

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Denise Merk	:	
	:	
v.	:	C-2022-3031624
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Eranda Vero
Administrative Law Judge

INTRODUCTION

This Initial Decision denies the Complaint of Denise Merk against PECO Energy Company because she failed to carry her burden of proving, by a preponderance of the evidence, that the utility has failed to provide her with reliable, safe, and adequate service.

HISTORY OF THE PROCEEDING

On March 28, 2022, Denise Merk filed a formal Complaint (Complaint) with the Public Utility Commission (Commission) against PECO Energy Company (PECO, Respondent, or the Company) alleging that she is having a reliability, safety, or quality problem with her electric service. In particular, she alleges in her Complaint that when PECO upgraded its electric facilities in her neighborhood, it installed a new transformer in her front lawn, partially blocking access to her backyard and depreciating the value of her property. Ms. Merk adds that during the installation Respondent damaged her lawn and cracked her pavement. Complaint ¶ 4. As relief, the Complainant requests that PECO place the new transformer “behind the old transformer” in the easement that PECO holds on the property. Complaint ¶ 5.

On April 18, 2022, PECO filed an Answer denying the material allegations of fact in the Complaint.

A Hearing Notice dated April 20, 2022, notified the parties that an initial hearing was scheduled for June 2, 2022, at 10:00 a.m.

A Prehearing Order was issued on May 17, 2022, advising the parties of the date and time of the scheduled hearing, informing them of the procedures applicable to this proceeding, and directing the submission of documents prior to the hearing.

The initial hearing convened as scheduled on June 2, 2022. Denise Merk appeared *pro se* and testified on her own behalf. Ms. Merk sponsored three exhibits which were admitted into the record. Khadijah Scott, Esq., represented the Respondent, and presented the testimony of Russell Jirik – who is a customer service liaison, contracted for PECO through LaFata Contract Services; Kevin Coe – who is a senior project manager at Danella Power Services; and Thomas Santacroce – who is a senior real estate representative for PECO. The Respondent sponsored three exhibits, two of which were admitted into the record in this matter. PECO's third exhibit was not admitted into the record due to its incomplete nature; however, I allowed the Respondent to submit the full document as a late-filed exhibit. The Complainant was instructed to submit any written objections to PECO's late-filed exhibit no later than June 10, 2022.

PECO submitted its late-filed exhibit via email on June 2, 2022. By email dated June 7, 2022, the Complainant questioned the fairness of not being consulted as to the location of the transformer but did not object to the admission of the late-filed exhibit. PECO's late-filed exhibit will be marked and identified as PECO late-filed Exhibit 3 and will be admitted into the record in accordance with the ordering paragraphs below.

The record in this matter closed upon receipt of the hearing transcript on June 28, 2022.

FINDINGS OF FACT

1. Complainant is Denise Merk who resides at 550 Prelate Circle, Philadelphia, PA 19128 (Service Address). Tr. 7.
2. Respondent is PECO Energy Company.
3. On June 4, 1979, PECO and Manatawna Construction Company executed a blanket easement agreement for a large tract of land bordered on three sides by Manatawna Avenue, Hagys Mill Road, and Cathedral Road in Philadelphia. Tr. 56-57; PECO late-filed Exhibit 3.
4. PECO's 1979 blanket easement agreement, or blanket distribution agreement, provides the Respondent with the rights to locate, relocate, construct, install, renew, replace, add to, operate, and maintain its facilities over a large tract of land that included Prelate Circle. Tr. 56-57; PECO late-filed Exhibit 3.
5. PECO's 1979 blanket easement agreement gives the Respondent rights of ingress and egress on this large tract of land in order to install and maintain its facilities. Tr. 56-57; PECO late-filed Exhibit 3.
6. The entire development in which the Service Address is located is served by underground electrical cables, with only transformers and a few poles located above ground. Tr. 65.
7. Ms. Merk has resided at the Service Address for approximately five years. Tr. 15.
8. A PECO pad-mounted transformer was located for many years on Ms. Merk's neighbor's property. Tr. 15; PECO Exhibit 1.

9. The old transformer was surrounded by mature decorative bushes to hide it from view. Tr. 15; PECO Exhibit 1.

10. On July 22, 2021, PECO, through its contractor LaFata Contract Services, sent out notification letters to Ms. Merk's neighborhood regarding its upcoming project to replace outdated equipment in the area. Tr. 20-21; PECO Exhibit 2.

