

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held June 13, 2024

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Waterco Springs, LLC

C-2022-3036860

v.

PPL Electric Utilities Corporation

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Exception filed by Waterco Springs, LLC (Waterco or Complainant) on February 14, 2024, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Chad L. Allensworth, issued January 25, 2024, in the above-captioned proceeding. The Initial Decision dismissed the Formal Complaint (Complaint) filed by Waterco on November 17, 2022, against PPL Electric Utilities Corporation (PPL or Respondent). PPL filed its Reply to Exception on February 26, 2024.

Also, before the Commission for consideration and disposition is the Petition of Waterco to Reopen the Record (Petition) filed on February 14, 2024. PPL filed its Answer to the Petition on February 28, 2024.

For the reasons stated below, we shall deny Waterco's Petition. We shall also deny Waterco's Exception, and adopt the ALJ's Initial Decision, consistent with this Opinion and Order.

I. History of Proceeding

On November 17, 2022, Waterco filed a Complaint with the Commission against PPL claiming that PPL incorrectly billed it for electric usage based on an administrative error following Waterco's acquisition of a prior PPL customer.¹ Waterco requested that two invoices from August 2022 be retroactively billed at the fixed rate, rather than the variable rate which it did not request. Complaint at 2-3.

On December 8, 2022, PPL filed an Answer to the Complaint in which it admitted and denied various allegations in the Complaint. Specifically, PPL admitted that Waterco requested to initiate electric service on June 30, 2022. PPL denied advising Waterco that it would receive the same rate for electric supply as its predecessor and that it did not provide Waterco with its account number until Waterco's first bill was issued. Answer at 1-2.

A hearing was held on October 18, 2023. Waterco was represented by counsel and presented one witness. PPL was represented by counsel and presented two

¹ The Complaint is an untimely appeal of the dismissal of an Informal Complaint by the Commission's Bureau of Consumer Services (BCS) on October 25, 2022, at BCS No. 3858662.

witnesses. Twelve exhibits were admitted into evidence (Waterco Springs Exhibit Nos. 1-10; PPL Exhibit Nos. 1-2).² I.D. at 3.

The record was closed on October 30, 2023, when the 156-page transcript was filed with the Commission. I.D. at 3.

In the Initial Decision issued on June 25, 2024, ALJ Allensworth dismissed the Complaint because Waterco failed to sustain its burden of proof. I.D. at 1, 14, 16.

As noted, *supra*, Waterco filed its Exception on February 14, 2024. PPL filed its Reply to Exception on February 26, 2024.

Also, Waterco filed its Petition to Reopen the Record on February 14, 2024, and PPL filed its Answer to the Petition on February 28, 2024.

II. Background

The dispute between the Parties concerns Waterco's allegation that PPL improperly billed it for electric generation service³ at a variable rate instead of a fixed generation rate from July 2022 to mid-August 2022. Waterco claimed that PPL was at fault because it: (1) failed to transfer the electric generation service contract that Waterco's predecessor had with Constellation to Waterco after the acquisition of the predecessor's assets; and (2) failed to provide Waterco with its PPL account number prior

² An objection to the admission of PPL Exhibit No. 3 was taken under advisement at the hearing and sustained in the Initial Decision. I.D. at 3, 7-9.

³ Neither party sought to include the electric generation supplier (EGS), Constellation NewEnergy, Inc. (Constellation), as an indispensable party in this matter, nor did the Complaint raise any allegations against Constellation.

to Waterco receiving its first bill which prevented earlier enrollment with Constellation. I.D. at 10.

PPL argued that: (1) PPL cannot transfer or unilaterally cancel a contract that a prior customer had with an EGS; (2) PPL policy requires a new account number for new customers; (3) PPL supplied default electric generation service to Waterco from July 1, 2022, to mid-August 2022 because it did not have an EGS contract for Waterco during that period; (4) Waterco was responsible for contacting Constellation to set up an EGS contract; (5) PPL received an EGS enrollment with Constellation for Waterco on August 5, 2022, which was completed on August 10, 2022; and (6) PPL provided Waterco's Chief Financial Officer with the PPL account number during the initial June 30, 2022, call when the electric service account was established. I.D. at 11-12.

