

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Paul W. Memminger	:	
	:	
v.	:	C-2020-3015313
	:	
PECO Energy Company	:	

INITIAL DECISION ON REMAND

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision on Remand from the Pennsylvania Public Utility Commission (Commission) dismisses the formal Complaint filed by Paul W. Memminger (Complainant) against PECO Energy Company (PECO or Respondent) as the Commission is without jurisdiction to interpret the meaning of a right-of-way agreement as requested by Complainant, and Complainant did not prove, by a preponderance of the evidence, that PECO failed to provide reasonable service.

HISTORY OF THE PROCEEDING

On December 31, 2019, Mr. Memminger filed a formal Complaint against PECO alleging that PECO had impermissibly run an electric service line across his property to another service address. Mr. Memminger asked the Commission to order removal of the line. Complainant had previously pursued an informal Complaint with the Commission’s Bureau of Consumer Service (BCS) at Case No. 3746267.

On January 27, 2020, PECO filed both an Answer and a Preliminary Objection to the Complaint, the latter duly endorsed with a Notice to Plead. In its Answer, PECO denied any

wrongdoing and argued that as the Complaint is a property dispute, the matter is outside of the jurisdiction of the Commission. PECO reiterated its legal argument in its Preliminary Objection asking that the Complaint be dismissed for legal insufficiency under the Commission's regulation at 52 Pa. Code § 5.101(a)(4).

No response to the Preliminary Objection was filed by Complainant.

On February 19, 2020, an initial hearing Notice was sent to the parties setting April 16, 2020, as the date for an in-person hearing.

On February 28, 2020, a revised hearing Notice was issued changing the type of hearing on April 16, 2020, to a telephonic hearing.

On April 16, 2020, a telephonic hearing in the nature of a prehearing conference convened. Edward Fisher, Esquire, appeared on behalf of PECO. Mr. Memminger appeared on behalf of himself. This conference was an off the record proceeding as only matters of a procedural nature were addressed, principally a query to Complainant as to whether he wished to Answer the Preliminary Objections and explaining the processing of an Initial Decision into the Exception stage.

On April 30, 2020, an Initial Decision was issued granting PECO's Preliminary Objections and dismissing the Complaint.

On May 5, 2020, Complainant filed Exceptions to the Initial Decision.

On June 24, 2020, PECO filed Reply Exceptions.

On July 15, 2021, the Commission entered an Opinion and Order granting in part and denying in part Complainant's Exceptions, vacating the Initial Decision, and remanding the case to the Office of Administrative Law Judge for further proceedings consistent with the Commission's Order.

On July 21, 2021, a hearing Notice was issued setting September 30, 2021, as the date for an evidentiary hearing in this case.

On September 17, 2021, PECO filed a Motion for Continuance of the hearing scheduled for September 30, 2021.

On September 21, 2021, a hearing Notice was issued setting November 18, 2021, as the date for an evidentiary hearing in this case.

On November 18, 2021, a telephonic evidentiary hearing took place. Complainant was present and testified on his own behalf.¹ Angela Lorenz, Esquire, appeared on behalf of PECO and presented the testimony of Daniel F. Pacheco, Manager of Acquisitions and Taxes for PECO, and Kenneth M. Poulton, a Design and Construction Consultant for PECO. PECO offered six exhibits which were received into evidence: PECO Exhibit 1, a definition of terms; PECO Exhibit 2, a chain of title of Complainant's property prepared January 24, 2020; PECO Exhibit 3, a deed between Donald Crawford and Jean Crawford, his wife, and Nathan Golub; PECO Exhibit 4, the deed in which Donald Crawford granted an easement to PECO and Bell Telephone; PECO Exhibit 5, a map of the Cintra Park subdivision; and, PECO Exhibit 6, a series of photographs of the properties through which the easement passes. At the hearing, Complainant raised an additional issue, not objected to by PECO, that a PECO employee had lied to him at a site visit with respect to the placement of the line.

