

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Juanita Hoffman	:	
	:	
v.	:	C-2017-2583598
	:	
The York Water Company	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This decision sustains a water utility customer’s complaint and directs the utility to repair and replace the cracked arched piece, control joint, and adjacent slab of sidewalk located to the front of its customer’s service property within 120 days of the date of entry of this order barring exigent circumstances.

HISTORY OF THE PROCEEDING

On January 5, 2017, Juanita Hoffman (Complainant or Ms. Hoffman) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against York Water Company (York Water or Respondent) alleging York Water failed to properly restore her newly installed sidewalk following a pipe replacement construction project on her service property in 2015. Complainant requests the Commission order York Water to make the appropriate repairs.

York Water filed an Answer and New Matter in response to the complaint on January 30, 2017, in which it generally denied an issue existed concerning the restoration of

three sections of sidewalk as part of a main replacement project in August, 2015, on Ms. Hoffman's property. On February 10, 2017, Complainant filed a response to York Water's New Matter denying the replacement of three sections of sidewalk was adequate or reasonable.

By Telephonic Hearing Notice dated May 8, 2017, a hearing was scheduled for June 20, 2017, and I was assigned to preside over this matter. On May 11, 2017, I issued a Prehearing Order setting forth the date and time of the scheduled hearing. On or about May 12, 2017, Complainant requested a continuance of the hearing due to her work schedule and the hearing was rescheduled and held on July 12, 2017. A 101-page transcript of the hearing was filed and the record closed on August 4, 2017. This case is ripe for a decision.

FINDINGS OF FACT

1. Complainant resides at 806 South Albemarle Street, York, Pennsylvania (service address) where she has been a customer of York Water Company (Respondent) for over ten years. (N.T. 6, 40).

2. There is a mainline in front of Ms. Hoffman's property, and there is a service line that comes from the main to Complainant's property that not only serves Complainant, but all the properties in her vicinity. N.T. 49.

3. The Company-owned service line terminates at a curb box which is in the sidewalk. N.T. 49, Exhibit C-1.

4. On or about June 20, 2013, Complainant received a letter citation from Spring Garden Township notifying her that repairs had to be made to her sidewalk within thirty days or the township would do the work and she would be billed for it. N.T. 33-34.

5. In response to the letter, Complainant had a new sidewalk installed in front of her house in August 2013. N.T. 33-34. Exhibits C-1, C-2 and C-3.

6. On or about September 18, 2015, Respondent dug up the mainline which had been installed in front of the service address between the sidewalk and the paved street and replaced it with new pipe. N.T. 6, 70-72.

7. In August, 2015, Respondent replaced Complainant's lead service line from the main to the curb stop, which is in the sidewalk, as part of a road renovation project that Spring Garden Township was initiating. N.T. 51, 70-76.

8. On September 18, 2015, Respondent's Contractor removed the cold patch from the pad containing the water pipe on Complainant's property, and replaced it with concrete; however, neither the cracked arched slab connected to the right of the replaced pad nor the adjoining slab that was chipped and cracked during the pipe replacement project were replaced. Exhibits C-2 and C-3.

9. On or about September 25, 2015, Complainant requested York Water repair her sidewalk to its former new condition. N.T. 14. Exhibits C-1, C-2 and C-3.

10. In the winter months, Respondent typically does not pour concrete because it could get cracked in cold temperatures. N.T. 58.

11. On or about May 12, 2016, Respondent's contractor replaced the slab that was chipped and cracked and in the process damaged the corner of the adjoining slab by breaking off the corner of the slab. N.T. 59-62, Exhibits C-2 and C-3.

12. Also on May 12, 2016, the contractor replaced an arched slab that was not damaged but never replaced the arched slab that had been damaged on August 5, 2015, during the beginning phase of the water pipe replacement project. N.T. 59-62, Exhibits C-2 and C-3.

13. To date, Complainant's sidewalk has neither been repaired nor replaced to her satisfaction despite her repeated requests of Respondent. N.T. 18-20. Exhibits C-1, C-2 and C-3.

