

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Francene Tearpock Martini	:	
	:	
v.	:	C-2021-3027093
	:	
UGI Utilities, Inc.	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This decision denies a formal complaint filed by a customer of an electric distribution company (EDC) for failure to satisfy her burden to demonstrate that the EDC has violated the Public Utility Code, a Commission order, a regulation, or a Commission-approved tariff of the company with regard to the installation of a replacement utility pole in a public right-of-way that is not on her property.

HISTORY OF THE PROCEEDING

On July 5, 2021, Francene Tearpock Martini (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against UGI Utilities, Inc., (UGI or Respondent) averring that the company had anchor wires on her property that were a safety hazard and that the company has no right-of-way on her property.

On July 7, 2021, the Complaint was served upon Respondent. On July 27, 2021, Respondent filed an answer in response to the complaint. In its answer, UGI admitted it provided

electric service to Complainant but denied that its utility pole and anchor were outside a municipal right-of-way except for a 2.5-foot ariel encroachment of the electric facilities across the corner of Complainant's property. UGI averred that this small encroachment is not a safety hazard within the meaning of the Public Utility Code.

On July 30, 2021, Complainant filed a reply insisting UGI has no right of way on her property, that the anchor wires were installed on her property without her consent, and that the anchor wires create a safety hazard and liability to her property.

After a failed mediation attempt, on August 4, 2021, a Hearing Notice was issued scheduling a hearing for September 14, 2021. On August 6, 2021, a Prehearing Order was issued setting forth various rules that would govern the hearing.

The evidentiary hearing was held on September 14, 2021, as scheduled. Ms. Tearpock Martini appeared *pro se* and sponsored one statement and ten exhibits, several of which were admitted into the record. Larry Crayne, Esquire appeared on behalf of UGI and presented two witnesses who sponsored eight exhibits that were admitted into the record. A transcript of 137 pages was created. After the hearing, Complainant filed post-hearing exhibits K-N, that over the objection of UGI were also admitted into the record on October 29, 2021. (*see Order Admitting Exhibits Into the Record*). The record closed on October 29, 2021. This case is ripe for a decision.

FINDINGS OF FACT

1. The Complainant in this case is Francene Tearpock Martini.
2. The Respondent in this case is UGI Utilities, Inc., an electric distribution company operating in Pennsylvania.
3. The service address is a national historical residence located at 56 South Main Street, Shickshinny, Pennsylvania. Tr. 116, Complainant Exhibit K-1.

4. Walter Gradzki is a project engineer performing distribution engineering projects with UGI Utilities, Inc. Tr. 40.

5. Between the roadway called Furnace Street and Complainant's property line there is a utility pole 44024-36283 (pole 24 over 83), constructed by UGI Utilities, Inc. with a single phase line coming off the pole heading up Furnace Street. Tr. 48, Respondent Exhibit R-4.

6. The pole 24 over 83 is within a public Pennsylvania Department of Transportation (PennDOT) right of way and construction of the pole was permitted by PennDOT before it was originally installed in 1951. Tr. 69-70, Respondent Exhibit R-6.

7. PennDOT has a 66-foot right of way, 40 feet of which is for the borough road of Furnace Street, but the right of way extends beyond the road by approximately 13 feet on each side. Tr. 68-69, Respondent Exhibit R-4.

8. The single phase primary line services customers along Furnace Street and also Church Street. Tr. 48.

9. In 1991, there was a car accident at the pole and it was replaced within the PennDOT right of way, approximately 12 feet from Furnace Street. Tr. 70-72, Respondent Exhibits R-6 and R-7.

10. Complainant's property pin is located farther from Furnace Street than the pole, approximately six inches behind the sidewalk and two feet two inches to the right of a sidewalk concrete slab. Tr. 78-79, Respondent Exhibit R-8, Complainant Exhibits M-2 and M-3.

11. The anchor guy on this utility pole crosses 2.5 feet aerially over the corner of Complainant's property. Tr. 44-47, Respondent Exhibit R-1.

12. The ariel encroachment off of pole 24 over 83 has been there a very long time supporting a main line. Tr. 47-48, 80.

13. The utility pole and anchor that go into the ground are in a public right of way on Furnace Street and not on Complainant's property. Tr. 46, Exhibit R-1.