On December 10, 2021, a hearing transcript of forty-seven (47) pages was filed with the Secretary of the Commission. On December 13, 2021, PECO's hearing exhibits were filed with the Secretary. The record closed on that day.

This matter is ready for adjudication.

¹ Complainant attached to his Complaint Attachments 2, 3, and 4 which were referred to during the hearing and which are of record with the Secretary's Office.

FINDINGS OF FACT

1. Complainant is Paul W. Memminger who resides at 121 Kiltie Drive, New Hope, Pennsylvania.

2. Respondent is PECO Energy Company, a jurisdictional public utility providing residential electric distribution service in the Commonwealth of Pennsylvania.

3. On December 31, 2019, Mr. Memminger filed a formal Complaint against PECO alleging that PECO had run an electric service line across his property to another service address and asking that PECO be ordered to move the wire.

4. Complainant and his wife own Lots 40, 39 and a portion of Lot 38 in what is referred to as the Cintra Park Subdivision in New Hope, Pennsylvania. Tr. 23-24; PECO Exhibit 5.

5. Lots 36, 37 and a portion of Lot 38 are owned by Patrick and Anna Murphy. Tr. at 14-15.

6. PECO does not have the right to cross Lots 24, 25, and 40 in the subdivision. Tr. at 25; PECO Exhibit 5.

7. In order to provide electric service to the Murphy residence, PECO had to run a distribution line across Lot 38, because an alternate arrangement would involve the line touching the roof of the Murphy house, which would be a safety concern. Tr. at 27, 39.

8. Based on an easement granted on a previous deed which was not revoked in Complainant's deed, PECO holds both a right-of-way and an easement across Complainant's property at Lot 38. Tr. at 17, 27-28; PECO Exhibits 2, 4 and 5.

9. On or about May 10, 1949, Donald Crawford, one of the previous owners of the lot that Complainant now owns, had conveyed the easement across the property at Lot 38 to Philadelphia Electric Company. Tr. at 18, 20-21; PECO Exhibit 2, 4.

10. PECO personnel advised the Complainant at a site meeting after Complainant filed his informal Complaint with BCS why it was necessary to cross Lot 38 with a distribution line. Tr. at 39-40.

11. Complainant was not satisfied with the explanation. Tr. at 40.

DISCUSSION

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 Public Utility Code. 66 Pa.C.S. § 332(a). To satisfy this burden, the Complainant must demonstrate that Respondent was responsible for the problems alleged in his Complaint through a violation of the Public Utility Code or a regulation or order of the Commission. This must be shown by a preponderance of the evidence. 66 Pa.C.S. §701; *Patterson v. Bell Tel. Co. of Pa.*, 72 PA P.U.C. 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. Cmwlth. 1990) *alloc. den.*, 602 A.2d 863 (Pa. 1992). In addition, the Commission's findings of fact 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. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 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, the Complainant has not satisfied his burden of proof. The Complainant now has to provide some 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).

In its Order remanding this matter for an evidentiary hearing, the Commission stated:

While it is true that the Commission has no jurisdiction to interpret the meaning of a written right-of-way agreement, see *Perrige*,^[2] supra, a threshold determination must still be made as to the existence of an easement or right-of-way agreement. *Samuel Messina v. Bell Atlantic – Pennsylvania*, 91 Pa. P.U.C. 657, 1998 WL 1040953 (Order entered September 23, 1998) (Commission concluded that whether a utility has an executed and recorded right-of-way is a factual determination that is incident to the Commission’s jurisdiction). Here, there is no factual record upon which the Commission can make the threshold determination that PECO has an executed and recorded right-of-way over the Complainant’s property.

