

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|                        |   |                           |
|------------------------|---|---------------------------|
| ADAM TERCEK            | : |                           |
| Complainant            | : |                           |
| v.                     | : | Docket No. C-2022-3032118 |
|                        | : |                           |
| DUQUESNE LIGHT COMPANY | : |                           |
| Respondent             | : |                           |

---

**EXCEPTIONS OF  
DUQUESNE LIGHT COMPANY TO INITIAL DECISION**

---

Pursuant to 52 Pa. Code § 5.533, Duquesne Light Company (“DLC”) hereby files exceptions to the Initial Decision (“I.D.”) of Administrative Law Judge Mary D. Long (“ALJ”) in the above-referenced matter. Adam Tercek (sometimes hereinafter “Complainant” or “Mr. Tercek”) did not meet his burden of proof to demonstrate that humming from the transformers at issue is excessively loud. Furthermore, the record is devoid of any factual basis to support a directive that the transformers at issue be replaced.

**BACKGROUND AND PROCEDURAL HISTORY**

In this case, Complainant alleges that three step-down transformers mounted on a distribution pole in a recorded public utility right-of-way on his property (the “Transformers”) “emit a perpetual loud humming noise”. *Formal Complaint, p. 3*. The relief sought by Complainant includes removing the Transformers from his property, or alternatively, eliminating the noise. *Id.*

DLC filed a timely Answer to the Formal Complaint denying Complainant’s characterization of the humming emitted by the Transformers and maintaining that

following inspection, it was determined that the Transformers are functioning normally within accepted operational parameters. *Answer to Formal Complaint, pp. 2 and 4.*

A hearing was held on July 20, 2022. At the hearing, Complainant testified on his own behalf and introduced no exhibits into the record. *Tr., pp. 8-20 and 37-39.*

Complainant also presented the testimony of two neighbors. *Tr. pp. 21-37.* Complainant did not present any expert testimony. DLC presented the testimony of three employee fact witnesses and introduced nine exhibits, one of which the ALJ excluded, finding that the exhibit failed to qualify as a business record. *Tr. pp. 40-87.* Like the Complainant, DLC presented no expert testimony.

The I.D. was issued and served on October 26, 2022. The ALJ finds that the Transformers emit an excessive humming noise (*I.D. p. 15*) and directs DLC to replace the Transformers within 30 days of the Commission's final order (*I.D. pp. 15 and 24*). The I.D. further finds that DLC's response to Mr. Tercek's complaints was unreasonable, and assesses a civil penalty of \$3,500, or \$500 for each month that DLC was found to have not fully investigated Mr. Tercek's complaints. *I.D. p. 23.*<sup>1</sup>

### **BURDEN OF PROOF**

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. *Sensenig v. PPL Electric Utilities Corp.*, 2017 WL 1406788 (Pa.P.U.C.), *citing* 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 his or her complaint in order to prevail. *Sensenig, citing Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990). "Burden of proof" means a duty to

---

<sup>1</sup> Without admitting the ALJ's reasonableness finding, DLC accepts the civil penalty assessed in the I.D. and chooses not to challenge the ALJ's reasonableness finding respecting DLC's investigation.

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. *Sensenig, citing 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. *Sensenig, citing* 66 Pa.C.S. § 701.

The phrase “burden of proof” is comprised of two distinct burdens, the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). The burden of production dictates which party has the duty to introduce enough evidence to support a claim. *Id.* The burden of persuasion determines which party has the duty to convince the finder of fact that a fact has been established. *Id.* The burden of persuasion never leaves the party to whom it is originally assigned, here the Complainant. *Id.*

Decisions of the Commission must be supported by substantial evidence. *Sensenig, citing* 2 Pa.C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Sensenig, citing Norfolk & Western 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. Comm., Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984). Mere bald assertions, personal opinions, or perceptions do not constitute evidence. *McCauley v. Pennsylvania Electric Company*, 2014 WL 1390779 (Pa.P.U.C.); *MidAtlantic Power Supply Association of Pennsylvania v. Pa. Pub. Util. Comm'n*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000).

As outlined in the exceptions below, when read as a whole, the I.D. shifts to DLC the burden of proving it did not violate a Commission statute, regulation or order. Such a shift in the burden of proof is obviously impermissible under applicable law. It is not the place of DLC to disprove Mr. Tercek's claim, but for Complainant to meet his burden. In this case, all the Complainant offered was bald assertions, personal opinions, perceptions and suspicions that the Transformers are malfunctioning without any substantial competent evidence to support those claims. The ALJ then shifted to DLC the burden of disproving Complainant's assertions. Such is not the law in this Commonwealth.

