

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Donald Fernandes	:	
	:	
v.	:	C-2020-3018794
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Eranda Vero
Administrative Law Judge

INTRODUCTION

This Initial Decision denies Donald Fernandes’s formal Complaint against PECO Energy Company upon finding that the Complainant failed to carry his burden of proving that the utility improperly removed him from its Customer Assistance Program.

HISTORY OF THE PROCEEDING

On February 7, 2020, Donald Fernandes (Mr. Fernandes or Complainant) filed a formal Complaint (Complaint) against PECO Energy Company (PECO, Respondent, or the Company) alleging that the Company improperly removed him from its Customer Assistance Program (CAP) after he refused to allow the Company to inspect every room in his house. As relief, Mr. Fernandes requests that the Commission order PECO to reinstate him into its CAP.

On March 5, 2020, PECO filed an Answer denying the material allegations of the Complaint.

A Hearing Notice dated March 9, 2020, notified the parties that an initial in-person hearing was scheduled for Wednesday, April 22, 2020, at 10:00 a.m.

A Hearing Cancellation/Reschedule Notice dated May 11, 2020, notified the parties that the initial hearing was changed from an in-person to a call-in hearing and was rescheduled for Tuesday, June 30, 2020, at 10:00 a.m.

A Prehearing Order was issued on May 27, 2020, reminding the parties of the date and time of the scheduled hearing, informing them of the procedures applicable to this proceeding, and directing the submission of documents prior to the hearing.

By e-mail dated June 29, 2020, PECO's counsel informed me that the Complainant was hospitalized over the weekend and unable to attend the June 30, 2020 hearing.

By Hearing Cancellation/Reschedule Notice dated June 30, 2020, the initial hearing was rescheduled for Thursday, August 20, 2020, at 10:00 a.m.

A second Prehearing Order was issued on July 14, 2020, reminding the parties of the date and time of the scheduled hearing, informing them of the procedures applicable to this proceeding, and directing the submission of documents prior to the hearing.

The hearing convened as scheduled on August 20, 2020. Mr. Fernandes appeared *pro se* and testified in support of his Complaint. Khadijah Scott, Esq., represented the Respondent, and presented the testimony of Issa Balde, who is a Senior Business Program Manager with PECO, and Dana McCollum, who is a Regulatory Assessor for the Company. The Respondent sponsored four exhibits all of which were admitted into the record.

The record in this matter closed upon receipt of the hearing transcript on September 20, 2020.

FINDINGS OF FACT

1. The Complainant is Donald Fernandes, who resides at 464 Fourth Street, Warminster, Pennsylvania, 18974-4408 (Service Address). Tr. 9.
2. The Respondent is PECO Energy Company.
3. The Service Address is a single-family home with two stories and an unfinished basement. Tr. 16.
4. Each floor of the Service Address has four rooms and a bathroom. Tr. 16.
5. Mr. Fernandes was enrolled in PECO's CAP on February 2, 2006. Tr. 35, 36, PECO Exhibit 2.
6. Participation in PECO's Low-Income Usage Reduction Program (LIURP) is a requirement for customers enrolled in PECO's CAP. Tr. 23, 36-37, PECO Exhibit 4.
7. LIURP is designed to help PECO's low income, high usage customers reduce their bills by performing a home energy audit in order to determine whether the customer is eligible for repair or replacement of appliances and heating/cooling system within his home. Tr. 19.
8. High usage customers are defined as customers whose monthly usage exceeds 150 CCF of gas, or 1,400 kWh of electricity. Tr. 19-20, PECO Exhibit 1.
9. LIURP energy audit is free of charge for the customer. Tr. 20.
10. The repairs or replacements of appliances and heating/cooling system are free for the customer through the LIURP. Tr. 19.

11. The energy audit lasts about four hours with the auditor visiting every room in the property, inspecting all energy consuming appliances, and educating the owner about their energy consumption or the need for their repair or replacement. Tr. 20-22.

12. After the energy audit, PECO determines whether the customer is eligible for any remedial measures and schedules a contractor to visit the property and make the necessary repairs or replacements. Tr. 21-22.

13. Upon review of Mr. Fernandes' usage history, PECO determined that he was a high usage customer. Tr. 37-39, PECO Exhibit 1.

14. In November 2019, PECO contacted Mr. Fernandes and asked him to participate in the LIURP energy audit. Tr. 14.

15. Mr. Fernandes refused to allow PECO to conduct a LIURP energy audit of the entire Service Address. Tr. 25.

16. Mr. Fernandes agreed to allow PECO to conduct an energy audit but only of the first floor and basement of the Service Address. Tr. 15, 39-40.

17. A partial energy audit does not help the Company identify either the source of the high energy consumption or the steps necessary to assist the customer in conserving energy. Tr. 22-23.

18. In December 2019, PECO issued a letter informing Mr. Fernandes that he would be removed from CAP if he did not participate in the LIURP audit. Tr. 14, 25.

19. Mr. Fernandes was removed from PECO's CAP on January 17, 2020. Tr. 36, PECO Exhibit 2.

20. In January 2020, PECO sent Mr. Fernandes a letter informing him that he was removed from CAP due to his failure to allow the audit from the LIURP. Tr. 19, 36, PECO Exhibit 3.

21. The January 2020 letter informed Mr. Fernandes that he could re-enroll in the Company's CAP after he allowed PECO to complete a LIURP energy audit as well as any associated remediation measures identified during the LIURP audit. Tr. 25-26, PECO Exhibit 3.