III. Discussion

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

A. Legal Standards

1. Burden of Proof

Section 332(a) of the Public Utility Code (Code) provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). To establish a legally sufficient case and satisfy the

burden of proof, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*). That is, a complainant's evidence must be more convincing, by even the smallest amount, than that presented by the respondent utility. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980) (*Norfolk*).

Upon the presentation by a 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 utility. If the evidence presented by the respondent utility is of co-equal value or "weight," the burden of proof has not been satisfied. The complainant now has to provide some additional evidence to rebut that of the respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of production 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. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

2. Safe, Adequate and Reasonable Electric Service

A public utility has a duty to maintain safe, adequate, and reasonable service and facilities and to make repairs, changes, and improvements that are necessary

or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. 66 Pa. C.S. § 1501. Section 1501 of the Code provides, in pertinent part, as follows:

§ 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. 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.

Section 1501 of the Code does not require a public utility to provide perfect service, but a public utility is obligated to provide service that is reasonable and adequate. *Analytical Lab Servs., Inc. v. Metro. Edison Co.*, Docket No. C-20066608 (Opinion and Order entered December 21, 2007). The term “service” is defined broadly under Section 102 of the Code to include 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. *See*, 66 Pa. C.S. §102. The statutory definition of “service” is also to be broadly construed by the Commission and the courts. *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995). “Inappropriate and unreasonable treatment to customers can be interpreted as inadequate service...” *Barbara R. Lolly v. Duquesne Light Co.*, Docket No. C-2010-2167824, Opinion and Order entered May 9, 2011) (citing *Edward T. O’Toole v. Metropolitan Edison Co.*, Docket No.

C-20030854 (Opinion and Order entered May 9, 2005)). Quality customer service is expected of all regulated utilities. *Id.*

B. ALJ's Initial Decision

In his Initial Decision, ALJ Allensworth made thirty-six Findings of Fact and reached fourteen Conclusions of Law. I.D. at 3-7; 14-16. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Regarding Waterco's first claim that PPL prevented Waterco from assuming the EGS contract that its predecessor had with Constellation, the ALJ found that Waterco failed to cite to any authority that required PPL to take such action. The ALJ stated that there is nothing in the Code, Commission Regulations, or a Commission Order that required PPL to transfer an existing account for a predecessor to Waterco as a new customer. The ALJ further concluded that PPL's witnesses credibly testified that PPL's policy prohibited the transfer of the predecessor's existing PPL account and its EGS contract with Constellation to Waterco as a new customer, and that all new PPL customers get a new account number. The ALJ found that PPL satisfied the requirement under 52 Pa. Code § 57.172 to advise Waterco that if it wanted to contract with Constellation it needed to contact the EGS directly. As a result, the ALJ determined that Waterco failed to establish a violation for PPL refusing to transfer or change the name on the existing account to Waterco from its predecessor. I.D. at 12-13 (citations omitted).

Next, the ALJ addressed Waterco's second claim that PPL failed to provide Waterco with its PPL account number in a timely manner and which prevented Waterco from completing a new enrollment with Constellation in a timely manner. The ALJ explained that Waterco's witness testified that he spoke with a PPL representative on

June 30, 2022, to set up the electric service account for Waterco and PPL did not provide him with the PPL account number for Waterco at that time, and that Waterco was told that it would have to wait for the first PPL bill to be issued in order to receive the account number, which was not received until the beginning of August 2022. The ALJ further explained that, in contrast, PPL's witness testified that Waterco was provided with its PPL account number on June 30, 2022, when the Waterco account was requested to be established.

