

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Accent Developers, LLC	:	
	:	
v.	:	C-2019-3010107
	:	
West Penn Power Company	:	
GECO Holding, Ltd.	:	
	:	
v.	:	C-2019-3010108
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision denies two consolidated formal complaints filed by customers of an electric distribution company who complained that the company has provided unreasonable service because it would not relocate electric facilities that are on the complainants' property at the company's own costs. This decision dismisses the complaints because the complainants failed to satisfy their burden of demonstrating that the company violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company when refusing to relocate facilities on the complainants' property at the company's own cost.

HISTORY OF THE PROCEEDING

On May 17, 2019, GECO Holding, Ltd. (GECO) filed a formal complaint with the

Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn), docket number C-2019-3010108. GECO averred that it had discussions with a West Penn representative regarding the necessity of relocating electric utility poles and power lines through the middle portion of its shale pit property and that GECO explained that the present location of the poles and lines interferes with its operations on the property. GECO added, among other things, that it understood that West Penn agreed to relocate the poles and utility line and provided GECO with the correspondence and forms for GECO to complete regarding a relocation of the poles and utility lines at West Penn's cost. GECO attached to its complaint a copy of a right-of-way agreement between the utility and GECO's predecessors in title containing language that requires West Penn to relocate the poles when necessary to conform to a property owner's future building operations. GECO requested in its complaint that poles be moved at West Penn's expense.

Also, on May 17, 2019, Accent Developers LLC (Accent) filed a formal complaint with the Commission against West Penn at docket number C-2019-3010107 averring that the present location of the electric utility pole on its real estate is now interfering with its use and enjoyment of the property. Accent averred that it had previously discussed this issue with West Penn and believed that the company would relocate the pole at its cost. Accent added, however, that West Penn has refused to cooperate regarding this matter and attached a right-of-way agreement which Accent believes controls the issue because it requires West Penn to relocate poles necessary to conform to future building operations. Accent requested that West Penn relocate the pole and transmission line to a location convenient to both the utility and the customer at the utility's expense.

On June 12, 2019, West Penn filed an answer and new matter in response to GECO's complaint. In its answer, West Penn admitted or denied the various averments made in the complaint. In particular, West Penn denied that it agreed to relocate the poles and the utility line at the company's expense or that it refused to cooperate regarding this matter. West Penn added that, to the extent the complaint seeks a legal determination regarding the scope or validity of a right-of-way, the Commission lacks subject matter jurisdiction to entertain and resolve the dispute. In its new matter, which was accompanied by a notice to plead, West Penn argued that the Commission only has the authority the legislature has specifically granted to it in the Public Utility Code and that the Commission lacks subject matter jurisdiction to entertain and resolve disputes over private

contractual matters between a citizen and a utility, including the validity of rights-of-way. West Penn argued that the formal complaint should be dismissed with prejudice for lack of Commission jurisdiction.

On June 12, 2019, West Penn filed an answer and new matter in response to Accent's complaint. In its answer, West Penn admitted or denied the various averments made in the complaint. In particular, West Penn denied that it refused to cooperate regarding this matter and noted that, to the extent the complaint seeks a legal determination regarding the scope or validity of a right-of-way, the Commission lacks subject matter jurisdiction to entertain and resolve the dispute. In its new matter, which was accompanied by a notice to plead, West Penn argued that the Commission only has the authority the legislature has specifically granted to it in the Public Utility Code and that the Commission lacks subject matter jurisdiction to entertain and resolve disputes over private contractual matters between a citizen and a utility, including the validity of rights-of-way. West Penn argued that the formal complaint should be dismissed with prejudice for lack of Commission jurisdiction.

Also, on June 12, 2019, West Penn filed separate but identical preliminary objections against both GECO and Accent's complaints. In the preliminary objections, which were also accompanied by a notice to plead, West Penn argued that the complaints only raise issues related to the scope and validity of a company right-of-way and that the Commission does not have jurisdiction to adjudicate such issues. West Penn, therefore, requested that all allegations in the complaints regarding the scope and validity of a right-of-way be stricken, the complainants be prohibited from presenting evidence regarding the scope and validity of the right-of-way and the complaints be dismissed in their entirety with prejudice.