11. The July 22, 2021, letter explained that the project is part of PECO's Reliability & Resiliency Plan to invest \$1.36 billion through 2025 on targeted reliability focused infrastructure investments. Tr. 20-24; PECO Exhibit 2.

12. The July 22, 2021, letter explained that PECO's accelerated investments will help strengthen the local electric infrastructure to better withstand more frequent and damaging storms, deliver enhanced reliability for its customers, and enable the adoption of clean energy resources. Tr. 20-24; PECO Exhibit 2.

13. The "About the Project" section of the July 22, 2021, letter explained that:

- a. PECO is investing more than \$700,000 to enhance the local electric infrastructure in Ms. Merk's area.
- b. Existing lower voltage electric circuits will be upgraded to higher voltages to better meet customer needs.
- c. A machine referred to as a directional bore machine will be used to install new conduit as well as new underground electrical cable throughout the neighborhood. New equipment, including pad-mount transformers could be installed or replaced as necessary.
- d. This work will help to improve reliability – reducing the frequency of outages and minimizing the duration of outages that do occur and will increase the ability for customers to install clean energy resources, like solar generation.

- e. Work will occur along Basilica Circle, Belfry Drive, Campanile Road, Cathedral Circle, Cathedral Road, Cloister Circle, Harner Street, Hagys Mill Road, Prelate Circle, Steeple Drive, and Vestry Circle.
- f. Construction will begin in June 21, 2021. The project is expected to be completed by August 31, 2021.
- g. Work will be performed by PECO crews and qualified PECO contractors.

PECO Exhibit 2.

14. In order to replace an old transformer, PECO contractors had to dig a hole, install the fiberglass pad, pull the underground conduit through it, and connect it to the new transformer. Tr. 34-35, 43-44.

15. The work to replace the old pad-mounted transformer located in Ms. Merk's neighbor's property took many days to complete. Tr. 34-35, 43-44.

16. Placing the new transformer on top of the old pad was not feasible because the replacement of the old pads is part of PECO's reliability project. Tr. 33.

17. Using the location of the prior transformer for the new one was unfeasible because it would involve multiple days of work where the old transformer would have to be turned off leaving many customers in the neighborhood without power. Tr. 33-34.

18. Placing the new pad-mounted transformer to the left of the old one was unfeasible because it would encroach on Ms. Merk's neighbor's driveway. Tr. 34, PECO Exhibit 1.

19. Placing the new transformer in front of the old one would encroach on the sidewalk and an underground telecommunications box already located there. Tr. 34, PECO Exhibit 1.

20. Placing the new transformer directly behind the old one was unfeasible because it would interfere with the existing secondary electrical wires that were coming off from the rear of the old transformer bringing the electricity to the houses in the neighborhood. Tr. 34, PECO Exhibit 1.

21. Placing the new transformer elsewhere to the back of the old one was also unfeasible because the underground cable cannot be pulled at a 90-degree angle. Tr. 42-43.

22. The only feasible location for the new transformer was to the right of the old one. Tr. 35.

23. PECO installed the new transformer approximately two and a half feet to the right of the old transformer. Tr. 25; Complainant Exhibit 3; PECO Exhibit 1.

24. PECO's new pad-mounted transformer sits on the front left corner of Ms. Merk's property. Complainant Exhibit 3; PECO Exhibit 1.

25. On January 31, 2022, Ms. Merk contacted the hotline for PECO's contractor, Danella Power Services (Danella). Tr. 31-32.

26. Kevin Coe, who is a senior project manager at Danella, called Ms. Merk on January 31, 2022, to discuss her concerns about the transformer installed on her property. Tr. 31-32.

27. On February 1, 2022, Mr. Coe relayed Ms. Merk's concerns to Russell Jirik, who is a customer service liaison with another PECO contractor, LaFata Contract Services. Tr. 19.

28. Mr. Jirik contacted Ms. Merk on February 2, 2022 and discussed with her the present location of the transformer. Tr. 19.

29. During the February 2, 2022, call, Mr. Jirik explained to Ms. Merk that the relocation of the already installed pad for the new transformer was not feasible. Tr. 20.

30. During the February 2, 2022, call to Ms. Merk, Mr. Jirik offered her a landscaping package which she did not accept at the time. Tr. 19-20.