The ALJ found that the testimony of PPL's witness was more credible and persuasive than that of Waterco's witness. I.D. at 13. The ALJ described certain factors that a presiding officer may consider in assessing the credibility of witnesses. *Id.* (citing *Danovitz v. Portnoy*, 399 Pa. 599, 161 A.2d 146 (1960); *In re Gaston's Estate*, 361 Pa. 105, 62 A.2d 904 (1949)). Based on the manner and clearness of the testimony, as well as the confidence with which it was presented, the ALJ found that the testimony of PPL's witness was more credible than the testimony of Waterco's witness. The ALJ was persuaded by the testimony of PPL's witness that she always provides the account number to all new customers, that PPL does not have a policy requiring new customers to wait for their first bill to receive their PPL account number, and that only new customers seeking to set up an online account have to wait to receive their first bill because PPL's computer system requires them to input the current amount due and due date of the bill. Therefore, the ALJ concluded that the testimony of PPL's witness was credible and persuasive in establishing that PPL provided the account number to Waterco on June 30, 2022, and that Waterco failed to establish a violation for PPL not providing timely information to allow it to enroll with Constellation. *Id.* at 13-14.

Accordingly, the ALJ concluded that Waterco failed to sustain its burden of proof and that the Complaint shall be dismissed. I.D. at 14.

C. Petition, Answer and Disposition

1. Waterco's Petition

Waterco's Petition requests that the record in this proceeding be re-opened for the limited purposes of: (1) requesting the issuance of a subpoena directed to PPL for a recording (Recording) of a June 30, 2022, phone call (Phone Call) between the Parties that PPL's witness described in her testimony; and (2) holding a supplemental hearing for purposes of playing the Recording to resolve the underlying factual question of whether PPL provided an account number to Waterco in the Phone Call and/or for questioning about the destruction of the Recording. Petition at 1.

Waterco avers that PPL's witness testified that she provided Waterco with an account number during the Phone Call despite having any specific recollection of doing so and not remembering details of the Phone Call. Waterco states that the testimony established that there was a Recording of the Phone Call, but PPL did not present it as evidence. Waterco further avers that PPL's witness testified that she did not listen to the Recording because she was not allowed, but that her supervisor, who did not testify at the hearing, listened to the Recording. Waterco states that although the testimony regarding the supervisor's analysis of the Recording was stricken, PPL conceded that the Recording was readily available but was not produced. Petition at 2 (citing Tr. at 93-100, 104).

Waterco states that it only learned of the existence of the Recording of the Phone Call at the hearing in this matter. Waterco argues that since PPL confirmed that the Recording of the Phone Call exists, the best evidence of what was stated during the Phone Call is the Recording, and the record should be re-opened so that a subpoena may be issued to PPL to produce the Recording. Waterco further asserts that making the Recording part of the record will remove the need to resolve this matter on credibility

issues because the Recording will conclusively establish what was, and was not, said during the Phone Call. Petition at 3.

Finally, Waterco notes that the Complaint was filed less than six months after the Phone Call occurred on June 30, 2022. Waterco contends that to the extent that PPL argues that it destroyed the Recording, such destruction is spoliation, and any destruction after the filing of the Complaint was improper. Petition at 4.

2. PPL's Answer

In its Answer, PPL contends that Waterco's Petition should be denied because it fails to demonstrate a material change of fact or law since the conclusion of the hearing and because the record includes enough information for the Commission to reach a decision in this case. PPL further argues that Waterco's request to hold a hearing for PPL to answer questions about the destruction of the Recording is unwarranted due to Waterco's failure to conduct discovery in this proceeding. PPL avers that Waterco cannot now raise an untimely objection based on the Best Evidence Rule or rely on an adverse inference as substantial evidence for a finding in its favor. PPL Answer to Petition at 1-2, 4.

PPL argues that Waterco's Petition fails to meet the legal standard required to reopen the record because it does not articulate any material change in law or fact. PPL states that the only change noted in the Petition is Waterco's knowledge that the Recording existed; however, PPL avers that Waterco's late recognition of a discoverable fact does not constitute a material change of fact warranting the reopening of the record. PPL Answer to Petition at 4-5.