On June 28, 2019, GECO and Accent each filed separate answers to the preliminary objections filed by West Penn.¹ In its answer to the preliminary objections, Accent admitted or denied the various averments made by West Penn. In particular, Accent argued that it made a reasonable request to West Penn to relocate the pole and transmission line and attached a right of way agreement. Accent added that the scope and validity of the right-of-way is not the only issue

¹ By letter dated June 17, 2019, counsel for GECO indicated that West Penn did not object to an extension in which to file a reply to the preliminary objection until June 28, 2019.

presented in the complaint and that the reasonableness of the request to relocate the pole and transmission line is also an issue before the Commission. Accent requested that West Penn's preliminary objections be dismissed.

Also on June 28, 2019, GECO filed an answer to West Penn's preliminary objection. Similar to Accent's answer to West Penn's preliminary objections, GECO argued that it made a reasonable request to West Penn to relocate the pole and transmission line and attached a right-of-way agreement and that the scope and validity of the right-of-way is not the only issue presented in the complaint but that the reasonableness of the request to relocate the pole and transmission line is also an issue before the Commission. GECO also requested that West Penn's preliminary objections be dismissed.

On July 1, 2019, Accent and GECO both also filed separate answers to the new matter filed by West Penn. As with the answers to the preliminary objections, the answers to the new matter were also substantially similar. For example, both answers averred that the complaints raise issues regarding the reasonableness of the location and/or necessity of a relocation of the utility poles and transmission lines across the complainants' properties. The answer filed by GECO also averred that it was led to believe that West Penn agreed to relocate the poles and transmission lines at West Penn's expense because of GECO's building operations.

On July 9, 2019, a motion judge assignment notice was issued in the complaint involving GECO informing the parties that I was assigned as the presiding officer and responsible to resolve any issues which might arise during the preliminary phase of this proceeding.

The preliminary objections filed by West Penn were denied via separate orders dated July 24, 2019. The portions of the complaints regarding the Commission's interpretation of the scope and validity of the right-of-way on the complainant's property were stricken from the complaint but all other issues were allowed to move forward to a hearing.

On July 25, 2019, the Commission issued a hearing notice scheduling an initial call-in telephonic hearing for both matters for Tuesday, September 10, 2019 and assigning me as the presiding officer. A prehearing order dated July 25, 2019 was issued for both cases setting forth

various procedural rules that would govern that hearing. Upon request of counsel for West Penn, the hearing was rescheduled to Thursday, October 17, 2019. A second request for a continuance made by West Penn was also granted scheduling the hearing for Tuesday, December 17, 2019.

The hearing convened on December 17, 2019, as scheduled. Accent and GECO appeared represented by William C. Cramer, Esquire, who presented one witness on behalf of both complaints. That witness sponsored seven exhibits that were all admitted into the record. Margaret Morris, Esquire, appeared on behalf of West Penn and presented two witnesses who sponsored six exhibits that were admitted into the record. The two complaints were formally consolidated at the beginning of the hearing. A transcript of 83 pages was created.

On December 20, 2019, pursuant to a discussion held during the hearing, West Penn submitted late-filed exhibit number 7. On December 31, 2019, GECO filed a limited objection to the admission of late filed exhibit number 7. West Penn's late-filed exhibit number 7 will be admitted into the record of this proceeding pursuant to the ordering paragraphs below.

The record in this case closed on January 10, 2020, the day the transcript was submitted to the Commission. For the reasons discussed below, the consolidated complaints will both be denied.

FINDINGS OF FACT

1. The Complainants in this case are Accent Developers LLC and GECO Holding, Ltd.
2. The Respondent in this case is West Penn Power Company.
3. David George is the owner of GECO, a construction company. Tr. 8-9.
4. The property at issue in the GECO complaint is 52 acres of approved and certified shale mine with no structures on it. Tr. 9.

5. Utility poles run through the GECO property from one end to the other and are perched high in the air with the bottom of the poles about 20 feet above the grade of the mine. Tr. 10.

6. Mr. George had multiple discussions with Brian Lauffer, a representative from West Penn, about the poles being moved. Tr. 11-15.

7. Mr. George believed that Mr. Lauffer agreed that West Penn would move the utility poles at West Penn's expense because they were unsafe. Tr. 16-17, 24, 40-41.

8. Mr. George had a previous complaint against West Penn at docket number C-2009-2088308 which was resolved via a certificate of satisfaction. Tr. 17-18.

