

Edward T. Fisher
Direct Dial: (215) 501-7846
efisher@griesinglaw.com

June 24, 2020

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

RE: Paul Memminger v. PECO Energy Company
PUC Docket No. C-2020-3015313

Dear Ms. Chiavetta:

Enclosed for filing with the Commission are the *Reply Exceptions of PECO Energy Company* with regard to the matter referenced above.

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Thank you for your time and attention on this matter.

Sincerely Yours,



Edward T. Fisher

EF/

Cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PAUL W. MEMMINGER,	:	
Complainant	:	
v.	:	DOCKET NO. C-2020-3015313
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

REPLY EXCEPTIONS OF RESPONDENT, PECO ENERGY COMPANY

PECO Energy Company (“PECO”) hereby replies to the Exceptions filed by Paul W. Memminger (“Complainant”) in the above-referenced matter on May 1, 2020.

On January 6, 2020, Paul W. Memminger (Complainant) filed a formal Complaint with the Public Utility Commission (PUC) against PECO Energy Company (“PECO”). In his formal complaint, Complainant alleged that PECO installed a wire across his property to an adjacent property. He claims this wire crosses his property at approximately twenty three (23) feet from a survey monument which was installed by a vendor that surveyed the aforementioned adjacent property. Complainant requests that PECO move the wire so it does not cross his property.

On January 27, 2020, PECO filed both an Answer denying all material allegations of the complaint and Preliminary Objections. In its Answer, PECO stated that after responding to Complainant’s informal Complaint, field investigators were dispatched to the Complainant’s property and were able to determine that while aerial wires do cross the Complainant’s property, the wires are placed within the permitted easement allowable by the utility easement acquired from the Crawfords, the prior owners of Complainant’s property, by grant dated May 10, 1949 and recorded June 7, 1949 in Bucks County records at Deed Book 906, Page 13. In addition, PECO’s Answer averred that Complainant’s Complaint should be dismissed as a matter of law for lack of subject matter jurisdiction. In its Preliminary Objections, PECO explained in depth to this

Commission that since the Complainant's allegations relate to real property rights, over which the Commission has no subject matter jurisdiction, the Complainant's Complaint should be dismissed.

On April 28, 2020, Administrative Law Judge Dennis J. Buckley issued an Initial Decision, finding that it is not the proper forum for adjudicating property rights disputes, sustaining PECO's Preliminary Objections, and dismissing the Complainant's Complaint.

On May 1, 2020, the Complainant filed Exceptions, stating that PECO made one argument in its response to his informal Complaint (that no wires crossed his property) and another argument in its response to its formal Complaint (that the wires crossed his property within a permitted easement). For the reasons stated in its Answer and Preliminary Objections and for the reasons stated below, the Complainant's Reply Exceptions should be dismissed.

II. SCOPE OF REVIEW

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 the respondent utility, PECO, is responsible or accountable for the problem described in the Complaint through a violation of the Code or a regulation or order of the Commission. *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*, 602 A.2d 863 (Pa. 1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, this Commission's decision must be supported by substantial evidence in the record, which is defined as 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. PUC*, 413 A.2d 1037 (Pa. 1980).

Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of the complainant, shifts to the respondent. If the evidence presented by the respondent 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 the respondent. *Burleson v Pa. PUC*, 443 A.2d 1371(Pa. Cmwlt. 1982), *aff’d*, 433 A.2d 1234 (Pa. 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. Cmwlt. 2001).

It is well settled that the Commission cannot exceed its jurisdiction and must act within it. *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. Ct. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Cf. Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Super. Ct. 1992). Furthermore, it is a long-standing principle that the question of jurisdiction over the subject matter of a dispute may be raised at any time and must be considered. *See, West Penn Power Company Petition for Declaratory Order Re Clean Air Act Compliance Plan*, Docket No. P-00910511 (Order entered July 22, 1991) 1991 Pa. PUC LEXIS 151; *Sophia Poole v. Columbia Gas of Pa., Inc.*, Docket No. Z-00109922, (Order entered June 19, 1995) 1995 Pa. PUC LEXIS 53.

Any issue or Exception that is not specifically delineated 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).

III. DISCUSSION

A. The PUC has No Authority to Decide Issues Relating to Property Rights

Complainant requests that the Commission order PECO to move wires that currently cross his property. As stated above, while aerial wires do cross the Complainant's property, the wires are placed within the permitted easement allowable by the utility easement acquired from the Crawfords, by grant dated May 10, 1949 and recorded June 7, 1949 in Bucks County records at Deed Book 906, Page 13. Complainant's sole claim in his Exceptions is that PECO had differing responses to his informal Complaint (that no wires cross his property) than to his formal Complaint (that the wires crossed his property within the permitted easement). As has been explained, after responding to his informal Complaint, PECO conducted an investigation during which PECO learned of the easement and confirmed Complainant's claim that the wires crossed his property.

Importantly, nothing in Complainant's Exceptions grants subject matter jurisdiction to the Commission. As Complainant's allegations – both in his formal Complaint and in his Exceptions – relate to real property rights, the Commission has no subject matter jurisdiction over the Complainant's allegations. ALJ Buckley correctly interpreted the law that the PUC is not the proper forum for adjudicating property rights disputes. Accordingly, the Commission is prohibited from providing the relief Complainant seeks. As such, the Complainant's exceptions should be dismissed.

IV. CONCLUSION

WHEREFORE, the Secretary should deny the Complainant's Exceptions and adopt the ALJ's Initial Decision. The Secretary should conclude:

1. That the Exceptions filed by Complainant Paul W. Memminger on May 1, 2020 at Docket No. C-2020-3015313, are denied.

2. That the Initial Decision of Administrative Law Judge Dennis J. Buckley is adopted within the Opinion and Order of the Secretary.

3. That the Formal Complaint filed by Paul W. Memminger on December 31, 2019, at Docket No. C-2020-3015313, is dismissed.

Respectfully submitted,



Edward T. Fisher, Esquire
Counsel for PECO Energy Company
Griesing Law, LLC
1880 John F. Kennedy Blvd., Suite 1800
Philadelphia, PA 19103
215-501-7846

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PAUL W. MEMMINGER,	:	
Complainant	:	
v.	:	DOCKET NO. C-2020-3015313
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

VERIFICATION

I, Edward T. Fisher, Esquire, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Reply Exceptions are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.



Date: June 24, 2020

Edward T. Fisher

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PAUL W. MEMMINGER,	:	
Complainant	:	
v.	:	DOCKET NO. C-2020-3015313
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

CERTIFICATE OF SERVICE

I, Edward T. Fisher, Esquire, hereby certify that I have this day served a true copy of the foregoing Reply Exceptions upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54, via First Class Mail and email:

Paul W. Memminger
121 Kiltie Drive
New Hope, PA 18938
paulwmemminger@gmail.com

Dated at Philadelphia, Pennsylvania, June 24, 2020.



Edward T. Fisher, Esquire
Counsel for PECO Energy Company
Griesing Law, LLC
1880 John F. Kennedy Blvd., Suite 1800
Philadelphia, PA 19103
215-501-7846