In addition, we note that the Commission has held that the relocation of utility facilities at a customer’s request falls within the statutory definition of service and that the Public Utility Code defines service in its broadest and most inclusive sense. See *Barbara Gallagher v. PECO Energy Company*, Docket No. C-2010-2201568 (Order entered September 22, 2011) at 21. Taking the averments and any reasonable inferences from the Complaint to be true, it could reasonably be construed that Mr. Memminger may have asserted an unreasonable service allegation averring that PECO initially denied that the wire crossed his property without proper investigation and refused to relocate the wire.

Memminger v. PECO Energy Co., Docket No. C-2020-3015313 (Opinion and Order entered July 15, 2021) p. 9-10.

What the Commission has requested, in part, is a threshold determination that PECO holds an executed and recorded right-of-way over Complainant’s property. PECO established that it does have such a right-of-way and easement across Complainant’s property through both testimony and documentary evidence. PECO’s witnesses Messrs. Pacheco and Poulton testified with respect to this and explained with reference to deeds and maps where the easement lies, how PECO obtained it, and why a distribution line must be run in such a way that it passes over part of Complainant’s property. I find the testimony of both of these witnesses credible.

² *Perrige v. Metro. Edison Co.*, Docket No. C-00004110 (Order entered July 3, 2003).

Case law provides extensive guidance in such matters raised by complainants. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Shedlosky v. Pa. Elec. Co.*, Docket No. C-20066937 (Opinion and Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). 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). 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 power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992) *alloc. denied* 637 A.2d 293 (Pa. 1993).

The Commission has determined that it is not the proper forum for resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction. *Perrige v. Metro. Edison Co.*, Docket No. C-00004110 (Opinion and Order entered July 11, 2003); *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Opinion and Order entered September 17, 1999). In *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.

In *Boczar v. PPL Electric Utilities Corp.*, Docket No. C-20016332 (Opinion and Order entered February 10, 2003), the complainant alleged that the utility was not authorized to place its poles, transformers and cable lines on his property. The Commission noted that the utility produced right-of-way agreements for the facilities in question and concluded that it was without jurisdiction to determine property rights concerning these easements. In *Lou Amati/Amati Service Station v. W. Penn Power Co. and Bell Atl. Pa., Inc.*, Docket No. C-00945842 (Final Order entered October 25, 1995), the Commission stated that real property issues, such as trespass and whether utility facilities were located pursuant to a valid easement, are within the exclusive jurisdiction of the Courts of Common Pleas.

In *Messina v Bell Atlantic-Pennsylvania*, Docket No. C-00968225 (Opinion and Order entered September 23, 1998), the Commission stated that it could adjudicate cases involving the existence rather than the scope and validity of an easement. In *Robert S.J. Nigro v. PPL*

Electric Utilities Corp., Docket No. C-00003242 (Opinion and Order entered October 26, 2004), where the utility was unable to produce a written document granting an easement across the complainant's property and claimed an easement by prescription, the Commission concluded that it was without jurisdiction to determine prescriptive easements.

Finally, in *Stavnicky v PPL Electric Utilities Corp.*, Docket No. C-20043368 (Final Order entered July 13, 2005), the Commission held that subject matter jurisdiction in right-of-way disputes extended only to cases where there was no written documentation of an easement. If the utility produced a document purporting to show a grant of authority for an easement concerning a complainant's property, the Commission's inquiry should be at an end. In that case, the Commission determined that it lacked jurisdiction because the utility presented written documentation of its easements.

Here the discussion might end, because the Commission does not have the authority to interpret the meaning of a right-of-way. However, Complainant also raised the issue of unreasonable service at the hearing alleging that he had not been informed by PECO of the reasons why the distribution line had to be configured as it was.³ Such a quality-of-service issue is within the Commission's jurisdiction under Section 1501 of the Public Utility Code, which states in pertinent part:

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.

66 Pa.C.S. § 1501.

³ PECO did not object to this expansion of the scope of the formal Complaint and offered the testimony of its witnesses in rebuttal.

