

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kevin Rogers	:	
	:	
v.	:	C-2021-3024909
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Christopher P. Pell
Deputy Chief Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the formal Complaint of Kevin Rogers against PECO Energy Company because he failed to meet his burden of proving that PECO Energy Company must relocate, at its own expense, electric facilities that are situated on his property pursuant to a right-of-way easement, or that PECO provided him with inadequate or unreasonable service.

HISTORY OF THE PROCEEDING

On March 30, 2021, Kevin Rogers (Complainant) filed a formal Complaint (Complaint) against PECO Energy Company (PECO or Respondent) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, the Complainant placed checkmarks in the boxes indicating “I am having a reliability, safety or quality problem with my utility service,” and “[o]ther.” In an attachment to the Complaint, the Complainant indicated that he has concerns regarding the safety of power lines on his property that do not supply power or communications to his home. The Complainant requested that PECO reroute these lines at its own expense.

On April 15, 2021, PECO filed an Answer denying all material allegations of fact in the Complaint.

By Initial Telephonic Hearing Notice dated June 10, 2021, a call-in telephonic hearing was scheduled for July 15, 2021, at 10:00 a.m., and the matter was assigned to me.

I issued a Prehearing Order on June 15, 2021. The Prehearing Order directed the parties to comply with various procedural requirements and explained that the Complainant bears the burden of proof to establish that the respondent violated its tariff, the Public Utility Code, or a Commission Order or regulation, and that he is entitled to the relief requested in the Complaint.

The telephonic hearing convened as scheduled on July 15, 2021. The Complainant appeared *pro se* and testified. The Complainant offered five exhibits, all of which were admitted into the record (Complainant Exhs. A, B, C, D, and E). The Respondent also appeared and was represented by Khadijah Scott, Esq., who presented the testimony of Deborah Taylor, a PECO Design Construction Consultant, and Deba Ather, a PECO Regulatory Assessor. The Respondent offered five exhibits, all of which were admitted into the record (PECO Exhs. 1, 2, 3, 4, and 6).

The record consists of a 70-page transcript and ten exhibits. The record closed on July 26, 2021, when the transcript was filed with the Commission.

FINDINGS OF FACT

1. The Complainant is Kevin Rogers.
2. The Respondent is PECO Energy Company.
3. The Complainant has lived at 2164 Wodock Avenue, Warrington, PA 18976 (service address) since 2008. Tr. 7, 30.

4. The Complainant's Complaint concerns a utility pole and power lines located on his property near his home. Tr. 7, 9.

5. The pole and attached lines are situated on the Complainant's property in a right-of-way pursuant to an easement. Tr. 51.

6. The lines include a 4,000-volt distribution line that provides service to one home. Tr. 20, 39.

7. These lines do not provide service to the service address. Tr. 7.

8. The pole and lines at issue were already present when construction began on the service address in 2007 and when the Complainant moved into the service address. Tr. 8, 30.

9. Rule 6.2, Service – Supply Alterations, of Respondent's Electric Service Tariff – Pa.P.U.C. No. 6 provides in pertinent part that “[c]hanges related to a service-supply line or a meter owned by the Company, including the installation of protective devices or visual markers to denote safe operating distance from the Company's facilities, for the accommodation of the customer, shall be at the expense of the customer.” Comp. Exh. C.

10. In 2016, the Complainant asked PECO about having the lines moved. Tr. 38.

11. In 2016, PECO advised the Complainant that it would cost \$4,732.63 for PECO to perform its portion of any relocation of the lines. Tr. 38.

12. In April 2020, a storm caused the lines to fall down alongside the Complainant's house. Tr. 10-11, 32.

13. When the lines came down, the cutout tripped causing the wires to become de-energized. Tr. 49, 58.

14. Within several hours of receiving a report of the downed power lines, PECO visited the service address, confirmed that the lines were de-energized, and repaired the downed wires. Tr. 14-15, 49.

15. The Complainant subsequently reported to PECO that the poles upon which the wires sit were leaning. Tr. 14.

16. PECO returned to the service address and straightened the poles. Tr. 14.

17. With the exception of the April 2020 incident, the power lines have not come down at any other time. Tr. 15, 32.

18. In the fall of 2020, the Complainant contacted PECO again to ask about having the power lines moved. Tr. 32.

19. A PECO Design Construction Consultant subsequently visited the service address to measure the distance between the power lines and the service address. Tr. 39.

