

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Mark Cohen

v.

PECO Energy Company

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C-2020-3022456

INITIAL DECISION

Before
Marta Guhl
Administrative Law Judge

INTRODUCTION

This Initial Decision denies the Complainant's formal Complaint because he failed to meet his burden of proof that he was experiencing a reliability, safety or quality of service issue in this matter.

HISTORY OF THE PROCEEDING

On October 8, 2020, Mark Cohen (Complainant or Mr. Cohen) filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO, Company or Respondent). On the Complaint form, the Complainant alleged that he was having reliability, safety, or quality of service issues. Specifically, the Complainant alleged that he incurred extensive damage at his residence on July 19, 2020, due to a power surge.

PECO filed an Answer with a New Matter on October 29, 2020. PECO denied all material allegations of fact in the Complaint and also indicated in the New Matter that the Complainant failed to state a claim upon which relief may be granted.

On October 30, 2020, the Complainant filed a response to the New Matter and requested that his Complaint move forward for a hearing on the merits of his Complaint.

On November 9, 2020, an Interim Order was issued by Chief Administrative Law Judge Charles E. Rainey, Jr. which set a resolution conference. This matter was not resolved through mediation.

On November 19, 2020, an Initial Telephonic Hearing Notice was sent to the parties and set a hearing on Tuesday, January 19, 2021, at 10:00 a.m. and the matter was assigned to me. I issued a Prehearing Order on November 23, 2020.

On December 11, 2020, a Hearing Cancellation/Reschedule Notice was issued and rescheduled the initial hearing for Wednesday, February 24, 2021, at 10:00 a.m. due to a conflict in the presiding officer's schedule.

On February 11, 2021, a Hearing Cancellation/Reschedule Notice was issued and rescheduled the initial hearing for Tuesday, March 16, 2021, at 10:00 a.m. due to a conflict in the presiding officer's schedule.

The hearing began on March 16, 2021. The Complainant appeared *pro se* for the proceeding. The Complainant testified on his own behalf and presented five exhibits which were entered into the record. Khadijah Scott, Esquire, was present on behalf of PECO and presented the testimony of Nichole Demott, a senior engineer; Paul Golden, a senior claims case manager; and Deba Ather, a senior regulatory assessor. The Company presented four exhibits which were entered into the record at the hearing.

The record closed on April 7, 2021, upon receipt of the transcript.

FINDINGS OF FACT

1. The Complainant is Mark Cohen, who resides at 3409 Binny Road, Doylestown, Pennsylvania 18902 (Service Address).
2. PECO Energy Company is the Respondent.
3. In 2018, the Complainant was having issues with multiple power outages at his residence. Tr. 18.
4. In the summer of 2018, PECO added a new transformer outside of the Complainant's residence. Tr. 18.
5. The new transformer resolved the Complainant's issues with the power outages. Tr. 18.
6. In July 2020, the Complainant returned to the Service Address from vacation and found that several electrical appliances had sustained damage. Tr. 19.
7. The Service Address is served by the circuit Buckingham 371. Tr. 23; PECO Exh. 2.
8. On July 22, 2020, the system recorded an outage due to a tree limb across aerial wires. Tr. 24; PECO Exh. 2.
9. The outage was due to a lightning storm in the area on that date, July 22, 2020. Tr. 24; PECO Exh. 2.
10. Utility work in the area of the Service Address in the summer of 2020 was related to a circuit expansion project, where the Company was building a new circuit and had been planned for at least a year. Tr. 25.

11. In Section 12.1 of PECO's tariff, the Company does not guarantee continuity of service and is not liable for events that are out of the Company's control. Tr. 31; PECO Exh. 3.

12. A lightning storm would be considered an event out of the Company's control under Section 12.1 of its tariff. Tr. 31; PECO Exh. 3.

13. A lightning storm can cause a surge at a customer's property. Tr. 32.

14. PECO did not experience any equipment failures on July 22, 2020, that would have caused a surge at the Complainant's Service Address. Tr. 32.

DISCUSSION

The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, Complainant has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a).

To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent public utility is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990), *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlt. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlt. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlt. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. 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 (1960); *Murphy v. Pa. Dep't of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa.Cmwlth. 1984).

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, the Complainant has not satisfied his burden of proof. The Complainant would 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*, 461 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. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

Issue at Service Address in July 2020

The Complainant alleges that there was a power surge at his property in July 2020. The Complainant contends that there were a number of electrical items in his residence that were damaged due to the power surge. PECO does not dispute that the Complainant had damage at his property but indicated that there was no issue with its equipment and that the power surge was due to a lightning storm in the area, which was out of the Company's control.

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 requires public utilities to provide reasonable and adequate, not perfect service. The statute at 66 Pa.C.S. § 1501, provides, in relevant part:

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.