Next, PPL states that it no longer has possession of the Recording because it was automatically purged on December 30, 2022, pursuant to PPL's Call Retention

Policy. Since the Recording does not exist, PPL argues that there is no good cause to reopen the record. PPL Answer to Petition at 5. Furthermore, PPL avers that Waterco never sought the Recording, policies or records relating to the Recording, or any materials from PPL during discovery. PPL submits that Waterco failed to take reasonable steps to develop its own case-in-chief, and it would be unfair and impractical to subject PPL to further hearings after the close of the record. *Id.* at 5-6.

Finally, PPL argues that it would not be in the public interest to reopen the record as Waterco requests. PPL reiterates that the Recording was automatically destroyed in December 2022, and PPL avers that reopening the record for arguments related to spoliation of evidence that was never requested would not be a productive use of time and resources. PPL Answer to Petition at 6.

3. Disposition

Upon review, we find that Waterco did not meet its burden of proof, pursuant to 66 Pa. C.S. § 332(a), because its Petition failed to set forth any material change of fact or law that occurred since the conclusion of the hearing. The Commission's Regulation regarding reopening the record prior to a final decision provides, as follows:

§ 5.571. Reopening prior to a final decision.

(a) At any time after the record is closed but before a final decision is issued, a party may file a petition to reopen the proceeding for the purpose of taking additional evidence.

(b) A petition to reopen must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

(c) Within 10 days following the service of the petition, another party may file an answer thereto.

(d) The record may be reopened upon notification to the parties in a proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

(1) The presiding officer may reopen the record if the presiding officer has not issued a decision or has not certified the record to the Commission.

(2) The Commission may reopen the record after the presiding officer has issued a decision or certified the record to the Commission.

(e) Subsections (a)—(e) supersede 1 Pa. Code §§ 35.231 - 35.233 (relating to reopening of record).

52 Pa. Code § 5.571.

Waterco's Petition did not identify any change in the Code, the Commission's Regulations, any Commission Order, or PPL's electric service tariff relevant to this proceeding. In addition, Waterco did not allege any change in fact regarding the Recording, other than to aver that the Recording exists and should be produced, or that the Recording does not exist and PPL should be sanctioned for its destruction. While the Petition argues that Waterco only learned at the hearing that the Recording of the Phone Call existed, we conclude that this late recognition of a discoverable fact does not constitute a material change of fact warranting the reopening of the record as required by 52 Pa. Code § 5.571(b) and (d).

Moreover, Waterco did not seek the Recording, policies or records related to the Recording, or any materials from PPL during discovery. Waterco's inaction during discovery to seek such materials in developing its case-in-chief does not justify producing

evidence that was not sought during discovery after the close of the record and conducting a further hearing to address such evidence.

Finally, from a practical perspective, good cause to reopen the record does not exist because the Recording no longer exists since PPL automatically purged the Recording on December 30, 2022.⁴ Without the existence of the Recording, reopening the record, as Waterco requests, would be a futile exercise and a waste of the Commission's and the Parties' time and resources.

Inasmuch as Waterco's Petition fails to demonstrate a material change of fact or law since the conclusion of the hearing, and Waterco did not conduct discovery in

⁴ We note that PPL states that it no longer has possession of the Recording because it was automatically purged on December 30, 2022, six months after the June 30, 2022, Phone Call (and approximately one month after the filing of the Complaint), pursuant to PPL's Call Recordings Retention Policies. We further note that the Commission's Regulation at 52 Pa. Code § 57.45 provides for specific retention periods for certain records, and for those not specifically listed therein, "each utility shall keep and preserve its records in conformity with the provisions applicable to it in the most recent publication of the National Association of Regulatory Utility Commissioners, entitled [']Regulations to Govern the Preservation of Records of Electric Gas and Water Utilities.[']" (NARUC Publication). Upon review of what appears to be the most recent publication of the NARUC Publication (Revised 2007), it states that for records other than those listed in its attachment, those records may be destroyed at the option of the public utility. NARUC Publication at 1. However, the NARUC Publication also states that a public utility involved in pending litigation or complaint procedures "shall retain all relevant records." NARUC Publication at 3. Therefore, based upon the Regulation at 52 Pa. Code § 57.45 and the NARUC Publication, it is not clear whether PPL's Call Recordings Retention Policies, and specifically the automatic purging of the Recording as described, *supra*, is consistent with our Regulations. Therefore, we shall serve a copy and refer this Opinion and Order to the Commission's Bureau of Investigation and Enforcement for its review and any further action deemed to be warranted. We further note that whether or not PPL's policy regarding the retention of phone call recordings, and the purging of the Recording, are consistent with our Regulations has no bearing on our conclusions and determinations in this matter because, as discussed, *infra*, Waterco's failure to seek materials through discovery and timely object to and secure a ruling at hearing waived its ability to raise this objection in Exceptions.