14. Complainant requests the company replace the damaged/cracked arched piece by pouring new concrete and repair or replace a second slab with a piece missing from it such that Spring Garden Township will not cite her again. N.T. 32-33.

15. Vernon Bracey is the Vice-President of Customer Service for York Water Company. N.T. 39.

16. Tim Young is the Superintendent of Distribution for York Water Company. N.T. 47-48.

17. Barry Generett is a Collector, Utility Man for York Water Company. N.T. 69.

18. Barry S. Updegraff is self-employed by Updegraff Concrete, located at 240 Margate Rd., York, PA 17408. N.T. 78.

19. In May, 2016, Mr. Updegraff or his crew with Updegraff Concrete saw-cut at the edges of slabs, removed two pieces of Complainant's sidewalk with a sledgehammer, and poured concrete to rebuild the slabs. N.T. 80.

20. Mr. Updegraff was uncertain as to whether the work he or his crew performed in May, 2016, caused a piece of sidewalk to chip off. N.T. 85-86.

21. Updegraff Concrete used a large circular saw to cut into the slab causing stress to the arched piece, which cracked when Updegraff Concrete took out the large adjacent slab in May, 2016, and this cracked piece was never repaired. N.T. 89-90, 94.

DISCUSSION

Legal Standards

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the Commission. Subject to the provisions of this part and the regulations or orders of the Commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service....

66 Pa.C.S.A. § 1501.

The Commission has the authority and responsibility to define reasonable service under 66 Pa.C.S. § 1501 and § 1502. The Commission has exclusive jurisdiction to determine the reasonableness, adequacy and sufficiency of a public utility's services and facilities.¹ The term "service" should be "used in its broadest and most inclusive sense, including any and all acts done, rendered, or performed, and any and all things furnished or supplied...by public utilities...in the performance of their duties under the Public Utility Code...."²

Burden of Proof

As the party seeking affirmative relief from the Commission, Complainant bears the burden of proof by substantial evidence. 66 Pa.C.S.A. § 332(a). Substantial evidence is defined as such evidence that a reasonable mind might accept as adequate to support a

¹ Elkin v. Bell of Pa., 491 Pa. 123, 420 A.2d 371 (1980).

² 66 Pa.C.S.A. § 102.

conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.³

Upon a Complainant's presentation of evidence sufficient to satisfy initially the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of the customer may shift to the public utility. If the evidence presented by the public utility is of co-equal value or weight, the burden of proof has not been satisfied by that Complainant. A Complainant still must provide additional evidence to rebut the contrary evidence presented by the public utility.⁴

Complainant's Position

Complainant requests the Commission direct York Water to replace and repair two sections of sidewalk because York Water failed to act appropriately in the work it or its contractor Updegraff Concrete did to Complainant's sidewalk. Complainant is concerned the township will cite her again for having an unsafe condition on her sidewalk at the front of the service property and she offers as evidence a letter from Spring Garden Township dated October 10, 2016, addressed to Mr. John Stine, Vice President – Operations for York Water Company, which discusses two areas marked on an attached photograph that are “open issues of concern” with the township. Exhibit C-1, C-2 and C-3. Complainant insists any repairs or replacements to date have been insufficient and unreasonable and she fears she will be cited again by the township for not having a safe sidewalk.

Respondent's Position

York Water argues Ms. Hoffman presented insufficient evidence that York Water failed to properly install the sidewalk upon completion of the line replacement project in August,

³ Norfolk & Western Ry. Company v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Board of Review, 194 Pa. Superior Ct. 278, 166 A.2d 96 (1961); Murphy v. Dept. of Public Welfare, 480 A.2d 382 (Pa.Cmwlth. 1984).

⁴ Morrissey v. Pa. Dept. of Highways, 424 Pa. 87, 225 A.2d 895 (1967) and Burleson v. Pa. Pub. Util. Comm'n, 66 Pa.Cmwlth. 282, 443 A.2d 1373 (1982), aff'd 501 Pa. 443, 461 A.2d 1234.