14. George Bokrosh is a senior engineering technician with UGI. Tr. 109.

15. Mr. Bokrosh attempted to take measurements on Complainant's property but was asked to leave the property by Complainant on or about May 19, 2021. Tr. 110, 122.

16. Mr. Bokrosh engaged in several discussions with Ms. Tearpock Martini and offered her three options to resolve her complaint prior to the hearing. Tr. 110.

17. As option 1, UGI has offered to relocate the anchor guy and create a sidewalk anchor guy that would leave the pole then hit a bar attached to the pole with the line coming straight down the pole, keeping the whole entire anchor guy within the public road right-of-way. Tr. 48-49.

18. Alternatively, UGI offers to relocate the single phase primary line from pole 24 over 83 to pole 16 over 74, located closer to Complainant's home at the intersection on the other side of Furnace Street. Tr. 50-51, Respondent Exhibit R-2.

19. As a third alternative to remove the encroachment UGI offers to alter the anchor guy located in that general area by shortening it with a sidelock anchor guy. Tr. 53-54, Respondent Exhibit R-3.

20. The parties have not agreed to an option for removing the encroachment on Complainant's property or in negotiating terms for an easement. Tr. 1-125.

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). “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, 70 A.2d 854 (Pa. 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. Ms. Tearpock Martini has 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).

On appeal, 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 & W. Ry. Co. v. Pa. Pub. Util. Comm’n, 413 A.2d 1037 (Pa. 1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa. Super. 1961); and Pa. Dep’t of Pub. Welfare, White Haven Ctr., 480 A.2d 382 (Pa. Cmwlth.1984).

In the instant case, Ms. Tearpock Martini would like anchor guy wires attached to a utility pole installed by UGI to be moved because they are allegedly a safety hazard and liability to her property. During the hearing Complainant requested the utility pole be moved to the other side of Furnace Street and Route 11. She averred that she has been in numerous conversations with UGI but that the anchor wires remain on her property. She asked Mr. Bokrosh to leave her property because he wasn’t a surveyor. Complainant ordered Mr. Bokrosh

from her property when he attempted to take measurements to remediate the ariel encroachment on the corner of Complainant's property.

In response, UGI presented the testimony of Walter Grodzki and George Bokrosh, engineers who testified that UGI is willing to obtain an easement or remove the anchor guy wire that encroaches Ms. Tearpock Martini's property. UGI has no easement on the property.

Ms. Tearpock Martini's complaint must be denied because although she succeeded in showing by a preponderance of the evidence that UGI has anchor guy wires on her property without a right-of-way, Complainant has failed to show the 2.5 foot ariel encroachment over the corner of her property is a safety hazard or property liability concern. She has failed to prove that she is entitled to the relief that the utility pole be moved across Route 11. Although the pole itself does not have to be removed, the guy wires should be removed from her property. *See, Milkie, supra*. Further, the three options UGI has offered Complainant are reasonable and within the managerial discretion of the utility. See Finding of Fact No. 17.

The Commission held in an earlier complaint proceeding involving the same parties:

As indicated by the ALJ, UGI has a statutory right to occupy streets, highways and other public ways for the purpose of placing, maintaining and removing aerial, surface and subsurface public utility facilities thereon or therein. 15 Pa. C.S. §1511(e). The ALJ also stated as follows:

UGI's placement of its poles in public ROW is consistent with utility practice in that, historically, electric utilities in Pennsylvania have been permitted to occupy public ROWs free of charge, subject to the government's power to regulate for the benefit of the public. See, e.g., PECO Energy Company v. Pa. P.U.C., 568 Pa. 39, 791 A.2d 1155 (2002); Delaware River Port Authority v. Pa. P.U.C., 393 Pa. 639, 145 A.2d 172 (1958).

Upon review of the record, we concur with the ALJ that the Complainant has not met her burden of proof regarding the unreasonableness of UGI's placement of the pole in the ROW.

Francene Tearpock-Martini v. UGI Utilities, Inc., F-2008-2022125, Opinion and Order entered June 19, 2009 (internal citations omitted). Thus, the Commission previously ruled that the same utility pole at issue in the instant case is in a public right of way and not an unreasonable placement of the pole.

