BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

JUDY DEFRENCH,	)	
	)	
Complainant,	)	
	)	
vs.	)	CASE NO. 21-0950-EL-CSS
	)	
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,	)	
	)	
	)	
Respondent.	)	

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S MOTION TO DISMISS

Pursuant to Section 4901-9-01(C)(3) of the Ohio Administrative Code, The Cleveland Electric Illuminating Company moves the Commission for an order dismissing the Complaint in the above-captioned matter. Dismissal of the Complaint is appropriate in the interests of administrative efficiency and economy as set forth more fully in the memorandum in support of this Motion that is attached and incorporated herein.

Respectfully submitted,

/s/ Christopher A. Rogers

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MEMORANDUM IN SUPPORT OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S MOTION TO DISMISS

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1. INTRODUCTION

Complainant Judy DeFrench's ("Complainant") Complaint against Respondent The Cleveland Electric Illuminating Company ("CEI") must be dismissed because it fails to set forth reasonable grounds that the charging of an opt-out fee is discriminatory, even when Complainant complains of adverse health issues resulting from alleged exposure to electromagnetic fields. Complainant's Complaint must be dismissed on four separate independent grounds:

- *First*, the Commission lacks subject matter jurisdiction to determine whether CEI's Commission-approved tariff violates the Americans With Disabilities Act.
- *Second*, the Complaint is an improper collateral attack on the CEI tariff the Commission authorized and approved in PUCO Case No. 20-0385-EL-ATA;
- *Third*, the Complaint asks the Commission to act in violation of the filed rate doctrine, codified in Sections 4905.32 and 4903.16, Revised Code; and
- *Fourth*, the Complaint fails to set forth reasonable grounds for the Complaint, as required by Section 4905.26, Revised Code.

Accordingly, CEI moves the Commission to dismiss the Complaint.

2. BACKGROUND

CEI obtained Commission approval to install smart meters.[1] O.A.C. 4901:1-10-05(J) governs the provision of smart meters to customers and requires that an electric utility installing a smart meter provide a customer with the option to decline installation of a smart meter and retain a traditional meter where the customer commits to paying for a cost-based, tariffed, opt-out service. In compliance with this Rule, CEI obtained Commission approval to charge an opt-out fee to those customers who do not wish to have a smart meter installed ("Rider AMO").[2] In

[1] *See generally In The Matter Of The Filing By Ohio Edison Company, The Cleveland Electric Illuminating Company And The Toledo Edison Company Of A Grid Modernization Business Plan*, PUCO Case Nos. 16-481-EL-UNC and 17-2436-EL-UNC, et al., Opinion and Order (July 17, 2019).

[2] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of New Tariff Language*, Case No. 20-0385-EL-ATA ("Rider AMO Case"), Finding and Order, ¶¶ 10-11 (Jul. 29, 2020) ("We find that the provisions of Ohio Adm.Code 4901:1-10-5 contain all

the Finding and Order approving Rider AMO, the Commission specifically found that Rider AMO complies with O.A.C. 4901:1-10-05.[3]

Following the Commission's approval of Rider AMO, CEI filed Tariff Update pages with the Commission, which included the approved Rider AMO language.[4] Rider AMO can be found in P.U.C.O. No. 13 at Sheet 128, 1st Revised Page 1 of 1. It provides, in pertinent part, that a customer who elects to opt-out of the installation of a smart meter must pay a recurring monthly fee of $28.29.[5]

Complainant does not dispute that the Commission has approved Rider AMO and the associated opt-out fee. In fact, she concedes that the Commission approved CEI's tariff. Instead, she asserts that the tariff itself, as applied to her, is invalid because it does not allow a reasonable accommodation to accommodate her disability.[6] She asserts that CEI should waive the fee because of the alleged health effects from electromagnetic fields and therefore the charging of a monthly opt-out fee is discriminatory. However, Commission precedent is clear, the charging of an opt-out fee, even in light of the alleged health effects, is not discriminatory.[7] Such allegations do not support a showing that a utility provided inadequate service or acted in an unjust or unreasonable way.[8]

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of the necessary and appropriate consumer protections for customers who participate in Rider AMO. . . Accordingly, upon review of the Companies' application and Staff's review and recommendation, the Commission finds that the application is consistent with Ohio Adm.Code 4901:1-10-5[.]").

[3] *Id.*

[4] *Rider AMO Case*, Case No. 20-0385-EL-ATA, Revised Tariff Update pages of Rider AMO for PUCO Electric Tariff No. 13 (Aug. 14, 2020).