2015. York Water contends it did not chip or crack the sidewalk located in front of the service address, although it admitted its contractor returned for a second repair job in May, 2016. York Water contends it provided reasonable and adequate customer service to Ms. Hoffman.

Disposition

The Commission found service to be unreasonable and in violation of Section 1501 in a similar case, when the installation of a utility pole damaged a complainant's sidewalk. *See Melvin Williams v. Duquesne Light Company*, C-2014-2446701, (Opinion and Order entered February 24, 2016) (*Williams*). Although the Commission deemed no civil penalty was warranted, the Commission found a violation based on the evidence of Mr. Williams testimony that Duquesne Light Company caused a fifteen-inch long crack and a five-inch long saw-cut in the shape of an "L" in his sidewalk, etc. *Id.* at 19. This testimony was not sufficiently refuted by any crewman who had worked on the project, only a supervisor. *Id.* at 19. Also, no testimony regarding the requirements of the local municipality or industry standards was produced. *Id.* at 19, citing *Moyer v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2013-2375588 (Final Order entered April 2, 2014).

In the instant case, it is not clear what the exact municipal requirements are; however, there is evidence that whatever repairs were made so far are inadequate due to the letter from Gregory Maust, P.E. Manager of Spring Garden Township dated October 10, 2016, addressed to John Stine, Vice President – Operations of York Water Company, which shares Complainant's view that the condition is an "open issue" involving a safety concern to pedestrians on her property. The letter supports Complainant's request that York Water address these two issues for Complainant as well. Exhibit C-1, C-2 and C-3.

I find Complainant has sustained her burden of proving that Respondent did not provide reasonable service when it replaced the three slabs of sidewalk in front of the service property in 2015 and made an over-extended saw cut into an adjacent arched piece of sidewalk that was never reasonably repaired despite her written requests dated September 25, 2015, October 30, 2015, April 22, 2016, May 27, 2016, and June 17, 2016. Exhibits C-1, C-2 and C-3.

Complainant had a new sidewalk installed in 2013 and provided as exhibits attached to her complaint a photograph dated August, 2013, showing a brand-new looking sidewalk with no visible chips, cracks or pieces missing. Complaint. Exhibits C-1, C-2 and C-3. Photographs taken more recently, on September 18, 2015 and in June, 2017, show visible pieces missing, an extended saw cut, and cracks in the sidewalk slabs, for which Complainant seeks replacement and repair. C-1, C-2 and C-3. Complainant's timeline shows she has been requesting replacement/repair continuously since May, 2016, the last time Respondent visited the property to make a repair. On December 20, 2016, Complainant was denied relief regarding her informal complaint at BCS Case No. 3496654. Exhibits C-1, C-2 and C-3.

Although Mr. Updegraff testified he would have been on the work site, he could not confirm that he personally inspected the work on this sidewalk project after it was completed. N.T. 81-85. Also, Mr. Updegraff was not sure how the piece missing from one of the slabs happened. He did not know if it was missing before he started the project. N.T. 85-86. Specifically, Mr. Updegraff testified,

It looks to me like it had some kind of patch put on it, some material that's still a little bit around the edges now; so, whether one of my guys may have patched that, I don't – you know, I could not say that we damaged that or not, if it was from us or the Water Company, or it could have been from somebody hitting it with, you know, a snow blower.

N.T. 86. He did admit on cross-examination that he typically used a diamond blade slightly larger than your average chain saw blade with a 12-14-inch circular blade on it. N.T. 88. Mr. Updegraff testified that while removing the sidewalk slabs in May, 2016, he also took out one arched section because it is a very fragile area. N.T. 89. He testified, "Well, taking out the first slab with that little piece curving off like that, it's very fragile area; so, it's one of them things where you're going to take it out that's either – you might get lucky, and it will be fine, or you might have to just take it out." N.T. 89. Mr. Updegraff admitted that cutting into the slab could have caused stress to the arched piece and cracked it when he was taking out the larger slab. N.T. 90. This testimony is consistent with Ms. Hoffman's claim that the contractor removed the wrong arched piece, and left a cracked one in place.

