

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jean Guirguis	:	
	:	
v.	:	C-2018-3004271
	:	
Pennsylvania Power Company	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses a formal Complaint filed by Jean Guirguis (Complainant) alleging unreasonable or inadequate service by Pennsylvania Power Company (Penn Power or Company). The allegation is based on an incident that occurred on May 18, 2018 that resulted in a power outage to Complainant’s home. Complainant contends that Penn Power did not provide reasonable or adequate service because it took four and a half hours to restore power to Complainant’s residence. Complainant failed to carry her burden of showing unreasonable or inadequate service by the utility. Further, Complainant’s renewed request for damages is denied.

HISTORY OF THE PROCEEDING

On August 10, 2018, the Complainant, Jean Guirguis, filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against Penn Power at Docket No. C-2018-3004271.¹ Complainant averred that on May 18, 2018, her residence lost power and

¹ I note that this Complaint is an untimely appeal from a determination by the Commission’s Bureau of Consumer Services (BCS) in Case No. 3619502.

that due to what she characterized as “inept management” by Penn Power she and her husband were inconvenienced for approximately four and a half hours and lost \$125.00 worth of refrigerated food. As relief, Complainant sought reimbursement for the cost of the lost food, an apology from Penn Power, and that the Commission closely monitor Penn Power’s response time to outages and to hold Penn Power accountable as a matter of public safety.

On September 13, 2018, Penn Power filed an Answer and New Matter with the latter endorsed with a Notice to Plead. In its Answer, Penn Power denied Complainant’s characterization of events and asserted that its actions have been reasonable and in conformity with all applicable laws including Penn Power’s tariff, the provisions of the Pennsylvania Public Utility Code (Code) and the regulations of the Commission. Penn Power further averred that the outage on May 18, 2018 was caused by the fall of a tree from outside of the right-of-way onto Penn Power’s line after that tree had been cut by a person or persons unknown. Penn Power maintains that, pursuant to its tariff, it is not liable for damages when an event is beyond the Company’s control. In its New Matter, Penn Power argued that the Commission does not have the authority to award damages.

On September 13, 2018, Penn Power also filed Preliminary Objections asking that the request for damages made in the formal Complaint be stricken as the Commission does not have the authority to award damages. The Preliminary Objections were properly endorsed with a notice to plead.

Complainant did not file an Answer to either the New Matter or to the Preliminary Objections.

On October 19, 2018, the Preliminary Objections were assigned to Administrative Law Judge David A. Salapa, and on October 24, 2018, Judge Salapa issued an Order granting Penn Power’s Preliminary Objections in part, striking the request for damages as beyond the Commission’s authority to grant.

On October 26, 2018, an Interim Order was issued referring this case to the Commission’s Mediation Unit. Ultimately, the case was not settled.

On December 3, 2018, I was assigned as Presiding Officer for the purpose of conducting an evidentiary hearing and preparing a decision.

On January 23, 2019, a hearing Notice was issued setting February 4, 2019, as the date for a telephonic hearing in this case.

On February 4, 2019, a telephonic hearing originating from the Commission's Harrisburg office was held. Complainant was present and offered testimony as did her husband, Adel Guirguis. Penn Power was represented by Margaret A. Morris, Esquire. Attorney Morris presented the testimony of two witnesses, Alison Walker, a Business Analyst in the Pennsylvania Compliance Department of FirstEnergy, and Jeffrey Doran, the Manager of Operation Services for FirstEnergy in Mercer County, Pennsylvania. The following exhibits were offered by Penn Power and received into evidence: Penn Power No. 1, a Customer Contact History; Penn Power No. 2, a PowerOn report related to May 18, 2018 outage; Penn Power No. 3, an extract from Penn Power's tariff; Penn Power No. 5, a work request related to the May 18, 2018 outage; and, Penn Power No. 6, a summary of Bureau of Consumer Services (BCS) Case No. 3619502.

The hearing concluded, and a transcript of sixty-five pages was filed on February 27, 2019. The record, which is comprised of the hearing transcript and the five Penn Power exhibits received into evidence, closed on that date.

This case is now ready for adjudication.

FINDINGS OF FACT

1. The Complainant in this proceeding is Jean Guirguis.
2. The Respondent in this proceeding is Pennsylvania Power Company.
3. The service address is 584 Methodist Road, Greenville, Pennsylvania.

4. On May 18, 2018, electricity was off at the service address from 3:29 p.m. to 7:58 p.m. Tr. at 10.

5. Complainant called to report the loss of power at approximately 3:30 p.m. on May 18, 2018. Tr. at 33, 46; Penn Power No. 1.

6. Representatives of Penn Power returned the call at 4:37 p.m. stating that the company was investigating the outage and estimating restoration at 6:00 p.m. Tr. at 34.