[5] P.U.C.O. No. 13 at Sheet 128, 1st Revised Page 1 of 1 (Aug. 14, 2020) ("Rider AMO")

[6] *In the Matter of the Complaint of Judy DeFrench v. The Cleveland Electric Illuminating Company* PUCO Case No. 21-950-EL-CSS, Complaint (Sept. 15, 2021).

[7] *See, e.g.*, *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 27 (Oct. 07, 2020) (holding that the Complainant's allegations of smart meter health risks did not meet the burden of proof and that the utility acted in accordance with its tariff and Commission rules).

[8] *Id.,* ¶ 26 ("We find that AEP Ohio's intent to levy a $24.00 monthly charge on Mr. Bushong is not unreasonable, unlawful, or discriminatory, and is imposed due to the fact the Commission approved this charge in the Tariff Case.").

The Complaint must be dismissed with prejudice.

3. ARGUMENT

The Commission should dismiss the Complaint with prejudice because Complainant failed to set forth reasonable grounds for her Complaint, as required by Section 4905.26 of the Ohio Revised Code. The Complainant bears the burden to demonstrate that she has set forth reasonable grounds for her Complaint.[9] If the Complaint fails to set forth such reasonable grounds, the Commission does not have the authority to hear the Complaint.[10]

As set out more fully below, the Complaint should be dismissed for several reasons:

- *First*, the Commission lacks subject matter jurisdiction to determine whether CEI's Commission-approved tariff violates the Americans With Disabilities Act.
- *Second*, the Complaint is an improper collateral attack on the CEI tariff the Commission authorized and approved in PUCO Case No. 20-0385-EL-ATA;
- *Third*, the Complaint asks the Commission to act in violation of the filed rate doctrine, codified in Sections 4905.32 and 4903.16, Revised Code; and
- *Fourth*, the Complaint fails to set forth reasonable grounds for the Complaint, as required by Section 4905.26, Revised Code.

For each of these reasons, the Complaint should be dismissed with prejudice.

a. The Commission Does Not Have Subject Matter Jurisdiction Over Alleged Violations of the Americans With Disabilities Act.

Complainant's primary argument to avoid the Commission-approved opt-out fee is that such fee violates the Americans With Disabilities Act's reasonable accommodation requirement. Such allegations are not properly before the Commission.

[9] *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1996).
[10] *Ohio Utils. Co. v. Public Utils. Comm'n*, 58 Ohio St. 2d 153, 159, 389 N.E.2d 483 (1979) ("R. C. 4905.26 requires that 'reasonable grounds for complaint' be stated before the commission can conduct a hearing and order a utility to produce information."); *see also Allnet Commuc'ns. Servs. v. Public Utils. Comm'n*, 32 Ohio St. 3d 115, 117, 512 N.E.2d 350 (1987).

The Commission may only exercise the jurisdiction conferred upon it by statute.[11] Pursuant to § 4905.26, Revised Code, the Commission has exclusive jurisdiction over claims pertaining to service-related matters.[12] The Commission "is not a court and has no power to ascertain and determine legal rights and liabilities." [13]

The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation.

> A person alleging discrimination under Title III must show (1) that he is disabled within the meaning of the ADA, (2) that the defendant is a private entity that owns, leases, or operates a place of public accommodation, (3) that the defendant took adverse action against the plaintiff that was based upon the plaintiff's disability, and (4) that the defendant failed to make reasonable modifications that would accommodate the plaintiff's disability without fundamentally altering the nature of the public accommodation.[14]

The consideration of these factors are beyond the statutory grant of authority to the Commission. To adjudge this controversy, the Commission would have to determine (1) whether Ms. DeFrench has a disability, (2) whether such disability (if it exists) is a disability under the ADA, (3) whether CEI owns, operates, or leases a place of public accommodation, (4) that CEI's actions were based on Ms. DeFrench's alleged disability, (5) whether an accommodation for Ms. DeFrench's disability would fundamentally alter the nature of CEI's business, and (6) whether CEI failed to make a reasonable accommodation for Ms. DeFrench's alleged disability.

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[11] *Lucas Cty. Commrs. v. Pub. Util. Comm'n of Ohio*, 80 Ohio St.3d 344, 347, 686 N.E.2d 501 (1997).
[12] *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 5.
[13] *See DiFranco v. FirstEnergy Corp.*, 134 Ohio St. 3d 144, 2012-Ohio-5445, 980 N.E.2d 996, ¶ 20; *Allstate Ins. Co. v. Cleveland Elec. Illum. Co.*, 119 Ohio St.3d 301, 2008-Ohio-3917, 893 N.E.2d 824, ¶ 16 (quoting *Incr. Village of New Bremen v. Pub. Utils. Comm'n*, 103 Ohio St. 23, 30-31, 132 N.E. 162, 164 (1921)).
[14] *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027 (8th Cir. 1999).