the proceeding, we shall deny the Petition. Accordingly, we will decide this matter on the record currently before the Commission.

D. Exception, Reply and Disposition

1. Waterco's Exception No. 1

In its Exception No. 1, Waterco states that the critical issue in this case is the information provided by PPL during the Phone Call on June 20, 2022. Waterco notes that its witness testified that in response to his request for Waterco's account number PPL told him he needed to wait until the first bill was issued to obtain the account number; however, PPL's witness testified that while she did not remember the specifics of the Phone Call, she believes she would have provided the account number during the Phone Call and PPL had a Recording of the Phone Call that she was not permitted to listen to and which PPL did not offer into evidence. Waterco avers that it objected to and moved to strike the testimony of PPL's witness and further argued that the testimony should be disregarded under the Best Evidence Rule and an adverse inference should be made that PPL intentionally refused to present the Recording at the hearing. Exc. at 2-3.

Waterco contends that the ALJ erred by not making an adverse inference where PPL failed to introduce as evidence or preserve the Recording, which caused the ALJ to incorrectly credit PPL witness' testimony that she would have provided Waterco with its account number during the Phone Call and find that Waterco failed to meet its burden of proof. Waterco submits that the Initial Decision makes no reference to the Recording. Exc. at 3-4. Also, Waterco argues that PPL should have introduced the Recording at hearing as the best evidence of the Phone Call's contents when the PPL witness could not remember the details of the Phone Call. *Id.* at 4, citing Pa. R.E. 1002.

Waterco argues that the Best Evidence Rule should have been applied in this case because the PPL witness revealed that PPL recorded the Phone Call and PPL believed the Recording was material and significant; however, PPL never introduced the Recording into evidence. Waterco avers that PPL's failure to introduce the Recording as evidence resulted in the ALJ making a credibility determination to resolve the question of whether PPL provided the account number to Waterco during the Phone Call. Waterco submits that such a credibility determination was not necessary because the Recording was the best evidence of the Phone Call. Waterco contends that the ALJ should have required PPL to produce and introduce the Recording or drawn an adverse inference that PPL did not provide an account number on the Phone Call from PPL's refusal, or inability due to its destruction, to offer the Recording as evidence. Waterco requests that the Initial Decision be reversed and that Waterco be awarded the relief requested in the Complaint. Exc. at 5-7.

2. PPL's Reply

In its Reply to Exception No. 1, PPL argues that the ALJ properly credited the testimony of PPL's witness in finding that Waterco failed to sustain its burden of proof and that no adverse inference is warranted. First, PPL contends that Waterco waived its opportunity to object to PPL's testimony based on the Best Evidence Rule. PPL avers that Waterco argues for the first time in its Exception that the ALJ should have required PPL to produce and introduce the Recording under the Best Evidence Rule. PPL argues that Waterco failed to follow the procedure to raise and preserve an evidentiary issue pursuant to Pa. R.E. 103 because Waterco failed to raise an objection to the testimony of PPL's witness based on the Best Evidence Rule during the hearing. Although Waterco's counsel asserted in closing that the Recording was the best evidence of what was said during the Phone Call, PPL submits that a credibility argument made in a closing statement does not meet the requirements to make a specific, contemporaneous objection to the testimony of PPL's witness on Best Evidence Rule grounds under

Pa. R.E. 103. Therefore, no objection based on the Best Evidence Rule was ever raised during the hearing. R. Exc. at 1-3.