7. After receiving the original outage call, Penn Power dispatched a “troubleshooter” to the service address. Tr. at 46.

8. A troubleshooter is a Company first responder who assesses the reported problem and advises the Company of what is needed to make repairs. Tr. at 47.

9. On May 18, 2018, the troubleshooter discovered that an off-right-of-way tree had fallen on the Company’s primary wire which resulted in bringing the wire down as well as causing damage to secondary wires. Tr. at 46.

10. The troubleshooter found a chainsaw stuck in the bottom of the off-right-of-way tree that had fallen on the Company’s primary wire. Tr. at 46.

11. An off-right-of-way tree is a tree outside of the established right of way that the Company cannot remove without permission unless the tree is diseased, dying or a potential threat to Company facilities. Tr. at 47.

12. The off-right-of-way tree that had fallen on the Company’s primary wire was the proximate cause of the outage on May 18, 2018. Tr. at 48.

13. Forty-eight customers were impacted by the outage on May 18, 2018, and the outage lasted approximately four hours and thirty-four minutes. Tr. at 48, 58-59.

14. The last customer without power had service restored at approximately 8:00 p.m. on May 18, 2018. Tr. at 49.

15. Because of the extent of the damage and for safety reasons, crews from the Forestry Department of Penn Power as well as a four-person repair crew from the Line Department were sent with a bucket truck to repair the damage caused by the treefall. Tr. at 49-50.

16. Despite conducting an investigation, the Company was unable to determine the identity of the person or persons who cut down the tree that caused the outage on May 18, 2018. Tr. at 52.

DISCUSSION

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n.*, 479 A.2d 10 (Pa.Cmwlth. 1984). This due process requirement is satisfied when the parties are provided with notice and an opportunity to be heard. *Id.*

As a matter of law, to establish a legally sufficient claim, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990). The offense must be a violation of the Public Utility Code, a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701.

Section 332(a) of the Public Utility Code (Code) provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). The burden of proof for actions before the Commission is the, "preponderance of the evidence" standard. *Suber v. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n.*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*); see also *North*

American Coal Corp. v. Air Pollution Commission, 279 A.2d 356 (Pa. Cmwlth. 1971). To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or evidence that outweighs, or is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. See *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 48-49, 70 A.2d 854, 855 (1950).

The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. It may shift between the parties during a hearing. If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. See *Id.* If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001); *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*. 501 Pa. 433, 461 A.2d 1234 (1983).

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. See *Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. In determining whether a complainant has met the burden of persuasion, the ultimate fact-finder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. See *Moore*, citing *Suber*.

In this case, Complainant testified that her residence lost power and that due to what she characterized as, “inept management” by Penn Power, power was not restored for approximately four and a half hours, and she and her husband lost \$125.00 worth of refrigerated food. Complainant originally demanded reimbursement for the cost of the food, an apology from Penn Power, and that the Commission closely monitor Penn Power’s response time to outages and to hold Penn Power accountable as a matter of public safety. The issue, here, is whether Penn Power failed to provide adequate, safe and reasonable service in restoring power on May 18, 2018. The burden of proof in this case is on the Complainant to demonstrate by at least a preponderance of the evidence that Penn Power failed to provide adequate, safe and reasonable service. For reasons that will be explained, below, I find that Complainant did not meet this burden of proof, and consequently her Complaint must be dismissed.

The applicable law in this case is Section 1501 of the Code, which states in pertinent part:

§ 1501. Character of service and facilities.

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.

The statute at 66 Pa. C.S. § 1501 governs any allegations of unreasonable or inadequate service. Pursuant to 66 Pa. C.S. § 1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. *Elkin v. Bell Telephone Co.*, 372 A.2d 1203 (Pa. Super. 1977) *aff’d* 420 A.2d 371 (Pa. 1977); *Behrend v. Bell Telephone Co.*, 243 A.2d 346 (Pa. 1968). As a general proposition, neither the Public Utility Code nor the Commission’s regulations require public utilities to provide constantly flawless service. The Public Utility Code at 66 Pa. C.S. § 1501 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service. *Analytical Laboratory Services, Inc. v. Metropolitan Edison Co.*, Docket No. C-2006608 (Order entered

December 21, 2007); *Emerald Art Glass v. Duquesne Light Co.*, Docket No. C-00015494 (Order entered June 14, 2002); *Re: Metropolitan Edison Co.*, 80 Pa. PUC 662 (1993). Thus, the standard of performance by the utility is a “reasonableness” standard.