#### **EXCEPTION NO. 1**

##### **The ALJ incorrectly found that Complainant met his burden to demonstrate that humming from the Transformers is excessively loud**

Complainant testified "I don't have evidence of them [DLC] breaking the law with the decibel level." *Tr. p.15*. The ALJ, presumably recognizing the burden of proof challenge presented by the nature of Mr. Tercek's claim, noted in the I.D. that "the Commission does not have a regulation which sets forth reasonable noise standards for transformers in residential areas." *I.D. p. 14*. In an attempt to meet his burden, Complainant offered no sound level readings or expert testimony to support his claim, but instead simply testified subjectively that the Transformers emit an excessively loud humming noise, characterizing the sound as follows: "like I have 1,962 Frigidaire deep freezers in my front yard plugged-in all the time". *I.D. p. 11*. Complainant further described his own belief that humming from the Transformers is louder now than before the Transformers were installed in 2019 (the Transformers replaced existing step-down transformers that were not malfunctioning, but were replaced as a matter of course when

the pole to which they were affixed was taken out of service). *Tr. pp. 9-18 and 54.* Mr. Tercek also presented the testimony of two neighbors who echoed his description of the humming emitted from the Transformers. *Tr. pp. 21-31.* The Complainant's subjective testimony, and that of his neighbors, constituted the entirety of Complainant's evidence presented in an attempt to meet his burden of proof. Under *McCauley, supra*, such bald assertions, personal opinions and perceptions, by themselves, are not substantial evidence for burden of proof purposes.

In rebuttal, and unlike Complainant, DLC actually presented objective evidence. Jeremiah Pisano, a DLC employee, testified that he visited Complainant's property to perform a sound level inspection in response to one of Mr. Tercek's several complaints. *Tr. p. 71.* This was not Mr. Pisano's first noise level inspection. *Tr. pp. 71-72.* He previously inspected properties with similar complaints of noise. *Id.* Mr. Pisano testified about sound level readings he obtained using a W.S. 1631 hand-held decibel meter, a device he had used before on similar noise complaints at other properties. *Tr. pp. 71 and 77-78.* Mr. Pisano recorded decibel levels from the Transformers of 47 and 48 taken at 4 PM and 9 PM respectively on April the 21<sup>st</sup>, 2022 and comparable readings of 52 and 53 from similar step-down transformers on a neighboring property also taken at 4 PM and 9 PM respectively on the same day. *Tr. pp. 77-78.* The decibel readings were contemporaneously recorded in a notes application on Mr. Pisano's work cell phone which he immediately sent to his supervisor in a text message. *Id.*

DLC offered additional comparative testimony to put into context the decibel readings from the Transformers. Mr. Pisano, who lives in Complainant's neighborhood, and frequently walks his dog through the neighborhood passing other step-down

transformers along the way, testified that humming from the Transformers is no louder than the perpetual humming emitted by other step-down transformers in Complainant's neighborhood. *Tr. pp. 79-80*. Mr. Pisano also compared the noise level of the Transformers to ordinary conversation. Specifically, he testified that sound level readings of 47 and 48 from the Transformers are less than decibel level readings of 58-62 he recorded during the telephonic hearing in this matter. *Tr. p. 86*.

DLC's case in rebuttal also included the presentation of business records showing that other inspectors visited the property on multiple occasions in response to noise complaints by Mr. Tercek and that those inspectors determined the Transformers are functioning properly. *DLC Ex. 8*. The determination in DLC Exhibit 8 is un rebutted.

In finding that Complainant met his burden, the ALJ:

- disregarded Mr. Pisano's testimony on the grounds he is not a sound expert (*I.D. pp. 13-14*);
- declined to admit DLC Exhibit 1, a record of decibel readings taken of the Transformers, which record formed the basis for Mr. Pisano's recital of on-site decibel readings, on the basis that the Exhibit is not a business record (*Tr. pp. 81-85*);
- declined to credit the un rebutted evidence of DLC Exhibit 8 that DLC inspectors found the Transformers to be operating normally (*I.D. p. 13*);  
and
- impermissibly found that DLC presented no evidence that the Transformers are operating correctly (*Id.*).

