BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION

DOCKET No. C-2020-3019763

Lawrence Kingsley,
Complainant

v.

PPL Electric Utilities,
Respondent

REPLY TO PPL'S OPPOSITION TO COMPLAINANT'S EXCEPTIONS

Overview

The complainant here replies to PPL's opposition to his Exceptions and Amended Exceptions. PPL labels its opposition to the initial Exceptions a "Reply," which should not be confused with the complainant's instant Reply. PPL's opposition to the complainant's Second Set of Exceptions and Motion for Reconsideration is captioned an "Answer."

The complainant's two sets of exceptions and correspondence with the Secretary touch on some of the reasons for this Reply to PPL. There is no attempt to duplicate or to replace these prior documents, but, where appropriate, short quotes are taken from them.

PPL purports to have emailed its oppositions to the complainant, but he only received a paper copy by recent USPS mail.

As we might expect and as elaborated below, PPL distorts the facts. Otherwise, PPL makes two main errors. The first error is one of logic: circular reasoning by which PPL tries to cite as proof the very rulings which are in question. The second error concerns burden-shifting, whereby PPL tries to ascribe to the complainant its own burden of proof. Both errors reveal arrogance in the assumption that no one will perceive PPL's distortion and shallow sophistry.

Re: PPL's initial Opposition.

Argument 1. By bald denials, PPL cannot overcome well-documented averments in the complaint.

Worth repeating is the principle that under Pennsylvania jurisprudence all assertions in the complaint are taken as true unless the defendant can come forward with clear and convincing evidence to the contrary. PPL has not done so.

Pennsylvania and U.S. Courts are uniformly agreed that "the Court will take Plaintiff's statements of fact as true, unless contradicted in the record." *Covington v. Hamilton Twp. Bd. of Educ*, Civ. No 08-3639 (FLW) (D.N.J. Jun. 15, 2015). See also: *Bykowski v. Chesed, Co.*, 625 A.2d 1256 (Pa. Super. Ct. 1993) ("All averments of fact properly pleaded in the adverse party's pleadings must be taken as true, or as admitted, unless their falsity is apparent from the record"; *Holiday v.*

Bally's Park Place, Inc., Civ. A. No. 06-4588, 2007 WL 2600877, E.D. Pa. Sept. 10, 2007 ("The court must generally accept as true the allegations in the complaint, unless they are contradicted by defendant's affidavits"); and *Bell Atlantic Corp. v. Twombly***,** 550 U.S. 544 (2007) (U.S. Supreme Court made clear that a court at the motion-to-dismiss stage is to consider not just "whether the factual allegations are probably true. We made it clear, on the contrary, that a *court must take* the allegations as true").

PPL was unable to proffer any credible evidence in support of its defense—no photographs, no affidavits, and no depositions. None of PPL's witnesses had firsthand knowledge or up-to-date records of the disputed facts and thus were unable to rebut the complainant's principal contentions.[1]

Specifically, PPL's only witness regarding vegetation management, Tyler Marino, testified that he was not employed by PPL when PPL "attacked" the complainant's trees and thus had no personal knowledge of the disputed facts. (Transcript of July 20, 2021 hearing at 100, lines 8-18; 107, lines 23-25; hereafter "Transcript"). Nor, according to his testimony, did PPL have any computer system installed at the time of the disputed work that could tell him even when the work occurred. (Transcript at 92, lines 8-10). He testified that he could not say whether

[1] The judgment and decision by Judge Buckley, however, finds witnesses credible even when they speak from acknowledged ignorance, as in having no relevant records, computer systems, or relationship to PPL during the period in question.

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this work complied with PPL's policies about trimming trees only within 15 feet of PPL's wiring. (Transcript at 108, lines 1-7).

He acknowledged that there was no record that the complainant was ever notified of the intended work. (Transcript at 98, lines 2-16; 105, lines 19-21). Routinely, he said, PPL conducts no follow-up with the property owner about whether notification ever occurs. (Transcript at 103, lines 221-225, to 104, lines 1-3).

He furthermore testified that PPL lacks any training program for its contractors, whom it misnames "foresters." (Transcript at 104, lines 21-24). Unlike Mr. Marino himself, PPL contractors have no training in forestry and specialize only in operation of a chainsaw.