To determine whether an issue raised in a complaint is within the jurisdiction of the Commission, the Supreme Court developed a two-part test: "First, is PUCO's administrative expertise required to resolve the issue in dispute? Second, does the act complained of constitute a practice normally authorized by the utility?"[15] If either question is answered in the negative, the Commission does not have jurisdiction to hear this matter.[16] The first question is dispositive here. The Commission does not have the administrative expertise, nor is its specialized expertise needed, to adjudge the legal rights and liabilities of the parties, including whether Ms. DeFrench even has a disability. This analysis is more appropriate for a judicial forum.

In *Complaint of Edward Porter*, the Complainant alleged that the charging of a credit card servicing fee was discriminatory because he was unable to routinely deposit checks into his checking account because of his disability.[17] Although the Commission denied the complaint based on the failure of Complainant to prove that Ohio Power Co.'s charges were unreasonable, it noted, in regards to the ADA claim, that the Commission "will be limiting [its] decision to those matters that fall squarely within [its] jurisdiction."[18] Although it does not appear that the Commission has directly addressed whether it has subject matter jurisdiction to entertain an ADA claim, other public utilities commissions have determined that their respective commissions lack jurisdiction to consider claims brought under the ADA.[19]

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[15] *Allstate.*, 2008 -Ohio- 3917, ¶ 12.
[16] *Id.*, ¶ 13.
[17] *In the Matter of the Complaint of Edward Porter v. Ohio Power Co.*, PUCO Case No. 20-260-EL-CSS, Opinion & Order, ¶ 11 (June 2, 2021).
[18] *Id.* ¶¶ 12, 18.
[19] *Wilmer Baker v. Sunoco Pipeline, LP*, Pa. PUC Case No. C-2018-3004294, 2020 WL 5877007, *7, 2020 PA. PUC LEXIS 493, *9, Opinion and Order (September 23, 2020) ("[T]he ALJ denied the request for an alarm and odorant as an accommodation under the Americans With Disabilities Act (ADA) for lack of jurisdiction to grant accommodations under the ADA in a proceeding before the PUC."); *Ronald P. Harper, Jr. v. PPL Elec. Utils. Corp.*, Pa. PUC Case No. F-2014-2422449, 2015 WL 664226, *10, Initial Decision (Jan. 27, 2015); *see also In the Matter of the Complaint of Louis Viny*, PUCO Case No. 83-602-EL-CSS, 1983 WL 887546, *1, Entry (June 22, 1983) ("the Commission will not make determinations as to civil rights violations").

This Commission has also held that it does not have jurisdiction over customer complaints sounding in violations of the Fair Debt Collection Practices Act ("FDCPA").[20] In granting the respondent's motion to dismiss, the Commission made the following observation:

> Generally, the Commission's jurisdiction relates to services and rates provided by public utilities. The FDCPA is a federal law relating to debt collection practices. As such, the FDCPA falls outside the scope of the Commission's jurisdiction. Thus, even if it were true that Toledo Edison violated the FDCPA, this would not be a proper forum to adjudicate the claim.[21]

The same logic applies to Complainant's ADA claim here. Accordingly, the Commission lacks subject matter jurisdiction to hear Complainant's ADA complaint.

b. **The Complaint is an Improper Collateral Attack on a Commission Authorized Tariff.**

Complainant's Complaint is nothing more than a redundant and inefficient collateral attack on prior Commission orders. The Commission may, "in the interest of judicial economy and efficiency, dismiss a complaint against a Commission approved tariff, where the Commission has recently and thoroughly considered the provisions of the tariff and the Complainant alleges nothing new or different for the Commission's consideration."[22] Here, the Commission thoroughly reviewed the challenged provision in July and October 2020.

Under Ohio law, CEI must provide a "cost-based, tariffed opt-out service" for customers who do not want to use a smart meter. O.A.C. 4901:1-10-05(J)(1); *see also* O.A.C. 4901:1-10-05(J)(3)(a) (when opting out of an advanced meter, the Electric Utility Provider must inform the customer that "[t]he customer <u>will be required</u> to pay the amount of the approved tariff charge." (emphasis added)).

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[20] *In the Matter of the Complaint of Marcena Upp v. The Toledo Edison Company*, PUCO Case No. 11-5427-EL-CSS, Entry, ¶ 8 (Jan. 4, 2012) (dismissing FDCPA claim for lack of subject matter jurisdiction).
[21] *Id*.
[22] *See In the Matter of the Complaint of Mark R. Weiss v. The Cleveland Electric Illuminating Co.*, PUCO Case No. 97-876-EL-CSS, 1997 Ohio PUC LEXIS 845 at *7 (Nov. 6, 1997) (citing cases).