9. Mr. George spoke with Mr. Lauffer in 2018 about a different issue on his property and, at that time, inquired again about moving poles in the shale pit. Tr. 19.

10. GECO Exhibit Number 1 is a letter from Mr. Lauffer to Mr. George dated April 19, 2018 regarding obtaining records and easements. Tr. 22-24; GECO Exh. No. 1.

11. Mr. Lauffer informed Mr. George that West Penn would not pay for the costs to move the poles. Tr. 25.

12. Mr. George wants the poles removed so he can dig under them and because he has safety concerns. Tr. 26-27.

13. GECO Exhibit Number 3 is a deed dated September 6, 2000 between Nathan and Doris Meyers and GECO. Tr. 28; GECO Exh. No. 3.

14. The property at issue in the Accent complaint is a farm that is being developed with houses. Tr. 29, 41-42.

15. The property is served by underground electricity but there is one pole that Mr. George would like West Penn to remove because it is in the road of one of the lots. Tr. 29-30, 70.

16. Accent Exhibit Number 1 is a deed dated June 14, 2004 between Elmer Buhrman and Accent Developers, LLC. Tr. 32; Accent Exh. No. 1.

17. Accent Exhibit Number 2 is a one-page right of way agreement between South Penn Power Company and Samuel C. and Frederica D. Humer dated January 21, 1924. Tr. 33; Accent Exh. No. 2.

18. Accent Exhibit Number 3 is a one-page deed dated January 21, 1954 between Elmer and Edna Buhrman and South Penn Power Company. Tr. 33; Accent Exh. No. 3.

19. Accent Exhibit Number 4 is a one-page construction schematic “sketch to accompany work order” dated January 18, 1953. Tr. 33-34; Accent Exh. No. 4.

20. Brian Lauffer is a Designer Tech 3 for West Penn Power Company and has been employed by the company for 32 years. Tr. 47.

21. Mr. Lauffer is responsible for designing new service, upgrades, relocations and customer requests. Tr. 47.

22. West Penn Exhibit Number 5 is a one-page screenshot showing the service address, mailing address and account details for DL George and Sons, Inc. Tr. 49; West Penn Exh. No. 5.

23. There is no active electric service at the shale pit. Tr. 49.

24. West Penn Exhibit Number 1 is the Tariff Rule 3 and Tariff Rule 4 of West Penn’s tariff that addresses rights-of-way. Tr. 49-50; West Penn Exh. No. 1.

25. Tariff Rule 3 addresses relocation of company facilities and states that the customer at his own cost must provide and grant the company a right-of-way acceptable to the company to place its facilities on its property. Tr. 50; West Penn Exh. No. 1.

26. GECO has never presented to West Penn an executed right-of-way regarding the relocation of the poles at the shale pit on Grant Shook Road. Tr. 51.

27. West Penn Exhibit Number 3 is a copy of a recorded easement given to South Penn Power Company. Tr. 51; West Penn Exh. No. 3.

28. Tariff Rule 4 provides in reference to the relocation of any existing poles that the customer must prepay before the company is required to do any work. Tr. 52; West Penn Exh. No. 1.

29. To remove the poles at the shale pit would require removal of four poles, two overhead lines and the installation of four poles around the perimeter without crossing the middle of the shale pit. Tr. 53.

30. Pursuant to West Penn's tariff, GECO would be responsible for the cost of the project at the shale pit. Tr. 53.

31. Mr. Lauffer is not authorized by West Penn to enter into an oral agreement with a customer to waive a portion of the company's tariff. Tr. 53, 54-55.

32. In 2012, West Penn agreed to pay the costs of the relocation of the poles at the shale pit on Grant Shook Road in satisfaction of a formal complaint filed in 2009 and a letter was sent to Mr. George with the terms of the agreement and the schematic but the agreement was never executed because it was never returned to West Penn. Tr. 56-57.

33. West Penn is no longer willing to move the poles and lines at the shale pit on Grant Shook Road at its own cost. Tr. 57.

34. Justin Akers is employed by West Penn as a Distribution Tech 4 and has worked for the company for 12 years. Tr. 63.

35. Mr. Akers is responsible for the design of new and upgraded service requests and relocation of company facilities. Tr. 64.

36. West Penn Exhibit Number 2 is a one-page screenshot showing the service address, mailing address and account details for R. Lee Royer. Tr. 65; West Penn Exh. No. 2.