31. The new pad-mounted transformer does not block the access to Ms. Merk's backyard. Tr. 20.

DISCUSSION

As the proponent of a rule or order, Denise Merk bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa.C.S. § 332(a). To satisfy this burden, she must demonstrate that the Respondent was responsible for the problems alleged in the Complaint through a violation of the Code or a regulation or order of the Commission. 66 Pa.C.S. § 701. This must be shown by a preponderance of the evidence. *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 decision 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. Co. 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 to the evidence presented by the Complainant, the Complainant has not satisfied her burden of proof. The Complainant would then 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. 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 her formal Complaint and during the hearing, Ms. Merk claimed that PECO improperly installed the new transformer on her property instead of placing it on the old transformer's prior location or immediately behind it. Ms. Merk maintained that the new transformer sits outside PECO's easement and testified that she was not aware that the transformer would be located on her property until work was finalized or shortly before that. Tr. 14, 27-28. She further argued that in selecting the present location of the new transformer PECO only considered the company's expenses related to the work but not the effect that the placement of the transformer would have on the homeowner's property value. Tr. 10, 13. Ms. Merk also added that during the installation the Respondent damaged her lawn and cracked her pavement. Tr. 14.

PECO's witnesses successfully rebutted all these claims. Thomas Santacrocce testified that PECO holds a blanket distribution easement agreement to provide utility services to the entire development where Ms. Merk's property sits. Tr. 65. Next, Russell Jirik testified that on July 22, 2021, PECO's contractor sent out notification letters to homeowners in Ms. Merk's neighborhood regarding its upcoming project to replace outdated equipment in the area. Tr. 20-21; PECO Exhibit 2. Mr. Jirik explained that the work to place the new transformer in Ms. Merk's property took many days to complete, thus giving her notice of the location of the transformer or at least an opportunity to gather information. Tr. 34-35, 43-44. In addition, Mr. Jirik disagreed with Ms. Merk's testimony that the newly installed transformer blocks the access to her backyard. Tr. 20.

Finally, Kevin Coe testified that placing the new transformer on Ms. Merk's property, two and a half feet to the right of the old transformer, was the only feasible solution. Tr. 25; Complainant Exhibit 3; PECO Exhibit 1. He explained that placing the new transformer on top of the old transformer pad was not feasible because the old pad needed to be replaced. Tr. 33. Using the location of the prior transformer for the new one was also unworkable because it would leave many customers in the neighborhood without power for many days. Tr. 33-34. Next, placing the new transformer to the left of the old one would encroach on Ms. Merk's neighbor's driveway, while placing it in front of the old one would encroach on the sidewalk and an underground telecommunications box already located there. Tr. 34. In addition, locating the new transformer directly behind the old one was unfeasible because it would interfere with the existing secondary electrical wires that come out from the rear of the old transformer bringing the electricity to the houses in the neighborhood. Tr. 34. Furthermore, placing the new transformer further away behind the old one was also unfeasible because the underground cable cannot be pulled at a 90-degree angle. Tr. 42-43. Finally, Mr. Coe added that, had there not been a dense root system surrounding the old transformer, PECO may have been able to install the new transformer six inches to a foot closer to its original location. However, it would still be located to the right of the old transformer and on Ms. Merk's property. Tr. 49.

Ms. Merk failed to rebut PECO's testimony other than to testify that, although she was aware of PECO's work to upgrade its equipment in her neighborhood and, more specifically, of the work that was being done in her front yard, she did not realize that the work would result in a transformer being installed on her property until the installation was complete. Tr. 10, 13.

For its part, PECO agreed to repair the concrete slab on Ms. Merk's property that was cracked during the installation of the new transformer and to offer Ms. Merk a vegetation package free of charge. Tr. 66-67.

It is every public utility's duty to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities" to its customers. 66 Pa.C.S. § 1501. In the present case, the Complainant failed to show by a preponderance of the evidence that PECO installed its new transformer outside of its easement or without due consideration of all feasible alternatives.

Ms. Merk failed to carry her burden of proving by a preponderance of the evidence that PECO violated the provisions of 66 Pa.C.S. § 1501 or any other Commission statute, regulation, or order.

In view of the above, Denise Merk's Complaint against PECO Energy Company is dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S. § 701.

2. As the proponents of a rule or order, the Complainant bears the burden of proof. 66 Pa.C.S. § 332(a).

3. To satisfy the burden of proof, the Complaint must demonstrate by the preponderance of the evidence that the Respondent was responsible for the problems alleged in the Complaint through a violation of the Code or a regulation or order of the Commission. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa.P.U.C. 196 (1990).

4. 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).

5. The Commission's decision 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. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