Contrary to PPL, the complainant's photographs show extensive damage by PPL. While the year of the work is debatable, we know that the work occurred, and that it was destructive. Judge Buckley's Decision at 16 was too accommodating to PPL in assuming that fallen limbs were natural ground-fall. Limbs fallen naturally do not have a saw cut at one end, as shown, for example, by Exhibits 5 and 12 of the Sept. 21, 2021 hearing. Two of the complainant's trees were so debilitated by PPL that they eventually fell into the creek.

PPL mistakes the time in question, which was not when the complainant found unannounced PPL contractors on his property ready to "strike again," but an

earlier period when the damage was sustained. The complainant "survived" the last visit since he was present to point out that no vegetation management was needed, but since PUC has never disciplined PPL, PPL believes that it can get away with invasion of private property and wrecking havoc whenever it wishes.

PPL demonstrates no intention of keeping its commitments to PUC about notifying property owners in advance of assault on their trees. If PPL were to do so, the property owner could contest the need or extent of announced work, but PPL and its contractors want to act as absolute rulers who cannot be challenged. Moreove, PPL pays its contractors by the job, and the contractors have an economic incentive to cut large swaths of a neighborhood before anyone can object.

Without explanation PPL tries to shift its burden of proof to the complainant. As elsewhere, PPL relies on ipse dixits, rather than intelligent reasoning and citation of competent authority. Nowhere does PPL explain how its practices differ from *Huffsmith v. PPL Electric Utilities Corp*., No. 11-CV-1012 (C.P. Lacka. Co., 2018), where PPL was held liable for trespass and intentional removal of fully-grown evergreen trees along the plaintiffs'property. The court found that a person who authorizes or directs another to trespass upon another person's land is also liable himself or herself as a trespasser and that this rule of law applies even if the authority or direction is given to one who is an independent contractor.

Argument 2. PPL argues frivolously about billing.

Billing is separate count in the complaint from PPL's excessive tree removal and amputation. The record is undisputed that PPL, under threat of terminating service, forced the complainant to pay monthly charges for his fiancée's estate. In a sense, he is analogous to a tenant who has the right to collect utility company payments from a landlord if the landlord fails to keep a utility account current.[2] Here no rent was due, but the decedent could hardly pay PPL's monthly bills. Even after the complainant was appointed Administrator (i.e., Executor) of Ms. Schoener's estate, he had no personal obligation for these bills. PPL should refund these payments to him and, like any creditor of the estate, apply for payment from the New York Surrogate's Court, which is similar to our Orphan's Court.

The record is undisputed that PPL has a history of collecting a security deposit from new customers. PPL's loss of records or spoliation of evidence from the earliest years when Ms. Schoener's account was opened by her parents should not give PPL the right to pocket this money. The fact that neither Ms. Schoener nor the complainant had to pay their own security deposit in no way means that her parents were relieved of the same obligation. Obviously, there would be no reason for Ms. Schoener or the complainant to surrender a new security deposit if it already had been

[2] Under 66 Pa. C.S. § 1529 (Right of tenant to recover payments), "Any tenant who has made a payment to a utility on account of nonpayment of charges by the landlord ratepayer pursuant to this subchapter may subsequently recover the amount paid to the utility."

paid. Since PPL avows that it has no records of the account when it was first opened, Judge Buckley has no justification for saying on p. 14 of his Decision that the security deposit "had never been paid." What is important is PPL's general policy over the years, and gaps in the record should not result in PPL's unjust enrichment--retention of the security deposit. PPL, however, has pocketed this amount along with payment for the 29 months of service billed to the deceased account holder.

PPL is the custodian of records from this period and should have the burden of accounting for these records. Ms. Schoener's account to this day remains active and is listed next to the complainant's account on PPL's Website. However, PPL cannot produce even the original application for service. If PPL has destroyed (or pretends to be unable to find) records for an active account, an adverse presumption should be entered that these records undermine PPL's position. It is unfair to shift this burden to the complainant who never knew Ms. Schoener or her parents when the account was first opened.