Furthermore, PPL contends that since no objection based on the Best Evidence Rule was ever raised, Waterco never received a ruling on the Best Evidence Rule issue from the ALJ, which bars Waterco from raising the objection now. PPL avers that Waterco's counsel had knowledge of the Pennsylvania Rules of Evidence because other timely objections were made during the hearing, and a Best Evidence Rule objection could have been raised during the testimony of PPL's witness; however, Waterco did not make such a timely objection and obtain a ruling. For this reason, PPL argues that an objection based on the Best Evidence Rule has been waived and cannot be raised now in Exceptions. R. Exc. at 3-4.

Next, PPL argues that even assuming for the purposes of argument that Waterco did not waive its Best Evidence Rule objection, PPL is not prohibited from proving the contents of the Recording through other evidence. PPL states that Pa. R.E. 1004 provides an exception to the Best Evidence Rule whereby an original recording is not required and other evidence of the content of a recording is admissible if all the originals are lost or destroyed, and not by the proponent acting in bad faith. PPL submits that its reliance on the testimony of its witness in lieu of the Recording meets this exception. PPL states that its Call Recordings Retention Policies provide that customer service calls are retained in its records for six months and then automatically purged. PPL explains that the Recording of the Phone Call took place on June 30, 2022, and the call was purged automatically on December 30, 2022, and not in bad faith. R. Exc. at 4-5.

PPL avers that it introduced PPL Electric Exh. No. 2, a record of all contacts between PPL and Waterco, in part because the Recording was not available. Also, PPL states that it presented the testimony of its witness to establish that PPL

provided Waterco with an account number during the Phone Call. PPL submits that the ALJ appropriately credited the PPL witness' assertion that PPL provided Waterco with its account number based on the testimony. R. Exc. at 5.

PPL also argues that the application of an adverse inference based on spoliation of evidence is not appropriate when PPL did not act in bad faith and Waterco never requested production of the Recording. PPL denies that there has been a sanctionable spoliation of evidence in this instance because Waterco did not produce evidence of spoliation during the hearing nor did it request the Recording at issue during discovery. Rather, PPL argues that the first time Waterco requested a copy of the Recording was when it filed its Petition, and the first time Waterco requested an adverse inference was in its Exception. PPL further avers that Waterco never conducted discovery between the time the Complaint was filed on November 17, 2022, and the date the hearing was held on October 18, 2023. PPL contends that sanctions are not warranted because PPL followed its standard retention policy in its treatment of the Recording, an automated action not carried out in bad faith or with the intent of destroying problematic evidence. Moreover, PPL argues that imposing an adverse inference on PPL would be unfair and unwarranted given Waterco's own inaction on this issue. R. Exc. at 6-9.

Finally, PPL argues that an adverse inference does not constitute evidence and cannot be used to support a finding that PPL did not provide Waterco with an account number. PPL avers that an adverse inference cannot be used to support a finding of fact because it is not evidence. R. Exc. at 9-10, citing *Kennett Square Specialties v. Workers' Comp. Appeal Bd.*, 31 A.3d 325, 328-29 (Pa. Cmwlth. 2011). Therefore, PPL submits that Waterco cannot now establish that PPL did not provide Waterco with an account number through the adverse inference it seeks. *Id.* at 10.

PPL contends that the determination of whether PPL provided Waterco with an account number depends on the credibility determination already made by the

ALJ in the Initial Decision. PPL argues that the ALJ correctly concluded that PPL provided Waterco with its account number on June 30, 2022, and that Waterco failed to sustain its burden of proof that PPL did not provide it with its account number. R. Exc. at 10-11.

PPL contends that none of Waterco's arguments have merit and requests that Waterco's Exception be denied. R. Exc. at 2.