Both in her Complaint and at hearing Complainant and her husband referred to the weather on May 18, 2018, but never explained how weather conditions on May 18, 2018 are relevant to the Complaint. Tr. at 8-9, 12, 18, 25-26. In fact, the weather is not a relevant factor. The cause of the outage was not within the Company’s control, and the weather was not a factor in the outage or in the Company’s response time.² The Company’s witness, Jeffrey Doran, established through credible testimony that the power outage on May 18, 2018 was caused by an unknown party or parties who cut down a tree outside of the Company’s right-of-way that took down a power line. Complainant did not refute this testimony or establish how the outage was caused or exacerbated by Penn Power, nor did Complainant establish why the restoration time was unreasonable.

Complainant and her husband also complained about the timeliness and method of Penn Power’s response to their request for reimbursement for lost food. Tr. at 17. However, neither Complainant nor her husband established that Penn Power’s handling of her phone calls was unreasonable. In fact, Complainant’s husband testified that they received a letter from Penn Power addressing their concern. Tr. at 17-18.

With respect to the four and a half hour repair and restoration time, given the severity of the damage to the power line on May 18, 2018, and the fact that both Forestry and Line crews were needed to affect a repair, Complainant failed to show how the Company’s service was unreasonable or inadequate.³ Complainant did not demonstrate how or why a four and a half hour repair and restoration time constituted unreasonable service by Penn Power. Tr. at 11. Mere opinion, without more, is insufficient to meet the Complainant’s burden. *Richard*

² The implication by Complainant and her husband seems to be that in temperate weather conditions the outage should not have occurred and the restoration time should have been shorter, though neither witness explained how or why that should have been the case.

³ Forty-eight customers were impacted by the outage on May 18, 2018. Tr. at 48, 58-59.

Kirby v. PPL Electric Utilities Corporation, Docket No. C-20066297 (Final Order entered November 16, 2006) (citing *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987)).

At hearing, Complainant renewed her request for damages, referring to Rule 21 of Penn Power's tariff, and demanding \$500 from the Company as compensation for damages in that she and her husband were inconvenienced. Tr. at 20, 25-26. Judge Salapa earlier ruled that the Commission is without authority to award damages, but Complainant nevertheless argued that under Rule 21 of Penn Power's tariff, she is entitled to \$500 for being inconvenienced and for the cost of pursuing this Complaint.⁴ The specific part of Rule 21 Complainant cited reads:

In all other circumstances, unless caused by the willful and/or wanton misconduct of the Company, the liability of the Company to Customers and third parties for all injuries and damages, direct or consequential, including damage . . . caused by variations or interruptions in electric supply . . . response time to electric outages or emergencies . . . shall be limited to Five Hundred Dollars (\$500) for residential customers . . .

As I pointed out at hearing, this is an incomplete reading of the tariff and presumes willful or wanton misconduct by the Company. Tr. 27-28. However, misconduct by the Company was never established by Complainant. Again, it is solely Complainant's opinion that a four and a half hour restoration time was unreasonable, and that opinion alone forms the basis of Complainant's case. The paragraph cited by Complainant is preceded by a much more relevant paragraph in Rule 21 which states:

The Company does not guarantee a continuous, uninterrupted or regular supply of electric service The Company shall not be liable for any damages due to accident, strike, storm, lightning, riot, fire, flood, legal process, state or municipal interference, or any other cause beyond the Company's control.

⁴ Requesting an award of damages because Complainant pursued this Complaint is tantamount to requesting costs and fees. The Pennsylvania Public Utility Code does not convey to the Commission nor to its judges the authority to make such awards. That request is, therefore, denied as beyond the jurisdiction of the Commission. 66 Pa.C.S. § 501.

In this case, Complainant did not demonstrate through objective, credible evidence that she suffered damage due to the willful and/or wanton misconduct of the Company. Complainant provided no evidence that four and a half hours was an unreasonable amount of time for Penn Power to accomplish the repair of the line on May 18, 2018. I agree with Penn Power's witness, Mr. Doran, that the repair was accomplished in a safe and timely fashion. Tr. at 53.

Complainant has not demonstrated that Penn Power has violated the provisions of the Public Utility Code or the rules and regulations of the Commission. Penn Power has not violated the provisions of its lawfully filed tariff. The Complaint must be dismissed, and Complainant's renewed request for the award of damages is denied.

CONCLUSIONS OF LAW

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

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950).

4. Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n.*, 479 A.2d 10 (Pa.Cmwlth 1984). This due process requirement is satisfied when the parties are provided with notice and an opportunity to be heard. *Id.*

5. 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. 66 Pa. C.S. § 1501.

6. Complainant failed to carry her burden of proof in this proceeding.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal Complaint filed by Jean Guirguis against Pennsylvania Power Company at Docket Number C-2018-3004271 is dismissed.
2. That Complainant's request for the award of \$500 in damages under Rule 21 of Pennsylvania Power Company's tariff is denied.
3. That this matter be marked closed.

Date: May 10, 2019

/s/
Dennis J. Buckley
Administrative Law Judge