Interpreting this provision in *West Penn Power Co. v. Pa. Pub. Util. Comm'n*, 478 A.2d 947, 949 (Pa.Cmwlth. 1984), the Commonwealth Court stated:

We hold that in order for the PUC to sustain a complaint brought under this section, the utility must be in violation of its duty under this section. Without such a violation by the utility, the PUC does not have the authority, when acting on a customer's complaint, to require any action by the utility.

Id. (footnote omitted).

The statutory definition of "service" is to be broadly construed.¹ *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa.Cmwlth. 1995). In applying the facts to the law, the issue becomes whether UGI's actions as described in the Complaint rise to the level of inadequate service that constitutes a violation of the Public Utility Code.

The Complainant testified that in July 2020 he was on vacation. When he returned to the Service Address, he found several electrical appliances had sustained damage. Tr. 19. PECO's witness, Ms. Demott, testified that the Service Address is served by the circuit Buckingham 371. Tr. 23; PECO Exh. 2. She indicated that on July 22, 2020, the system recorded an outage due to a tree limb across aerial wires. Tr. 24; PECO Exh. 2. Ms. Demott stated that the outage was due to a lightning storm in the area on that date. Tr. 24; PECO Exh. 2.

¹ "Service." Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them 66 Pa.C.S. § 102.

Ms. Demott also testified that the utility work in the area of the Service Address in the summer of 2020 was related to a circuit expansion project, where the Company was building a new circuit that had been planned for at least a year. Tr. 25. She indicated that this was not related to the issue at the Service Address in July 2020. Tr. 25.

Further, PECO's witness, Mr. Golden testified that in Section 12.1 of PECO's tariff, the Company does not guarantee continuity of service and is not liable for events that are out of the Company's control. Tr. 31; PECO Exh. 3. A lightning storm would be considered an event out of the Company's control under Section 12.1 of its tariff. Tr. 31; PECO Exh. 3. Mr. Golden stated that a lightning storm can cause a surge at a customer's property. Tr. 32. He indicated that PECO did not experience any equipment failures on July 22, 2020, that would have caused a surge at the Complainant's Service Address. Tr. 32.

In Complainant Exhibit No. 5, the Complainant made a list of the items in his residence that were damaged in July 2020, related to the lightning storm. However, Pennsylvania courts have held that the enforcement powers of the Commission do not include the power to award monetary damages. *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1978); see *Nagy v. Bell Tel. Co. of Pa.*, 436 A.2d 701 (Pa.Super. 1981). The Court of Common Pleas retains original jurisdiction over suits for monetary damages. *Behrend v. Bell Tel. Co. of Pa.*, 363 A.2d 1152 (Pa.Super. 1976).

Based on all of the above, the Complainant has not met his burden to establish that there was a safety issue, or that the Company failed to provide adequate and reasonable service. The lightning storm that caused the issues at the Complainant's Service Address was out of the control of the Company. PECO presented credible testimony that its equipment did not fail, and that the outage was due to a tree limb on a line in the area. Further, there was credible testimony that the lightning storm could cause a surge at a customer's residence. Moreover, it is important to note that the Complainant was not at the Service Address at the time of the lightning storm on July 22, 2020 and cannot specifically state when the damage occurred. Lastly, it is beyond the Commission's jurisdiction to award monetary damages to the

Complainant related to the items he listed in Complainant Exhibit No. 5. Therefore, the Complainant's formal Complaint must be dismissed.

CONCLUSIONS OF LAW

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

2. Pursuant to 66 Pa.C.S. § 332(a), the burden of proof in this proceeding is upon the Complainant. 66 Pa.C.S. § 332(a).

3. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704.

4. To satisfy the burden of proof against a utility, the Complainant must show that the utility is responsible or accountable for the problem described in the Complaint, *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976), or that the utility has violated either its duty under the Public Utility Code or the orders or regulations of the Commission. 66 Pa.C.S. § 701.

5. Every public utility must furnish and maintain adequate, efficient, safe, and reasonable service and facilities. 66 Pa.C.S. § 1501.

6. Service is defined as "any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, in the performance of their duties to their employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them" 66 Pa.C.S. § 102.

7. Pennsylvania courts have held that the enforcement powers of the Commission do not include the power to award monetary damages. *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1978); *see Nagy v. Bell Tel. Co. of Pa.*, 436 A.2d 701 (Pa.Super. 1981). The Court of Common Pleas retains original jurisdiction over suits for monetary damages. *Behrend v. Bell Tel. Co. of Pa.*, 363 A.2d 1152 (Pa.Super. 1976).

8. In Section 12.1 of PECO's tariff, the Company does not guarantee continuity of service and is not liable for events that are out of the Company's control, which would include a lightning storm.

9. The Complainant has failed to meet his burden of establishing that the Company failed to provide adequate, safe, and reasonable service.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Mark Cohen against PECO Energy Company at Docket No C-2020-3022456 is denied and dismissed.

2. That Docket No. C-2020-3022456 be marked closed.

Date: July 1, 2021

_____/s/
Marta Guhl
Administrative Law Judge