In fact, under 66 Pa. C.S. § 315(d), "The burden of proof to justify every accounting entry questioned by the commission shall be upon the public utility making, authorizing, or requiring such entry, and the commission may suspend any charge." However, the security deposit is considerably smaller than the total for the 29 months of service from Ms. Schoener's death to the start of the complainant's own account. During this time the complainant lived in New York, paying ConEd

for utilities. As we find for tenants, usage rather than ownership of the building is what normally determines the obligation of the ratepayer. PPL is off base in arguing that eventual ownership of the property obligated the complainant to pay for the period when the estate, rather than him, occupied the house. He did not move in until 2/1/20.

PPL's witness about billing, Kelly Bell, was of little use to PPL since she was not employed by PPL when the account was first opened. She testified that records during the period when the estate was the account holder were purged. Partial PPL records, however, show that the complainant paid $1,011.60 on behalf of the estate during 22 months following Ms. Schoener's death on Oct. 2015. Starting in August 2017, the complainant, for prudence, asked for an account in his own name even though he still was living in New York. (Transcript of March 20, 2022 hearing at 157, lines 23-25 to 158, lines 1-2).[3] He calculated an estimate for all 29 months of the purged records, using as a proxy data from Jan. 17, 2017 to July 17, 2017 (with approximately 2.5 winter months and 3.5 summer months). This total is $1,946.85. No air conditioning was in use or even installed during either Ms. Bell's or the complainant's estimate. With interest, not to mention penalties, the $1,946.85 easily could exceed $2,000.

[3] Judge Buckley refused to let the complainant explore why PPL's Website differs from records that were the subject of he testimony about billing.

PPL plays a word game in alleging: "Complainant himself admits within his own exceptions that he voluntarily paid the electric bills between Ms. Schoener's death and the transfer of the electric bill for the property into his own name ."[4] There is nothing voluntary about forcing the complainant to pay the Estate's monthly bills under threat that the service otherwise would be terminated in the dead of winter. Controls of the heating equipment required electricity, and pipes could freeze without heat. But PPL's threat to terminate the decedent's service in winter flagrantly violated 52 Pa. Code § 56.100 (Winter termination procedures) and was another indication of PPL's *ultra vires* conduct throughout this case.

Argument 3. PPL misapprehends the complainant's Pretrial Memorandum.

This Memorandum was properly filed on 3/10/22 (eFiling Confirmation Number 372963). Yet, on 5/12/22 Judge Buckley struck this pretrial Memorandum, mistakenly calling it a post-trial brief which he then prohibited. There is no rule nor standard making a post-trial brief, much less a pretrial Memorandum, *verboten*. PPL argues frivolously that "Complainant fails to cite to a single rule that would have permitted the filing of this 'memorandum.'"(PPL Reply at 4). No such citation is needed because the Public Utility Code is always in effect, and an experienced judge should have been familiar with 66 Pa. C.S. § 332(b), which states: "Every party is entitled to present his case or defense by oral

[4] PPL's "Reply" at 3.

or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Because Judge Buckley bifurcated the case, the complainant's Pretrial Memorandum—a digest and review of evidence from the first hearing—should have been helpful. However, as with other rulings, Judge Buckley wanted to silence the complainant and to deprive him of an appellate record, so that the court's likely predetermined decision would seem undisputed.

It would have been one thing simply to have found the Memorandum unpersuasive and to have entered judgment in favor of PPL. But striking a harmless Memorandum suggests a further motivation: denial of the complainant's right to be heard and thus infringement of due process. Anyone can see that this Memorandum contains no "redundant, immaterial, impertinent, or scandalous matter," which could be stricken under 52 Pa. Code § 1.4 or FRCP 12(f); nor was there any allegation that the evidence was cumulative or irrelevant. The complainant has requested leave to resubmit this Memorandum: if this request if granted, Commissioners can see for themselves why the striking of this Memorandum was unnecessary and excessive.

Judge Buckley's striking of the complainant's Preliminary Objections to

PPL's Answer,[5] as well as the Motion for Declaratory Judgment (Confirmation No. 2184761, plus the Secretary's striking of the complaint's Motion for Reconsideration (re: the Amended Exceptions, Confirmation No. 2424482) and letter to the Secretary (Confirmation No. 2424593) are in the same category: an attempt to suppress dissent, distort the record, and leave PPL as the unchallenged victor.

Also to this end, Judge Buckley besmirches the complainant without cause, most notably in the abstract where there is no context that can be examined and interpreted differently. Each of the stricken documents should be examined in terms of whether the complainant was treated fairly.