DISCUSSION

In his formal Complaint against PECO, Mr. Fernandes alleged that PECO improperly removed him from its CAP after he refused to allow the Company to inspect every room in his house. As relief, Mr. Fernandes requests that the Commission order PECO to reinstate him into its CAP. Mr. Fernandes, as the proponent of a rule or order, bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa.C.S. § 332(a). To satisfy this burden, he must demonstrate that the Respondent was responsible for the problems alleged in the Complaint through a violation of the Code or a regulation or order of the Commission. This must be shown by a preponderance of the evidence. *Patterson v. Bell Tel. Co. of Pa.*, 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. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlt. 1990) *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992). In addition, the Commission's decision 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 & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 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 the Respondent. If the evidence presented by the Respondent is of co-equal weight to the evidence presented by the Complainant, the Complainant has not satisfied

his burden of proof. The Complainant would then be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 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. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

At the hearing, Mr. Fernandes explained that he is willing to allow PECO to conduct the LIURP audit on the first floor and the basement of the Service Address. Tr. 15, 39-40. However, he refuses to allow the Company to inspect the rooms on the second floor of his property. Tr. 25. Mr. Fernandes maintained that PECO's request to conduct an energy audit by inspecting the entirety of the Service Address amounts to an illegal search and a violation of his 4th Amendment rights under the United States Constitution. Tr. 26, 44.

The United States Constitution, however, only applies to "state action." It does not apply to conduct by a private company like PECO Energy Company, even if the company is regulated by the state. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349-350 (1974) (*Jackson*); *Schutz v. PPL Elec. Utils. Corp.*, No. C-2018-3005659, 2019 WL 2744430, at 12 (Pa. PUC, June 11, 2019) (*Schutz*).

In *Jackson*, a customer sued a privately owned and operated utility company, alleging that it violated her due process rights under the Fourteenth Amendment to the United States Constitution by terminating her electric service. 419 U.S. at 348-49. The U.S. District Court for the Middle District of Pennsylvania dismissed her complaint. *Id.* at 349. The United States Court of Appeals for the Third Circuit affirmed. *Id.* The Supreme Court of the United States granted certiorari and again affirmed. The Supreme Court ruled that although the utility company was heavily regulated by the Commonwealth of Pennsylvania, this state regulation did not convert the utility's decision to terminate the complainant's electric service into "state action." *Id.* at 358-59.

The Commission reached the same conclusion recently in the *Schutz* case. In that case, a residential customer filed a complaint seeking to prevent a utility company from installing a smart meter at her residence. 2019 WL 2744430, at 1. She argued that the installation of a smart meter violated her right against unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution. *Id.* at 12. In response, the utility asserted that it was not a state actor and thus not subject to the Fourth and Fourteenth Amendments. *Id.* The Commission concluded that the utility was not a "state actor"; rather, "it is a private, regulated utility company not constrained by the Fourth Amendment." *Id.* Although PECO is regulated by the Commission, it is a private company, not a "state actor." Accordingly, the United States Constitution does not apply in this matter.

CAP and LIURP are two components of PECO's Universal Service and Energy Conservation Plan currently in effect which has been approved by the Commission. Tr. 31-32, PECO Exhibit 4. Pursuant to the terms of the Plan, customers may be dismissed by PECO from CAP for failure to participate in a LIURP audit. Tr. 24-25, PECO Exhibit 4.

PECO's witnesses in this case testified that Mr. Fernandes was enrolled in PECO's CAP from February 2, 2006 until January 17, 2020. Tr. 35, 36, PECO Exhibit 2. Participation in LIURP is a requirement for customers enrolled in PECO's CAP. Tr. 23, 36-37, PECO Exhibit 4. LIURP is designed to help PECO's low income, high usage customers reduce their bills by performing a home energy audit in order to determine whether the customer is eligible for repair or replacement of appliances and heating/cooling system within his home. Tr. 19. Upon review of Mr. Fernandes' usage history, PECO determined that he was a high usage customer. Tr. 37-39, PECO Exhibit 1. In November 2019, PECO contacted Mr. Fernandes and asked him to participate in the energy audit. Tr. 14. Mr. Fernandes agreed to allow PECO to conduct an energy audit but only of the first floor and the basement of the Service Address. Tr. 25.

In defense of his refusal to allow a full energy audit of the Service Address, Mr. Fernandes argued that there are not energy consuming appliances on the second floor of his property. Tr. 39-40. In response, a PECO witness explained that a partial energy audit would

not satisfy the requirements of LIURP as it does not help the Company identify either the source of the high energy consumption or the steps necessary to assist the customer in conserving energy. Tr. 22-23.

In view of the above, I find that Mr. Fernandes has failed to carry his burden of proving that PECO violated a Commission statute, regulation, or Order by removing Mr. Fernandes from its CAP. While it is well within his rights to refuse PECO permission for a LIURP energy audit, he does so forfeiting the assistance offered through PECO's Customer Assistance Program. Consequently, the present Complaint is denied in its entirety because the Complainant failed to carry his burden of proof.

CONCLUSIONS OF LAW

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

2. The party filing the Complaint bears the burden of proving by a preponderance of the evidence that she is entitled to relief from the Commission. 66 Pa.C.S. § 332(a).

3. 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. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990) *alloc. den.*, 529 Pa. 654, 602 A.2d 863 (1992).

4. The Commission's decision 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 & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

5. The United States Constitution applies to "state action." It does not apply to conduct by a private company even if the company is regulated by the state. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349-350 (1974); *Schutz v. PPL Elec. Utils. Corp.*, No. C-2018-3005659, 2019 WL 2744430, at 12 (Pa. PUC, June 11, 2019).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal Complaint filed by Donald Fernandes against PECO Energy Company at Docket No. C-2020-3018794 is denied.
2. That the Secretary mark this docket closed.

Date: December 10, 2020

_____/s/
Eranda Vero
Administrative Law Judge