ property.

RESPONSE: Denied. Plaintiffs incorrectly refer to the subject pole as a utility pole. The subject pole is a customer-owned private property pole. By way of further

response, unknown at this time to Answering Defendant as to any cable lines serving Plaintiffs' property. This Request seeks information and knowledge of persons or entities other than Answering Defendant. By way of further answer, since PECO does not own the pole in question, it believes and therefore avers that it has not received any connection fee or value from Comcast for Comcast's connection of its cable to this customer-owned pole.

INTERROGATORY 10: If the Request for Admission No. 10 is anything other than an unqualified admission, state all facts upon which the denial or partial denial is based.

RESPONSE: Unknown at this time to Answering Defendant as to any cable lines serving Plaintiffs' property. This Interrogatory seeks information and knowledge of persons or entities other than Answering Defendant. To the extent PECO has any responsive information, see Circuit Map Solebury - 2 and Secondary Quad Map 05-EF78, attached hereto.

REQUEST FOR PRODUCTION OF DOCUMENTS 10: Identify and produce all documents related to your response to Interrogatory No. 10.

RESPONSE: Unknown at this time to Answering Defendant as to any cable lines serving Plaintiffs' property. This Request seeks information and knowledge of persons or entities other than Answering Defendant. To the extent PECO has any responsive information, see Circuit Map Solebury - 2 and Secondary Quad Map 05-EF78, included in PECO's document production as Exhibit O.

REQUEST FOR ADMISSION 11: Admit that Defendant PECO required Plaintiffs to replace two utility poles on Plaintiffs' property prior to Defendant PECO restoring electric to the subject property after Plaintiff Stanley Fellerman was injured.

RESPONSE: Denied as stated. Plaintiffs incorrectly refer to the subject poles as utility poles. The subject poles are customer-owned private property poles, which Plaintiffs/Customers were responsible for replacing in order for PECO to restore service to the property.

INTERROGATORY 11: If the Request for Admission No. 11 is anything other than an unqualified admission, state all facts upon which the denial or partial denial is based.

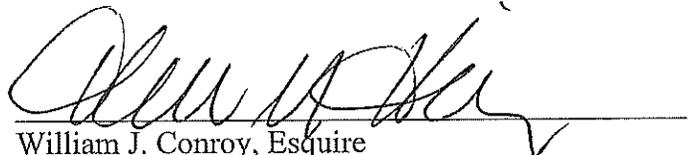
RESPONSE: The subject poles are customer-owned private property poles.

REQUEST FOR PRODUCTION OF DOCUMENTS 11: Identify and produce all documents related to your response to Interrogatory No. 11.

RESPONSE: See Circuit Map Solebury-2 and Secondary Quad Map 05-EF78 as well as the PECO Electric Service Tariff, included in PECO's document production as Exhibits O and P.

CAMPBELL CAMPBELL EDWARDS & CONROY, P.C.

BY:



William J. Conroy, Esquire
Thomas M. Hinchey, Esquire
Lynda J. Klebanoff, Esquire

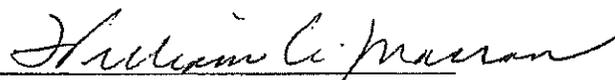
Attorneys for Defendant, PECO Energy Company

Date: March 12, 2015

VERIFICATION

I, William A. Marron, hereby declare that I am Manager, Claims of PECO Energy Company; that as such I am authorized to make this verification on its behalf; that I do not have personal knowledge of all the facts recited in the foregoing Responses of PECO Energy Company to the Request For Admissions, the information contained in Said Responses having been furnished to me by various PECO Energy Company personnel, but that the facts set forth in the Responses are true to the best of my information and belief based upon the information made available to me, and that these Responses are, accordingly, verified on behalf of PECO Energy Company.

I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsification to authorities.


William A. Marron

Dated: 3/12/15

CERTIFICATE OF SERVICE

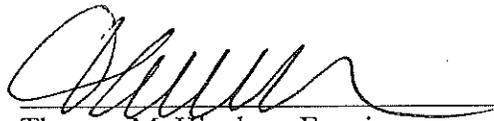
I, Thomas M. Hinchey, Esquire, hereby certify that I caused a true and correct copy of the foregoing *Answers to Plaintiffs' Request for Admission* to be served on the 12th day of March, 2015 via email and Federal Express mail as follows:

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By:



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