Considering this precedent, I find no violation of any Commission Order, regulation, or statute and I am not directing the utility to proceed with implementation of one of the three options described by the engineers at the hearing. However, I agree with UGI that their preferred option seems a reasonable method to remove the ariel guy wires from Complainant's airspace. I encourage the parties to work together to implement the removal of the wires. The utility received permits from PennDOT to construct the utility pole within PennDOT's right-of-way adjacent to Complainant's property. Complainant's property pin is not closer to Furnace Street than the utility pole. The pole is not on Complainant's property, only the ariel guy wires encroach on 2.5 feet of air space on Complainant's property near the sidewalk, and I am not persuaded that this is a safety or liability hazard for the property owner who testified her landscaper was able to blow mulch below the encroachment without incident. The property pin was buried under a foot of mulch.

Further, it is well established that the Commission only has those duties, powers and responsibilities as expressly, or by necessary implication, given to it by the General Assembly and that the Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n, 43 A.2d 348 (Pa. Super 1945). 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 Pennsylvania Supreme Court held that the Commission does not have jurisdiction to determine the scope and validity of an easement). *See also*, Lasko v. Windstream Pa., LLC, Docket No. C-2010-2217869 (Final Order dated April 1, 2011); Perrige v. Metro. Edison Co., Docket No. C-00004110 (Order entered July 3, 2003); Fiorillo v. PECO Energy Co., Docket No. C-00971088 (Order entered September 15, 1999).

There are some matters involving easements beyond the scope and validity of the easement over which the Commission has jurisdiction. *See e.g., W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 578 A.2d 75 (Pa. Cmwlth 1990) (affirming the Commission's decision to impose a fine on the utility for the removal of 74 trees from a customer's property). However, the facts presented by Complainant present precisely the type of issues regarding easements that the Commission lacks jurisdiction to consider. Therefore, although UGI has attempted to obtain an agreed upon easement from Complainant regarding her property, the Commission does not have jurisdiction to direct an easement be formed.

In conclusion, Complainant has failed to satisfy her burden to demonstrate that UGI has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the installation of a replacement pole in a right-of-way of PennDOT that is not on her property. UGI has attempted to remedy an inadvertent ariel encroachment of 2.5 feet of guy wires on the corner of Complainant's property; however, Complainant has not agreed with such efforts and has ordered UGI's personnel off of her land. I encourage the parties to agree to implement one of UGI's proposed options in order to cause removal of the guywires on Complainant's airspace, and to resolve this dispute.

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, 70 A.2d 854 (Pa. 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 & W. Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (PA. Super. 1961); and Murphy v. Pa. Dep't of Pub. Welfare, White Haven Ctr., 480 A.2d 382 (Pa. Cmwlth.1984).

9. The Commission only has those duties, powers, and responsibilities as expressly, or by necessary implication, given to it by the General Assembly and that the Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n, 43 A.2d 348 (Pa. Super 1945).

10. 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. Fairview Water Co. v. Pa. Pub. Util. Comm'n, 502 A.2d 162 (Pa. 1985).

11. UGI has a statutory right to occupy streets, highways and other public ways for the purpose of placing, maintaining and removing aerial, surface and subsurface public utility facilities thereon or therein. 15 Pa. C.S. §1511(e).

12. Pole 24 over 83 is within a PennDOT right-of-way and not on Complainant's property; however there is a 2.5 foot ariel encroachment of guy wires on Complainant's property. 15 Pa. C.S. §1511(e).

13. The ariel encroachment off of pole 24 over 83 is an inadvertent encroachment that has been there a very long time supporting a main line and is not a safety hazard. 66 Pa. C.S. §1501.

14. UGI's placement of its pole 24 over 83 in a public right-of-way is consistent with utility practice in that, historically, electric utilities in Pennsylvania have been permitted to occupy public right of ways free of charge, subject to the government's power to regulate for the benefit of the public. See, e.g., Francene Tearpock-Martini v UGI Utilities, Inc. F-2008-2022125 (Opinion and Order entered June 19, 2009), citing PECO Energy Company v. Pa. Pub. Util. Cmm'n, 791 A.2d 1155 (Pa. 2002); and Delaware River Port Authority v. Pa. Pub. Util. Cmm'n, 145 A.2d 172 (Pa. 1958).

15. Complainant has failed to satisfy her burden to demonstrate that UGI has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company with regard to the installation of a replacement utility pole in PennDOT's public right-of-way. Francene Tearpock-Martini v UGI Utilities, Inc. F-2008-2022125 (Opinion and Order entered June 19, 2009), citing PECO Energy Company v. Pa. Pub. Util. Cmm'n, 791