37. Only Tariff Rule 4 applies to the Accent project because there are no new poles at that property because the property was a farm and no new easement was required because the existing easement was sufficient. Tr. 66, 68.

38. Mr. George contacted West Penn about moving poles for the Accent project in November 1, 2017 and West Penn provided Mr. George a design and cost estimate on November 6, 2017. Tr. 66-67.

39. Accent paid the cost of the estimate on July 19, 2019 and the project was completed on September 13, 2019. Tr. 67.

40. West Penn Exhibit Number 4 is a construction drawing for the work to be completed on the Accent project. Tr. 69; West Penn Exh. No. 4.

41. West Penn Exhibit Number 7 is a settlement letter dated July 20, 2012 from John Munch, attorney for West Penn, to Mr. Cramer and an accompanying schematic and certificate of satisfaction in connection with the formal complaint at C-2009-2088308.

DISCUSSION

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). As a matter of law, 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 Tel. Co. of Pa., 72 Pa. PUC 196 (1990) (Patterson). “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). The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701. In this consolidated proceeding, the complainants have requested relocation of West Penn electric poles and lines that impact their respective properties. GECO and Accent, therefore, have the burden of proof in this proceeding.

If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001) (Milkie); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. 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. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961); and Murphy v. Comm., Pa. Dept. of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth.1984).

In this case, both complainants argue that West Penn should relocate facilities from their property because the facilities are interfering with their use of the property. GECO argued that the facilities should be removed because West Penn previously agreed to move the facilities at its own cost and, with regard to Accent, because West Penn is no longer using the facilities that Accent would like moved. Although the facilities impacting the Accent property have subsequently been moved at Accent's expense, Accent now seeks reimbursement for the costs of removal from West Penn. In response, West Penn argued that it is not obligated under the prior agreement with GECO to move the facilities at its expense because GECO never executed the agreement and, with regard

to both GECO and Accent, it is not required to move the facilities because its tariff does not require the company to move the facilities at its own cost.

Both complaints will be denied because neither GECO nor Accent has satisfied their burden to demonstrate that West Penn violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the service provided to them.

As a preliminary matter, West Penn filed a late-filed exhibit number 7 pursuant to a discussion held during the hearing. *See*, Tr. 39, 78. West Penn Exhibit Number 7 is a compilation of documents related to the settlement of a formal complaint filed by D.L. George & Sons Manufacturing, Inc., against West Penn at docket number C-2009-2088308. Part of the exhibit is a letter from John Munsch of West Penn to Mr. Cramer dated July 20, 2012 memorializing the understanding in the settlement of the complaint, as well as a certificate of satisfaction dated July 25, 2012 regarding the complaint from Mr. Munsch to the Commission Secretary formally resolving the complaint. In response to West Penn's late-filed exhibit, GECO filed a limited objection. GECO argued that it has no objection to the admission of West Penn Exhibit Number 7 to the extent the letter dated July 20, 2012 memorializes the understanding that West Penn would relocate the poles at its cost. GECO did object to the admission of West Penn Exhibit 7 for any other purpose, including that GECO actually received the documents contained in the exhibit or to establish the located right-of-way. As such, with consideration for GECO's limited objection, West Penn's late-filed exhibit number 7 will be admitted into the record of this proceeding and West Penn is directed to provide two copies of the exhibit to the Secretary's Bureau for inclusion in the official record.

Furthermore, it is noted that this decision does not address the scope or validity of any right-of-way. As previously noted in the order granting in part and denying in part the preliminary objections filed by West Penn in response to both complaints, allegations relating to property rights and the interpretation of a valid right of way agreement are exclusively within the jurisdiction of the Courts of Common Pleas. *See e.g.*, Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985) (the Commission does not have jurisdiction to determine the scope and validity of an easement). Nonetheless, both complaints were allowed to proceed to a hearing because, when accepting as true all well pleaded material facts and every reasonable

inference from those facts, and viewing the complaints in the light most favorable to the complaints, as is required when disposing of preliminary objections, it was clear that the complaints raised issues beyond the scope and validity of the rights-of-way that should move forward to a hearing.