By relying upon Complainant's subjective lay testimony, while disregarding DLC's corresponding testimony because it was not proffered by a sound expert, the ALJ inappropriately applied a double standard to the sufficiency of evidence concerning the level of humming emanating from the Transformers. The ALJ did not require Complainant to present expert testimony and instead simply allowed Complainant to testify subjectively about his beliefs respecting sound levels at his property. DLC sought to elicit, in part, the same type of subjective testimony from Mr. Pisano, who was not called as an expert. The ALJ deemed his testimony incompetent, taking the position in the I.D. that such testimony can only be proffered by a witness with qualified expertise in sound monitoring. The ALJ's legal error regarding evidentiary sufficiency in this instance is fatal to her finding that the Transformers are too loud, as the record is devoid of any substantial evidence by Complainant to support a finding that humming from the Transformers is excessive. The only substantial evidence respecting sound levels from the Transformers was offered by DLC, which evidence established that the humming of the Transformers at ground level is no louder than one's normal speaking voice. The ALJ committed an error of law in refusing to credit DLC's objective rebuttal evidence.

DLC was further handicapped in its presentation of testimony from Mr. Pisano by the ALJ's failure to admit decibel level recordings on the grounds that such readings lacked foundation for admission as a business record. Here, DLC laid a proper foundation for such inclusion. Mr. Pisano testified that DLC's business practice is to send an inspector like himself to a property following noise complaints from customers to perform a decibel level inspection using a handheld decibel meter, to record the decibel meter measurements in a notes application on his phone, and to then forward

those results to his supervisor, all of which was done in this instance. The ALJ nonetheless refused *sua sponte*, without any objection from Complainant, to acknowledge DLC Exhibit 1 as a business record and used the exclusion as the basis for refusing to credit Mr. Pisano's testimony regarding decibel readings. The ALJ's decision to exclude DLC Exhibit 1 and not to weigh Mr. Pisano's testimony is misplaced. First, as discussed above, DLC demonstrated at the hearing that DLC Exhibit 1 is a business record. Second, even if DLC Exhibit 1 had not been qualified as a business record, it should have been admitted. The technical rules of evidence do not limit administrative hearings, where all relevant evidence of reasonably probative value is admissible. *Gasparro v. PUC*, 814 A.2d 1283, nt. 3 (Pa. Cmwlth. 2003). No prejudice would inure to Complainant by admitting DLC Exhibit 1, which was authenticated by the operator of the hand-held decibel meter, and who was available for cross-examination.

The ALJ also erroneously found that DLC offered no evidence to support its defense that the Transformers are operating correctly. Specifically, the ALJ found that "[t]here is no evidence that Duquesne Light inspected the transformers to ensure that they were operating properly or that they were mounted to the pole correctly." *I.D. p. 18*. In fact, the only pertinent evidence in the record demonstrates that DLC did inspect the Transformers. The reports documenting multiple inspections of the Transformers at DLC Exhibit 8 found no problems with the Transformers.<sup>2</sup> Complainant offered no evidence suggesting that DLC failed to thoroughly inspect the Transformers.

Nevertheless, the ALJ chose to disregard the findings in DLC Exhibit 8 because she

---

<sup>2</sup> The I.D. states, at page 21, that "the record is silent as to what occurred during those visits other than Mr. Tercek's testimony...." This statement by the ALJ is not supported by the record. In addition to DLC Exhibit 8, Mr. Pisano testified about the nature and scope of his inspection.

found that they lacked details of the inspections (“There is no record of what the troubleshooter did, therefore there is no foundation in the record which supports the conclusion that there was ‘no trouble found’”). *I.D. p 13*). In so doing, the ALJ assumed without foundation that the inspections were inadequate. Such a finding is not evidence that the Transformers are malfunctioning. It is Complainant’s burden to demonstrate inadequacy, not DLC’s, and the record is devoid of any such evidence.