The statute at 66 Pa.C.S. § 1501 governs any allegations of unreasonable or inadequate service. Pursuant to 66 Pa.C.S. § 1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. *Elkin v. Bell Tel. Co. of Pa.*, 372 A.2d 1203 (Pa. Super. 1977) *aff'd* 420 A.2d 371 (Pa. 1977); *Behrend v. Bell Tel. Co. of Pa.*, 243 A.2d 346 (Pa. 1968). 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 does not require perfect service or the best possible service but does require public utilities to provide reasonable and adequate service. *Analytical Lab. Servs., Inc. v. Metro. Edison Co.*, Docket No. C-20066608 (Opinion and Order entered December 21, 2007); *Emerald Art Glass v. Duquesne Light Co.*, Docket No. C-00015494 (Opinion and Order entered June 14, 2002); *Re: Metro. Edison Co.*, 80 Pa. PUC 662 (1993).

Complainant testified that he met with PECO witness Kenneth Poulton at a site visit. At that meeting, Mr. Poulton explained to Complainant why it was necessary to run the distribution line (also referred to as a conductor) across Lot 38. Tr. 39-40. While the date of the meeting is not certain, this was after Complainant filed his informal Complaint with BCS.⁴ Complainant was not satisfied with the explanation provided by Mr. Poulton and challenged the veracity of Mr. Poulton's testimony, but as stated above, I find Mr. Poulton's testimony credible, and that Complainant's dissatisfaction with the witness' answer does not constitute proof of unreasonable service by PECO.

Complainant's objection to the placement of the distribution line and PECO's refusal to relocate the line does not, in itself, amount to unreasonable service by PECO. As explained, above, PECO placed the line within the easement allowed by previous deed and did so because to do otherwise would create a safety hazard at the Murphy residence. Thus, Complainant has not met his burden of showing by a preponderance of the evidence that PECO provided unreasonable service contrary to the provisions of the Code and the regulations of the Commission, and his Complaint in this regard will be dismissed.

⁴ Complainant also questioned Mr. Poulton extensively about why Mr. Poulton, on the day of the site visit, went to the Murphy property first and not to Complainant's residence. Though not objected to as such, this line of questioning was irrelevant to any issue in this case. Tr. at 41-44.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to this proceeding and with respect to such allegations as are based on reasonableness of utility service. 66 Pa.C.S. §§ 703; 1501.

2. The Commission has no jurisdiction to interpret the meaning of a written right-of-way agreement, but a conclusion must still be made as to the existence of an easement or right-of-way agreement. *Dengler v. Metro. Edison Co.*, Docket No. C-2009-2112197 (Final Order entered November 17, 2009); *Messina v. Bell Atlantic–Pennsylvania Inc.*, 91 Pa. P.U.C. 657, 1998 WL 1040953 (Opinion and Order entered September 23, 1998).

3. 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).

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. 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.*, 602 A.2d 863 (Pa. 1992). In addition, the Commission's findings of fact 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. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

6. 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. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. 66 Pa.C.S. § 1501.

7. Complainant has not met his burden of showing by a preponderance of the evidence that PECO provided unreasonable service contrary to the provisions of the Code and the regulations of the Commission, and his Complaint in this regard will be dismissed. 66 Pa.C.S. § 332(a); 66 Pa.C.S. § 1501, *Patterson v. Bell Tel. Co. of Pa.*, 72 PA P.U.C. 196 (1990).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint filed by Paul W. Memminger against PECO Energy Company at Docket No. C-2020-3015313, with respect to the provisions of an easement is dismissed with prejudice for lack of jurisdiction.

2. That the allegation raised by Paul W. Memminger against PECO Energy at the hearing in this matter with respect to quality of service is dismissed as Complainant failed to demonstrate by a preponderance of the evidence that PECO violated the Public Utility Code or a regulation of the Commission.

3. That the Secretary of the Commission mark this matter closed.

Date: January 24, 2022

/s/
Dennis J. Buckley
Administrative Law Judge