With regard to the complaint filed by GECO, however, this complaint will be denied because GECO never demonstrated that West Penn in fact committed to relocate the facilities at its own cost. GECO witness George testified that he had multiple discussions with West Penn witness Lauffer about the poles being removed and that he believed that Mr. Lauffer agreed that West Penn would move the poles at its own expense because the poles were unsafe. Tr. 11-17. In response, West Penn presented Mr. Lauffer who testified that GECO never presented to West Penn an executed right-of-way regarding the relocation of the poles in question. Tr. 51. Mr. Lauffer added that he is not authorized by West Penn to enter into an oral agreement with a customer to waive a portion of the company's tariff, including, in this instance, Tariff Rule 4 which pertains to relocation of facilities. Tr. 53-55. In addition, West Penn Exhibit 7 specifically provides that, "upon D.L. George's execution of a right-of-way agreement, the parties will cause to be closed, with prejudice, the above-captioned complaint" and "please confirm this agreement by execution below of acknowledgement by return email confirming the above understanding." West Penn Exh. 7. Yet, GECO did not provide any evidence that either the right-of-way agreement or the settlement agreement was executed.

In addition, GECO did not provide any evidence in support of its position that the facilities it wanted relocated are somehow unsafe. Mr. George testified, for example, that "there's always safety [concerns] when you have poles 20 feet up in the air." Tr. 27. Mr. George also testified that "anytime you have a pole that's not really doing anything there's always some safety issue." Tr. 30. Certainly, utilities under the Commission's jurisdiction are required to provide service that is safe. 66 Pa.C.S. § 1501. But, Mr. George did not provide any additional evidence to demonstrate that the facilities were unsafe. Mr. George's opinion alone is not sufficient to warrant a finding that West Penn violated the Public Utility Code because its facilities are unsafe. Personal opinions or perceptions do not constitute substantial evidence sufficient to permit a complainant to sustain their burden of proof. 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)). In fact, West Penn witness Lauffer testified that any safety issues were “presumably created by the complainant himself.” Tr. 58.

As a result, GECO has failed to satisfy its burden of proof in its complaint. As noted above, if a utility rebuts a complainant’s evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility’s evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Milkie, supra*. In this case, GECO presented the oral testimony of its witness that an agreement was made between GECO and West Penn for West Penn to remove the poles at its own expense. West Penn rebutted that evidence by demonstrating that in order for the oral agreement to be effective, GECO would have had to execute the right-of-way. GECO did not present any evidence that it in fact executed the right-of-way to make the oral agreement effective other than the testimony of its witness. Therefore, GECO has not rebutted the evidence presented by West Penn and has not satisfied its burden of proof.

GECO has not satisfied its burden of proof in this case by arguing that it had an oral agreement with West Penn for West Penn to remove the facilities at its own cost and then not provide documentary evidence in response to West Penn’s rebuttal that GECO was required to execute the right-of-way and settlement agreement in order to effectuate the agreement. In the face of such evidence, GECO cannot rely on Mr. George’s testimony that there was an oral agreement in order to satisfy its burden of proof. This is particularly true in light of West Penn’s tariffs which, as discussed further below, require the customer to prepay for the relocation of any poles before the company is required to do the work, *infra*.

With regard to the complaint filed by Accent, this complaint will also be denied. In this complaint, Mr. George testified that he would like a pole removed by West Penn and at West Penn’s cost because it is located in the road of one of the lots of a farm that is being developed with houses. Tr. 29-30, 41-42, 70. In response, however, Mr. Lauffer testified regarding Tariff Rules 3 and 4 in the West Penn Tariff. In particular, Mr. Lauffer testified that Tariff Rule 3 addresses relocation of company facilities and states that the customer at his own cost must provide and grant West Penn a right-of-way acceptable to West Penn to place its facilities on its property. Tr. 50; West Penn Exh. No. 1. Mr. Lauffer then testified that Tariff Rule 4 provides in reference to the

relocation of any existing poles that the customer must prepay before West Penn is required to do any work. Tr. 52; West Penn Exh. No. 1.

Mr. Lauffer testified that Mr. George contacted West Penn about moving poles for the Accent project November 1, 2017 and West Penn provided Mr. George a design and cost estimate on November 6, 2017. Tr. 66-67. Mr. Lauffer added that Accent paid the cost of the estimate on July 19, 2019 and the project was completed on September 13, 2019. Tr. 67. Counsel for Accent indicated that there was a stipulation confirmed by counsel that Mr. George did, in fact, pay to have that pole removed but that was with the reservation of his right that should he prevail either before the Commission or in litigation at the court of common pleas, that Mr. George would be reimbursed. Tr. 31.

