

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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|---------------------|---|----------------|
| Alexander Von Koch | : | |
| | : | |
| v. | : | C-2021-3029826 |
| | : | |
| PECO Energy Company | : | |

INITIAL DECISION

Before
F. Joseph Brady
Administrative Law Judge

INTRODUCTION

This Initial Decision denies the Formal Complaint (Complaint) of Alexander Von Koch (Mr. Koch or Complainant) against PECO Energy Company (PECO or Respondent) upon finding that the Complainant did not carry his burden of proving that PECO failed to provide safe, adequate, and reasonable service.

HISTORY OF THE PROCEEDING

On November 15, 2021, the Complainant filed a Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO. In the Complaint, Mr. Koch alleges that PECO is responsible for damages he incurred at his property as a result of electrical surges which occurred in July 2018, October 2019, and two events in October 2021. As relief, the Complainant requested that PECO immediately prevent surges from entering his property and monetary damages.

On December 16, 2021, the Respondent filed an Answer with New Matter to the Complaint (Answer) denying all material allegations of fact. In its Answer, PECO stated that its own investigation determined that the surge in October 2019 was caused by downed trees/vegetation for which they are not liable. PECO further stated that it has a Long-Term Infrastructure Improvement Plan (LTIIP) to retire the Complainant's current 4kV circuit and upgrade it to a higher voltage, 34kV. PECO stated that the LTIIP project began in July 2021 and is expected to be completed in the third quarter (Q3) of 2022.

In its New Matter, PECO argues that the Commission does not have the authority to award the monetary damages requested by the Complainant. Thus, the Complainant's request for monetary damages should be denied pursuant to 52 Pa. Code § 5.101(a)(1).

On December 18, 2021, the Complainant filed a Reply to PECO's Answer wherein he reiterated his claims that PECO is responsible for damages to his property caused by electrical surges.

By Telephonic Hearing Notice dated January 20, 2022, a telephonic hearing was scheduled for March 8, 2022, at 10:00 am.

On March 8, 2022, the hearing convened as scheduled. The Complainant appeared *pro se* and testified on his own behalf. The Complainant offered a late exhibit, which will be entered into the record through this decision.¹ PECO was represented by Khadijah Scott, Esquire. PECO presented the testimony of Timothy Grow, Claims Case Manager at PECO, and Daniel Miller, Engineer at PECO. PECO also offered eight exhibits which were entered into the record.

The record closed on March 17, 2022, upon submission of the transcript to the Commission.

¹ During the hearing, I granted the Complainant's request to file an exhibit after the hearing. The Complainant submitted Complainant Exhibit 1 on March 9, 2022. On March 11, 2022, PECO filed a response stating it has no objection to Complainant Exhibit 1.

FINDINGS OF FACT

1. The Complainant is Alexander Von Koch. Tr. 4.
2. The Respondent is PECO Energy Company.
3. The Complainant is the owner of the service addresses located at 1255, 1257, and 1259 Newark Road, Toughkenamon, Pennsylvania (Service Addresses). Tr. 5.
4. PECO provides electric service to the Service Addresses. Tr. 5.
5. Timothy Grow is a Senior Claims Case Manager at PECO. Tr. 21-22
6. The Complainant experienced an electrical surge on July 24, 2018. Tr. 8.
7. PECO conducted an investigation of the July 24, 2018 event and determined that a downed tree impacted the circuit serving the Service Addresses. Tr. 26-27; PECO Ex. 2.
8. The Complainant experienced an electrical surge on October 8, 2019. Tr. 8.
9. PECO conducted an investigation of the October 8, 2019 event and determined it was caused by a downed tree. Tr. 28-29; PECO Ex. 4.
10. The Complainant experienced an electrical surge on October 10, 2021. Tr. 9
11. PECO conducted an investigation of the October 10, 2021 event and determined it was caused by a motor vehicle accident that impacted the entire circuit serving the Service Addresses. Tr. 29-30; PECO Ex. 3.
12. The Complainant experienced an electrical surge on October 29, 2021.
Tr. 10.

13. The Complainant's service area in Chester County was subject to storm activity resulting in more than 70,000 customers experiencing outages on October 29, 2021. Tr. 24-25; PECO Ex. 5.

14. Daniel Miller is an engineer at PECO. Tr. 33.

15. The design of the circuit serving the Service Addresses – “London 2” – is approved by the National Electric Safety Code. Tr. 39.

16. PECO completed a reliability enhancement of the London 2 circuit in September 2021 by replacing a deteriorating cross-arm. Tr. 40; PECO Ex. 7.

17. PECO is currently working on retiring and converting the London 2 circuit from a 4kV to 34kV circuit as part of a LTIIP project that entails 11 miles of conversion work. Tr. 40, 52; PECO Ex. 8.

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 (Opinion and Order entered February 8, 1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (Opinion and Order entered October 6, 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). A complainant can meet that burden if he presents evidence more convincing, by even the smallest amount, than that evidence presented by Respondent. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order, or a violation of a Commission-approved tariff. 66 Pa.C.S. § 701.

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 *Murphy v. Pa. Dep't of Pub. Welfare, White Haven Cntr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

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 the complainant. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001); *see also, Burlison v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982).