In addition, the ALJ committed an error of law in excluding certain findings from DLC Exhibit 8 as a business record based upon her interpretation of the directive of *Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038 (Pa. Cmwlth. 1997) and *Ganster v. W. Pa. Water Co.*, 504 A.2d 186 (Pa. Super. 1985). *I.D. p, 13*. Those cases stand for the proposition that business records may be excluded from evidence absent the availability of the author, but only to the extent of expert opinions, recommendations and conclusions contained in the records, not with respect to factual findings. Here, DLC Exhibit 8 was offered to document that inspections of the Transformers occurred and that no abnormalities were identified. The records were not offered in the form of expert opinions. Complainant not having objected to the admissibility of DLC Exhibit 8, its unrebutted factual findings should not have been excluded by the ALJ. Specifically, reference is made in DLC Exhibit 8 to findings of “normal operation and normal humming from transformer” and “transformers working properly-no issues”. DLC submits that these findings are factual in nature and not conclusions in the form of expert opinions that would warrant their exclusion from evidence absent the author’s availability.

Contrary to the ALJ's finding, DLC did offer comparative testimony in an attempt to provide context to the decibel readings taken by Mr. Pisano. As part of his testimony, Mr. Pisano compared decibel readings from the Transformers (which Complainant contends are malfunctioning) to decibel readings from other step down transformers on the block where Complainant lives, which other step-down transformers Complainant does not contend are malfunctioning. Mr. Pisano also offered evidence documenting that normal speaking voices of the parties and counsel at the hearing resulted in decibel levels higher than the humming noise coming from the Transformers, which evidence is unrebutted.<sup>3</sup>

For all of the foregoing reasons, the ALJ's finding that Complainant met his burden of proof with respect to humming emitted from the Transformers cannot stand.

### **EXCEPTION NO. 2**

#### **The ALJ had no factual grounds to order that the Transformers be replaced**

The I.D. directs DLC to replace the Transformers on the grounds they are "emitting excessive noise." *I.D. pp. 23-24*. The ALJ assumes in the I.D. that replacement step-down transformers will not emit as much humming. There is, however, no evidence of record to support the ALJ's determination that replacement transformers will be any quieter, and for this reason, the directive in the I.D. to replace the Transformers cannot stand. Alternatively, the Commission should reopen the record for the submission of testimony regarding the feasibility and effectiveness of

---

<sup>3</sup> For purposes of clarification, the *Nixon* and *Sherman* Commission decisions cited by the ALJ in the I.D. at pages 16-17 are cited only with respect to the reasonableness of DLC's investigation, which finding DLC is not disputing, and have no bearing on the substantive evidence submitted by DLC in support of its defense that humming emitted from the Transformers is not out of the ordinary.

replacement transformers to address the humming of which Mr. Tercek complains, including what level of humming qualifies as excessive.

Significantly, the I.D. does not establish a sound level baseline DLC must meet as part of any transformer replacement. The ALJ's directive, given the lack of any baseline, is cause for exception on two other fronts. First, there is simply no reason for the Commission to mandate that step-down transformers in a residential neighborhood be quieter than a person's normal speaking voice, as the I.D. would effectively require. And second, if left to stand, the I.D. would cause confusion regarding allowable sound level values for step-down transformers in residential neighborhoods Commonwealth-wide, arguably establishing an unworkable bright-line rule requiring utilities to replace all similarly situated step-down transformers with decibel readings greater than 47-48. Such cannot have been the ALJ's intent.

### **CONCLUSION**

For the reasons set forth above, DLC respectfully requests that the Commission reject the findings in the I.D. that the Transformers are excessively loud and should be replaced.

Respectfully submitted,



---

Michael A. Gruin (I.D. No. 78625)  
Donald R. Wagner (I.D. No. 80280)  
David R. Beane (I.D. No. 53343)  
STEVENS & LEE  
111 North Sixth Street  
Reading, PA 19601  
Tel: 610-478-2000  
Fax: 717-234-1099  
*michael.gruin@stevenslee.com*  
*donald.wagner@stevenslee.com*  
*david.beane@stevenslee.com*  
COUNSEL FOR DUQUESNE LIGHT COMPANY

Dated: November 15, 2022

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

|                        |   |                           |
|------------------------|---|---------------------------|
| ADAM TERCEK            | : |                           |
| Complainant            | : |                           |
| v.                     | : | Docket No. C-2022-3032118 |
|                        | : |                           |
| DUQUESNE LIGHT COMPANY | : |                           |
| Respondent             | : |                           |

---

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the foregoing *Exceptions of Duquesne Light Company to Initial Decision* upon the Complainant, via U.S. First Class Mail, in accordance with the requirements of 52 Pa.Code §1.54 relating to service by a party.

Adam Tercek  
571 Dewalt Drive  
Pittsburgh, PA 15234



---

David R. Beane

DATED: November 15, 2022