20. PECO's construction standards require that for lines carrying 4 KV, horizontal clearance between the wires and "walls, projections & guarded parts," "guarded windows," and "balconies and areas readily accessible to pedestrians" must be at least 7 feet 6 inches. Tr. 42-43; PECO Exh. 4.

21. If the distance between the house and power lines is less than 7 feet 6 inches, PECO will put an extension arm on the pole and move the power lines away from the house until they are in compliance. Tr. 45.

22. PECO uses extension arms that are between 4 and 6 feet in length. Tr. 46.

23. If PECO is unable to come into compliance by using an extension arm, PECO will move the pole to come into compliance. Tr. 46.

24. On April 30, 2021, using a measurement wheel, PECO's Design Construction Consultant measured the distance between the wires and the foundation and determined that the power lines are between 9 and 10 feet away from the service address. Tr. 39-40, 45, 52-53; PECO Exh. 2.

25. PECO's Design Construction Consultant concluded that the wires met PECO's standards for clearance of seven feet six inches, even when considering the eaves of the service address. Tr. 39-40, 47.

26. PECO informed the Complainant that he could have these power lines moved at his own expense. Tr. 32-33.

DISCUSSION

The Public Utility Code, 66 Pa.C.S.A. § 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.A. § 332(a).

To establish a sufficient case and satisfy the burden of proof, 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 (Pa. Cmwlth. 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. Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n.*, 623 A.2d 6 (Pa. Cmwlth.

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*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemp't Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Pa. Dep't of Pub. Welfare, White Haven Cntr.*, 480 A.2d 382 (Pa. Cmwlt. 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. Cmwlt. 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. Cmwlt. 2001).

PECO is required by law to provide the Complainant with adequate and reasonable service. Section 1501 of the Public Utility Code, 66 Pa.C.S. § 1501, provides, in relevant 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.

Interpreting this provision in *W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 478 A.2d 947 (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.

478 A.2d at 949 (footnote omitted).

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

Additionally, a utility's Commission-approved tariff (list of services, rules for service and rates for service) has the force of law and is binding on the utility and its customers. *Stiteler v. Bell Tel. Co. of Pa.*, 379 A.2d 339 (Pa. Cmwlth. 1977); *Brockway Glass Co. v. Pa.3 Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *Pa. Elec. Co. v. Pa. Pub. Util. Comm'n*, 663 A.2d 281 (Pa.Cmlth. 1995).

Tariff provisions approved by the Commission are *prima facie* reasonable. *Lynch v. Pa. Pub. Util. Comm'n*, 594 A.2d 816 (Pa. Cmwlth. 1991); *alloc. den.*, 605 A.2d 335 (Pa. 1992), 66 Pa.C.S.A. §316.

Rule 6.2 of Respondent's Electric Service Tariff – Pa.P.U.C. No. 6 enjoys all of these legal presumptions.

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.A. § 102.

The Complainant has challenged the location and safety of PECO wires that run across his property to provide service to a neighboring property. In support of the request to have these power lines either buried or relocated, the Complainant testified that in April 2020 a storm knocked these wires down from the pole, causing them to rest alongside his home. The Complainant maintained that the proximity of the downed wires to his home exposed him and his family to danger.

The record reflects that PECO responded promptly to a report of downed wires at the service address. When the lines came down, a cutout tripped causing the electric wires to become de-energized. Tr. 58. Within several hours of receiving the report of the downed power lines, PECO visited the service address, confirmed that the lines were de-energized, and fixed the downed wires. Tr. 14-15, 49. The Complainant subsequently reported to PECO that the poles upon which the wires sit were leaning. Tr. 14. PECO returned to the service address and straightened the poles. Tr. 14.

Upon review of the record, I conclude that PECO provided an adequate and timely response to the downed wires at the service address. It is important to note that once the wires came down, PECO's safety precautions worked as designed causing the downed wires to become de-energized. Moreover, PECO straightened the poles after receiving a report from the Complainant that they were leaning. PECO is required to provide adequate service. PECO is not required to provide flawless service. Under the circumstances, I must conclude that PECO provided the Complainant with adequate and reasonable service at all times relevant to this Complaint.