In this case, the original requests for relief by the Complainant were for PECO to immediately prevent surges from entering his property and monetary damages for previous surges. Prior to the hearing, PECO and the Complainant confirmed that PECO was currently retiring and converting the Complainant's circuit from a 4kV to 34kV; therefore, Complainant's request for relief that PECO "fix" the service to his properties is moot. In regard to the Complainant's request for damages, he was advised that the Commission is not authorized to grant monetary damages,² but may determine whether a public utility has provided "adequate, efficient, safe, and reasonable service and facilities." *See* 66 Pa. C.S. § 1501. As a result, the hearing was held to determine whether PECO violated the provisions of 66 Pa.C.S. § 1501 in its provision of electric service to the Complainant.

² Monetary damages may be sought in an appropriate civil court. *See Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980).

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. (footnote omitted).

478 A.2d at 949. The statutory definition of "service" is to be broadly construed.³ *Country Place Waste Treatment Co., Inc. v. Pa. Pub. Util. Comm'n*, 654 A.2d 72 (Pa. Cmwlth. 1995).

In determining whether PECO violated the provisions of 66 Pa.C.S. § 1501, it must be understood that "[n]either the Public Utility Code nor the Commission's regulations require that public utilities provide flawless service." *A-Rize-N Mgmt. Co., LLC v. Pa. Am. Water Co.*, Docket No. C-2009-2119162 (Final Order entered August 5, 2010, adopting decision of

³ "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.

ALJ Salapa dated June 15, 2010). Section 1501 only requires public utilities “to provide reasonable and adequate, not perfect, service.” *Id.*; *see also Biason v. Metro. Edison Co.*, Docket No. C-00004450 (Opinion and Order entered December 19, 2001).

Here, the Complainant argues that the surges he experienced were the result of a faulty design by PECO and therefore preventable. I cannot reach the same conclusion. PECO established that the design of the circuit serving the Service Addresses – “London 2” – is approved by the National Electric Safety Code. Furthermore, PECO was able to demonstrate that each of the surges experienced by the Complainant were the unfortunate result of circumstances beyond PECO’s control. The first surge occurred on July 24, 2018 and was the result of a downed tree. Likewise, the second surge occurring on October 8, 2019, was also the result of a downed tree. The third surge on October 10, 2021, was the result of a motor vehicle accident and the fourth surge experienced on October 29, 2021, was caused by storm activity resulting in more than 70,000 other customers also experiencing outages.

Finally, it must be recognized that 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. 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).

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

PECO’s Electric Service Tariff enjoys all of these legal presumptions. Consistent with section 12.1 of PECO Energy’s tariff, the Company cannot guarantee continuous uninterrupted service. Section 12.1 of PECO Energy’s Commission approved tariff provides:

12.1 LIMITATION ON LIABILITY FOR SERVICE INTERRUPTIONS AND VARIATIONS. The Company does not guarantee continuous, regular, and uninterrupted

supply of service. The Company may, without liability, interrupt or limit the supply of service for the purpose of making repairs, changes, or improvements in any part of its system for the general good of the service or the safety of the public or for the purpose of preventing or limiting any actual or threatened instability or disturbance of the system. **The Company is also not liable for any damages due to accident, strike, storm, riot, fire, flood, legal process, state or municipal interference, or any other cause beyond the Company's control.**

In all other circumstances, the liability of the Company to customers or other persons for damages, direct or consequential, including damage to computers and other electronic equipment and appliances, loss of business, or loss of production caused by any interruption, reversal, spike, surge or variation in supply or voltage, transient voltage, or any other failure in the supply of electricity shall in no event, unless caused by the willful and/or wanton misconduct of the Company, exceed an amount in liquidated damages equivalent to the greater of \$1000 or two times the charge to the customer for the service affected during the period in which such interruption, reversal, spike, surge or variation in supply or voltage, transient voltage, or any other failure in the supply of electricity occurs. . .

See, Section 12.1 of PECO Energy's tariff (emphasis added).

Based on the foregoing, I find the service provided to the Complainant by PECO to be safe, adequate, and reasonable. Thus, the Complainant failed to carry his burden of proving that PECO violated the Code, a Commission Regulation or Order, or a violation of a Commission-approved tariff. Accordingly, the Complaint shall be denied.

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. Dept't of Pub. Welfare, White Haven Cntr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

9. It is every public utility's duty to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities," and to "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. 66 Pa.C.S. § 1501.

10. Under 66 Pa.C.S. § 1501, a public utility is not required to provide flawless or perfect service, but rather, only reasonable, and adequate service. *A-Rize-N Mgmt. Co., LLC v. Pa. Am. Water Co.*, Docket No. C-2009-2119162 (Final Order entered August 5, 2010, adopting decision of ALJ Salapa dated June 15, 2010); *see also Biason v. Metro. Edison Co.*, Docket No. C-00004450 (Opinion and Order entered December 19, 2001).

11. The Respondent does not guarantee continuous, regular, and uninterrupted supply of service and is not liable for any damages due to accident, strike, storm, riot, fire, flood, legal process, state or municipal interference, or any other cause beyond the Company's control. Section 12.1 of PECO Energy's tariff.

12. Absent proof by a preponderance of the evidence that the Respondent violated the provisions of 66 Pa.C.S. § 1501, the Commission has no authority to require any action by Respondent. *W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 478 A.2d 947 (Pa. Cmwlth. 1984).

13. The Complainant failed to meet his burden of proving that the Respondent violated the Public Utility Code, a Commission regulation, or a Commission order. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That Complainant Exhibit 1 is entered into the record.
2. That the Complaint filed by Alexander Von Koch against PECO Energy Company, at Docket No. C-2021-3029826, is denied.
3. That Docket Number C-2021-3029826 be marked closed.

Date: June 7, 2022

/s/
F. Joseph Brady
Administrative Law Judge