Argument 4. PPL continues to misstate the circumstances of its report to Judge Rainey.

PPL flagrantly misstates the facts about its *ex parte* communication with Judge Charles E. Rainey. Contrary to PPL, Judge Buckley, and explicit facts already set forth, the complainant never requested an internal PUC report, but only a copy of the report which PPL submitted to PUC apropos of the parties' failed mediation. Judge Rainey required PPL to report the outcome of this mediation, and the only reason why PPL would have withheld this report from the complainant is

[5] Efiling Confirmation No. 2185808. Preliminary Objections are a standard tool under 56 Pa. Code § 5.101(e).

that PPL must have used it to attack him surreptitiously without fear of rebuttal. PPL could have laid this matter to rest long ago simply by serving this report on the complainant, but PPL's steadfast refusal to do so suggests errors or calumny in the report which PPL does not wish brought to light. The complainant should be entitled to know if PPL tarnished him from the outset of this case, and even now, for the appeal, he would like a copy of what PPL stated. If, as PPL contends, the report is harmless, there is no reason to conceal it.

Argument 5. PPL distorts the facts about discovery.

PPL's refused to answer the complainant's Interrogatories and produced only a negligible response to the demand for production of documents. When Judge Buckley bifurcated the case, he reopened discovery, but again PPL refused to provide discovery in good faith. Judge Buckley refused the complainant's request to compel discovery on 10/31/21. This lack of discovery, which was an impediment at both hearings, is part of the complainant's Exceptions, and PPL should not try to cite as proof of its position the very order which is in question.

Re: PPL's Opposition ("Answer") to the complainant's Amended Exceptions and Motion for Reconsideration.

Argument 6. PPL's so-called "Answer" falsely claims that the Amended Exceptions will create delay.

After filing the initial Exceptions on July 5, 2022 the complainant almost immediately moved for leave to correct typos and to clarify his initial set of

Exceptions. Contrary to PPL, the Amended Exceptions enhance readability and clarity and thus will facilitate or even expedite the Commissioners' decision on the Exceptions. The two versions of the Exceptions are closely related, one being a revision of the other, and have the same prayer for relief. PPL's claim about delay suggests retreat to boilerplate objection as opposed to advancement of valid argument.

The only complication of the Amended Exceptions does not owe to the complainant, but rather to the Secretary's unwarranted rejection and striking of this document under the belief that the complainant should wait until the final judgment to file new exceptions. In fact, the "new" exceptions relate to the Secretary's interference with the appellate process, whereby the Commissioners are denied the full record in this case and given only a censured version of it expected to encourage a pro-PPL judgment. However, the Commissioners, not the Secretary, should decide the appeal, including the scope and admissibility of the record. A hard case to make is that a properly filed document that clarifies the dispute and which improves readability constitutes any type of transgression by the complainant.

No disrespect is intended, but the striking of the Amended Exceptions by the Secretary is similar to decisions by Judge Buckley. By denying the complainant an opportunity to be heard, Judge Buckley, like the Secretary, impermissibly has

curtailed the record in favor of PPL, while trying to paint the complainant as proceeding improperly. The complainant, in contrast, believes that the entire record, including stricken documents, should be available to the Commissioners for review. An important part of his appeal centers on this arbitrary, capricious restriction of evidence and argument in prejudice of the complainant. The result is not so different from George Orwell's *1984*, where "Every record has been destroyed or falsified, every book rewritten, every picture has been repainted, every statue and street building has been renamed, every date has been altered. History has stopped." Another analogy is Nazi burning of books.

PPL may have the advantage of recognition as an incumbent utility, but both parties to this dispute should be treated equally. They have not been. The complainant cannot even get attention from Judge Buckley or the Secretary for corrections of the 3/10/22 transcript which the complainant submitted on 5/2/22, well before the 6/15/22 dismissal of this case. Obviously, this corrigenda should have been decided before the case was dismissed.

Argument 7. PPL's argument about expense is specious.