Based on this evidence, I find Complainant sustained her burden of proof as the sidewalk was not repaired in a reasonable manner. Record evidence demonstrates that the wrong arched piece was removed and replaced, and there are still issues with cracks and pieces missing in the sidewalk more likely than not caused by the sawing and removal of an adjacent slab of concrete sidewalk in May, 2016. This testimony is supported by numerous dated photographs showing the condition of the property in August 2013, September 18, 2015, and in June, 2017. I am further persuaded by the letter from Gregory Maust, P.E. Manager of Spring Garden Township dated October 10, 2016, addressed to John Stine, Vice President – Operations of York Water Company which shares Complainant’s view that the condition is an “open issue” involving a safety concern to pedestrians on her property. The letter supports Complainant and requests York Water address these two issues for Complainant as well. Exhibit C-1, C-2 and C-3.

Accordingly, this formal complaint is sustained as the service rendered by the utility was unreasonable and York Water Company shall be directed to repair and replace the sidewalk slabs and arches such that they are neither cut, cracked or with pieces missing within 120 days of the date of entry of a final Commission Order, absent exigent circumstances such as extreme weather conditions. Further, the company shall remove all debris from the site.

Civil Penalty

As I found there to be a violation of 66 Pa. C.S. § 1501, I turn to a civil penalty analysis. Section 69.1201 of the Commission’s regulations provides a Policy Statement regarding factors and standards to be used when evaluating litigated and settled proceedings. 52 Pa.Code § 69.1201. The Policy Statement notes that “these factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest.” 52 Pa.Code § 69.1201(a). These factors and standards are as follows:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or

misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa.Code § 69.1201(c); *see also*, Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company, Docket No. C-0092409, Final Order (entered February 10, 2000).

The conduct in question was neither serious nor intentional, but rather negligent in nature. There is no evidence of fraud or misrepresentation. There were no serious injuries or property damages as a result of the violation. Only one customer was affected by the violation. These factors mitigate a civil penalty. Similar to the Commission's ruling in the case of *Melvin Williams v. Duquesne Light Company*, C-2014-2446701, (Opinion and Order entered February 24, 2016), I will direct Respondent to repair the damage to Complainant's sidewalk and remove any debris generated during the course of repairing the sidewalk within 120 days of the date of entry of a final Commission Order. Following completion of repairs, York Water shall be directed to file a compliance report and affidavit with the Secretary's Bureau pursuant to 52 Pa. Code § 5.591. Additionally, a civil penalty in the amount of \$100 shall be assessed to deter future violations.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S.A. § 701.

2. Complainant carried the burden of proving Respondent failed to provide reasonable and adequate customer service or to make repairs in an appropriate manner. 66 Pa.C.S.A. § 1501.

3. Complainant met the burden of proving Respondent failed to provide reasonable and adequate customer service or to make repairs in an appropriate manner. 66 Pa.C.S.A. § 1501.

4. A civil penalty in the amount of \$100 is appropriate given the factors of 52 Pa.Code § 69.1201.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of Juanita Hoffman against York Water Company at Docket No. C-2017-2583598 is hereby sustained.

2. That York Water Company is directed to replace and repair Juanita Hoffman's sidewalk and remove any debris associated with such replacement at 806 S. Albemarle St., York, Pennsylvania within one hundred twenty (120) days of the date of entry of a final order at Docket No. C-2017-2583598.

3. That in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within thirty (30) days of the date of entry of this final order, York Water Company shall pay a civil penalty of \$100. Certified check or money order in that amount shall be made payable to "Commonwealth of Pennsylvania" and sent addressed as follows:

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

4. That a copy of this Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

5. That upon the payment of a civil penalty and the filing of an affidavit by York Water Company reporting the directed work is completed, Docket No. C-2017-2583598 shall be marked closed.

6. That York Water Company shall cease and desist from further violations of the Public Utility Code, 66 Pa. C.S. §§ 101, *et seq.*, and the Regulations of the Commission, 52 Pa. Code §§ 1.1, *et seq.*

Date: August 31, 2017

_____/s/
Elizabeth H. Barnes
Administrative Law Judge