The Complainant further argued that these lines are still dangerously close to his home. The Complainant testified that he measured that these wires are between 81.5 inches and 90 inches from his home. Tr. 8. The Complainant wants PECO to either relocate these wires to the road behind his property or bury these lines at its own expense.

In response to the Complainant, a PECO Design Construction Consultant (DCC) testified that PECO's construction standards require that for lines carrying 4 KV, horizontal

clearance between the wires and “walls, projections & guarded parts,” “guarded windows,” and “balconies and areas readily accessible to pedestrians” must be at least 7 feet 6 inches. Tr. 42-43; PECO Exh. 4. Additionally, PECO’s DCC testified that she visited the service address to investigate the Complainant’s concerns about the proximity of the wires to his home. PECO’s DCC used a measurement wheel to measure the distance between the lines and the foundation of the house and determined that the power lines are between 9 and 10 feet away from the service address. Tr. 39-40, 45, 52-53; PECO Exh. 2.

PECO’s DCC provided credible testimony that PECO’s wires located near the Complainant’s house comply with PECO’s construction standards. Moreover, the record demonstrates that PECO’s aerial wires existed in a right-of-way pursuant to an easement on the Complainant’s property before the service address was even constructed. PECO is not responsible for placing these wires in close proximity to the service address. Rather, the construction company that built the Complainant’s house is responsible for placing his home in close proximity to PECO’s facilities, ultimately causing his concerns.

Additionally, Rule 6.2, Service – Supply Alterations, of Respondent’s Electric Service Tariff – Pa.P.U.C. No. 6 provides in pertinent that “[c]hanges related to a service-supply line or a meter owned by the Company, including the installation of protective devices or visual markers to denote safe operating distance from the Company’s facilities, for the accommodation of the customer, shall be at the expense of the customer.” Comp. Exh. C. As previously noted, Rule 6.2 of PECO’s Electric Service Tariff has the force and effect of law and is binding on the utility and its customers. Since the Complainant did not offer anything to demonstrate that this rule is unreasonable, then pursuant to Rule 6.2 of PECO’s Electric Service Tariff, if the Complainant wants the wires at issue moved away from his home or buried, he will either have to accept PECO’s offer to place these wires on an extension arm on the utility pole, or he will have to pay for relocation or burial of the wires pursuant to PECO’s tariff.

Accordingly, the Complainant’s Complaint is denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and subject matter of this proceeding. 66 Pa.C.S.A. § 701.
2. Pursuant to 66 Pa.C.S.A. § 332(a), the burden of proof in this proceeding is upon the Complainant. 66 Pa.C.S.A. § 332(a).
3. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993); *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); 2 Pa.C.S. § 704.
4. Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service. 66 Pa.C.S. § 1501.
5. A public utility's Commission-approved tariff has the force of law and is binding on the utility and its customers. *Stiteler v. Bell Tel. Co. of Pa.*, 379 A.2d 339 (Pa. Cmwlth. 1977); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981); *Pa. Elec. Co. v. Pa. Pub. Util. Comm'n*, 663 A.2d 281 (Pa. Cmwlth. 1995).
6. Tariff provisions approved by the Commission are *prima facie* reasonable. *Lynch v. Pa. Pub. Util. Comm'n*, 594 A.2d 816 (Pa. Cmwlth. 1991); *alloc. den.*, 605 A.2d 335 (Pa. 1992), 66 Pa.C.S.A. §316.
7. The Complainant failed to meet his burden of proving that the Respondent provided him with inadequate or unreasonable service. 66 Pa.C.S.A. § 332(a).
8. The Complainant presented no evidence that Rule 6.2, Service – Supply Alterations, of Respondent's Electric Service Tariff – Pa.P.U.C. No. 6 is unreasonable.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Kevin Rogers against PECO Energy Company at Docket No. C-2021-3024909 is denied; and
2. That the docket at Docket No. C-2021-3024909 be marked closed.

Date: October 19, 2021

/s/
Christopher P. Pell
Deputy Chief Administrative Law Judge