First of all, it should be noted that this case derives from PPL's misconduct which has cost the complainant untold opportunity costs, out-of-pocket expenses, and grief. PPL's misconduct includes failure to keep its commitments to PUC about notifying homeowners of intended work, acting as though (in the absence of

any court ruling) it has eminent domain throughout its service areas, invasion of private property without first securing a right-of-way, poisoning wells and waterways in the runoff of herbicides used for vegetation management, and butchering the complainant's trees. The complainant merely is trying to defend himself and his property against a Boston-based, billion dollar company which has a long history of alienating Pennsylvania residents, as well as local, state, and federal agencies.[6]

PPL could save far more than the litigation costs of this dispute by burying is wiring underground, as 52 Pa. Code § 57.84 requires for new construction. PPL then could spare itself the annual cost of vegetation management, emergency repair during severe weather, and criticism from customers about unsightly "aerial trash." For comparison, PG&E in California is placing 10,000 miles of its wiring

[6] See https://www.puc.pa.gov/search/document-search/?DocketNumber=&ReferenceDocketNumber=&eFilingConfirmationNumber=&CaseType=Formal+Complaint&PublicMeetingFromDate=&PublicMeetingToDate=&DocumentReceivedFromDate=&DocumentReceivedToDate=&DocumentServedFromDate=&DocumentServedToDate=&DocumentTitle=&DocumentType=11717473&UtilityCode=&UtilityName=ppl+electric&UtilityType=2842707&ufprt=16BF055DE744AF479E18AA2D8A23DC11DEB4871A9847982088D72480B231ADD74B78D1E8FA07AAE922EF6D0EAA93484276C41B01F8CD1C402D5881F961B4BC392FE4C6993F4ED1F0F324A148A7BEAB8050008D1D99C77C54F32F622822AE3D29DCED755D0C73CBCD5474843AD505E4EEFCDEAAFCAC3C366540297DCCC5B95F29968A01A7F6ECC8FC829CF7C02526968540B9118F962C6BA17566008115B87CE345F823EFA02671DDFB03B33EAD5620D0E30233A24958FD3F8841E9B9D306F2AA&page=1#search-results; https://www.bbb.org/us/pa/allentown/profile/electric-companies/ppl-corporation-0241-50006555/complaints; and https://www.google.com/search?client=firefox-b-1-d&q=ppl+electric+lawsuits. A synopsis also is found in the complainant's Memorandum, Dated Oct. 5, 2020.

underground to mitigate fires from fallen wires.[7] A NARUC panel on Smart Vegetation Management in 12/16/21 cited the former Executive Director of California Public Utilities Commission for the finding that vegetation management, exceeding $100 million annually, "is frequently the single largest line item in annual operating budgets" for many large utilities.[8] A savings every year in the vicinity of $100 million would allow for considerable burying of existing wiring. But since PPL in this way has been unwilling to invest in Pennsylvania, the Commission, employing its power to void contracts, could place PPL's service area up for auction. FTC auctions of airwaves bring in billions of dollars, and an auction of PPL's territory could add millions of dollars to the PA Department of Revenue while securing, as a condition of the auction, underground wiring everywhere that PPL prefers to destroy foliage.

PPL often is in court and has only itself to blame for misguided policies and failure to train its contractors properly. However, PPL, in its Opposition ("Answer") to the Amended Exceptions, already has declined an opportunity to question the complainant's Amended Exceptions in any depth; likely PPL has nothing material to say about them anyway. Already, PPL's implication that typos

[7] See *The Wall Street Journal* article from July 22, 2021, found at https://www.wsj.com/articles/pg-e-in-reversal-to-bury-power-lines-in-fire-prone-areas-11626905920.

[8] This program, which included a PPL panelist, is searchable at https://pubs.naruc.org/resources/library.

should not be corrected or that enhanced readability is not helpful for the Commissioners is foolish. What PPL really is implying is that it is better-off to the extent that the complainant is worse off. But that is not a factor that should determine whether emendations are desirable for a just ruling in this case.

Conclusion

PPL's delayed response to the complainant's Exceptions is another hack job by PPL which evades the actual issues in dispute. PPL is entitled to defend itself, but not to mislead PUC on the basis on distorted and fabricated facts.

The Amended Exceptions are an important stone in the mosaic which the Commissioners are reviewing, and there is no reason to deny them relevant information.

Dated: Lancaster, PA
Aug. 1, 2022

Respectfully submitted,

/S/

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Certificate of Service

I hereby certify that on Aug. 1, 2022 I emailed a true copy of the forgoing Motion for Leave to Amend Exceptions to PPL's counsel:

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Respectfully submitted,

/S/

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