Public utility tariffs have the force and effect of law and are binding on the public utility and its customers. Pa. Electric Co. v. Pa. Pub. Util. Comm'n, 663 A.2d 281 (Pa. Cmwlth. 1995). The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest. Philadelphia Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa. Cmwlth. 2002). Furthermore, section 57.27 of the Commission's regulations governs the relocation of electric facilities. This regulation provides: "A public utility shall file as part of its tariff provisions setting forth its method of determining pole removal or relocation charges." 52 Pa.Code § 57.27(d).

In this case, West Penn's tariff provides that customers must pay for the relocation of company facilities before West Penn is required to do any work. Accent has already paid for the relocation and the relocation was performed. Accent now seeks reimbursement. Requiring West Penn to provide reimbursement to Accent would not be consistent with West Penn's tariff and Accent has not provided substantial evidence that demonstrates that the tariff is unlawful as applied in this case. As a result, Accent's complaint must also be denied.

In conclusion, both the formal complaint filed against West Penn by GECO and the formal complaint filed against West Penn by Accent must be denied. Neither GECO nor Accent have satisfied their burden of demonstrating that West Penn violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company by not relocating

facilities at its own cost or reimbursing for the cost to remove facilities that have already been paid. As a result, both complaints must be denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter 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. 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 Tel. Co. of Pa., 72 Pa. PUC 196 (1990).
4. "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).
5. The offense must be a violation of the Public Utility Code, the Commission's regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701.
6. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the complainant will prevail. If the utility rebuts the complainant's evidence, the burden of going forward with the evidence shifts back to the complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); *see also*, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

7. The decision of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704.

8. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. 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. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa.Super. 278, 166 A.2d 96 (1961); and Murphy v. Pa. Dept. of Public Welfare, White Haven Center, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

9. Allegations relating to property rights and the interpretation of a valid right of way agreement are exclusively within the jurisdiction of the Courts of Common Pleas. *See e.g.*, Fairview Water Co. v. Pa. Pub. Util. Comm'n, 502 A.2d 162 (Pa. 1985) (the Commission does not have jurisdiction to determine the scope and validity of an easement).

10. Personal opinions or perceptions do not constitute substantial evidence sufficient to permit a complainant to sustain their burden of proof. 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)).

11. Public utility tariffs have the force and effect of law and are binding on the public utility and its customers. Pa. Electric Co. v. Pa. Pub. Util. Comm'n, 663 A.2d 281 (Pa. Cmwlth. 1995).

12. The Commission has no authority to allow a public utility to deviate from its tariff even where the Commission concludes it is in the public interest. Philadelphia Suburban Water Co. v. Pa. Pub. Util. Comm'n, 808 A.2d 1044 (Pa. Cmwlth. 2002).

13. A public utility shall file as part of its tariff provisions setting forth its method of determining pole removal or relocation charges. 52 Pa.Code § 57.27(d).

14. Accent Developers, LLC has failed to satisfy its burden of demonstrating that West Penn has violated the Public Utility Code, a Commission order or regulation or a Commission approved tariff of the company with regard to the service provided to it.

15. GECO Holding, Ltd. has failed to satisfy its burden of demonstrating that West Penn has violated the Public Utility Code, a Commission order or regulation or a Commission approved tariff of the company with regard to the service provided to it.

ORDER

THEREFORE,

IT IS ORDERED:

1. That West Penn Exhibit Number 7 is admitted into the record of this consolidated proceeding and West Penn is directed to submit two copies of the exhibit to the Commission's Secretary's Bureau for inclusion in the official file.

2. That the formal complaint filed by Accent Developers, LLC against West Penn Power Company at docket number C-2019-3010107 on May 17, 2019 is denied.

3. That the formal complaint filed by GECO Holding Ltd. against West Penn Power Company at docket number C-2019-3010108 on May 17, 2019 is denied.

4. That these consolidated matters be marked closed.

Date: April 2, 2020

/s/
Joel H. Cheskis
Deputy Chief Administrative Law Judge

C-2019-3010107 - ACCENT DEVELOPERS LLC v. WEST PENN POWER COMPANY

C-2019-3010108 - GECO HOLDING LTD v. WEST PENN POWER COMPANY

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