3. Disposition

Upon review of the record, we shall deny Waterco's Exception. Waterco failed to raise an objection to the testimony of PPL's witness with respect to the Recording of the Phone Call. Pennsylvania Rule of Evidence 103 addresses the procedure to raise and preserve an evidentiary issue in Pennsylvania courts as follows:

Rule 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only:

(1) if the ruling admits evidence, a party, on the record:

(A) makes a timely objection, motion to strike, or motion *in limine*;

and

(B) states the specific ground, unless it was apparent from the context; or

* * *

Pa. R.E. 103. In order to properly preserve an assertion of error, a party must make an objection during the hearing and secure a ruling on the objection from the presiding officer. *See, Blumer v. Ford Motor Co.*, 20 A.3d 1222, 1233 (Pa. Super. 2011). Waterco did not object to the testimony of PPL's witness regarding the Recording of the Phone

Call pursuant to the Best Evidence Rule during the hearing. *See*, Tr. at 93-116. Although Waterco’s counsel argued in his closing argument that the Recording was the best evidence of what was said during the Phone Call on June 30, 2022, such an argument made during a closing statement does not constitute a specific objection to a witness’ testimony under Pa. R.E. 103(a). Accordingly, Waterco did not object to the testimony of PPL’s witness based on the Best Evidence Rule during the hearing, nor did it receive a ruling on the issue; therefore, Waterco has waived raising such an objection at this stage of the proceeding in its Exception. *See, Boscia v. Massaro*, 529 A.2d 504, 507 (Pa. Super. 1987).⁵ For these reasons, we shall deny Waterco’s Exception.

Inasmuch as we conclude herein that Waterco failed to conduct any discovery prior to the hearing and to timely raise an objection and secure a ruling at the hearing resulting in it being barred from raising an objection based on the Best Evidence Rule with respect to the PPL witness’ testimony regarding the Recording of the Phone Call on June 30, 2022, in its Exception, there is no need for the Commission to address the additional arguments included in the Exception and Reply to Exception. Therefore, the arguments regarding exceptions to the Best Evidence Rule under Pa. R.E. 1004(a) and whether an adverse inference based on a theory of spoliation of evidence is warranted in this case are hereby deemed moot.

Based upon our findings and determinations herein, we agree with the ALJ that the main question here – *i.e.*, whether PPL provided Waterco with an account number on the June 30, 2022, Phone Call – depends on a credibility determination. We further agree that the record includes sufficient information to reach a decision in this matter, and we have no reason to disagree with the ALJ’s findings and conclusions in the Initial Decision presiding over the hearing and weighing the evidence offered by the

⁵ We note that Waterco’s counsel demonstrated knowledge and awareness of the Pennsylvania Rules of Evidence because other timely objections were raised, and rulings were secured, at the hearing with respect to other PPL exhibits.

Parties. Accordingly, we shall adopt the ALJ's Initial Decision, consistent with this Opinion and Order.

IV. Conclusion

For the reasons set forth above, we shall deny Waterco's Petition. We shall also deny Waterco's Exception, and adopt the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Petition to Reopen the Record, filed by Waterco Springs, LLC, on February 14, 2024, at Docket No. C-2022-3036860, is denied, consistent with this Opinion and Order.
2. That the Exception of Waterco Springs, LLC, filed on February 14, 2024, to the Initial Decision of Administrative Law Judge Chad L. Allensworth, issued on January 25, 2024, at Docket No. C-2022-3036860, is denied, consistent with this Opinion and Order.
3. That the Initial Decision of Administrative Law Judge Chad L. Allensworth, issued on January 25, 2024, at this docket, is adopted, consistent with this Opinion and Order.
4. That the Commission's Secretary shall serve a copy of this Opinion and Order on the Commission's Bureau of Investigation and Enforcement for its review and any further action as deemed to be warranted.

5. That this matter shall hereby be marked closed.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first letter of each word being significantly larger and more stylized.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: June 13, 2024

ORDER ENTERED: June 13, 2024