Pursuant to the requirements of the Ohio Administrative Code, CEI filed proposed tariff pages reflecting changes to the Rider AMO in Commission Case No. 20-0385-EL-ATA.[23] This filing was made in accordance with Rules 4901:1-10-05(J)(1), (J)(5)(a) and (J)(5)(b) of the Ohio Administrative Code, and in response to the Commission Opinion and Order in Case Nos. 16-481-EL-UNC and 17-2436-EL-UNC, et al., dated July 17, 2019. The filing was intended, in pertinent part, to "provide any customer taking service under the Residential Service rate schedule (Rate RS) with the option . . . to decline installation of an advanced meter and retain a traditional meter, through a cost-based, tariffed optout service."[24] This option is outlined in the revised tariff pages, and provides that the monthly customer charge for opt-out customers is $28.29 (the "Opt-out Customer Charge").[25]

CEI's application was docketed at the Commission and made available for review by all interested parties. The Commission approved the Rider AMO on July 29, 2020,[26] holding that "the provisions of Ohio Adm.Code 4901:1-10-5 contain all of the necessary and appropriate consumer protections for customers who participate in Rider AMO."[27] CEI filed its revised tariff pages reflecting the Rider AMO on August 14, 2020.[28] Therefore, these charges, by law, are facially reasonable.[29]

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[23] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Application (Feb. 18, 2020).
[24] *Id.*, Ex. C-1.
[25] *Id.*, Ex. B.
[26] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Finding and Order, ¶ 8 (July 29, 2020).
[27] *Id.*, ¶ 10.
[28] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Revised Tariff Update pages of Rider AMO for PUCO Electric Tariff No. 13 (Aug. 14, 2020).
[29] *In the Matter of the City of Reynoldsburg v. Columbus S. Power Co.*, Case No. 08-846-EL-CSS, Opinion and Order at 14 (Apr. 5, 2011).

Moreover, the Commission recently considered, and dismissed, identical customer complaints requesting a waiver of the Rider AMO based on health concerns. In October 2020, the Commission explicitly determined that the intent to levy a monthly opt-out charge was allowed, even when the Complainant alleged health and safety risks from smart meter use.[30] In Commission Case No. 18-1828-EL-CSS, the Commission found as follows:

> We find that AEP Ohio's intent to levy a $24.00 monthly charge on [Complainant] is not unreasonable, unlawful, or discriminatory, and is imposed due to the fact the Commission approved this charge in the *Tariff Case*. …[A]ny potential health or safety risk is rendered moot because AEP Ohio has allowed [Complainant] to retain his analog meter ….[31]

The Commission found similarly in Commission Case No. 17-1943-EL-CSS, where the Commission determined that any health effects from a smart meter were relieved by requesting a non-emitting meter and paying the opt-out fee.[32] The charging of these fees is not, as the Commission recently determined, discriminatory.[33]

Complainant's Complaint here challenges Rider AMO that is mandated by the Ohio Administrative Code. The Commission recently and thoroughly considered the provisions of Rider AMO, as well as the specific allegations related to health effects from smart meters. Complainant alleges nothing new or different for the Commission's consideration. The Complaint should be dismissed as an improper collateral attack on Rider AMO, in the interest of judicial economy and efficiency.

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[30] *See In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 27 (Oct. 07, 2020) (holding that the Complainant's allegations of smart meter health risks did not meet the burden of proof and that the utility acted in accordance with its tariff and Commission rules).

[31] *Id.*, ¶¶ 26-27.

[32] *See In the Matter of the Complaint of Kenneth B. Logan, v. Ohio Power Company*, PUCO Case No. 17-1943-EL-CSS, Opinion & Order, ¶¶ 24-25 (Jan. 16, 2019) (finding that any health concerns related to a smart meter are relieved by requesting a traditional meter and pay the out-out charge).

[33] *In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 26 (Oct. 07, 2020).

c. The Complaint Asks the Commission to Violate the Filed Rate Doctrine.

Ohio law is clear: CEI must charge the rates set forth in its tariff and a complainant's challenge of those rates in a complaint filed pursuant to R.C. 4905.26 is unreasonable as a matter of law.[34]

Under Ohio law, the Commission, as well as a public utility, must follow the filed rate doctrine as codified in R.C. 4905.32 and 4903.16.[35] Specifically, R.C. 4905.32 provides:

> No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.
>
> No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified or, any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

In sum, a utility has no discretion in the matter, but instead must collect the rates set by the Commission and cannot waive these fees based on a complainant's specific circumstances unless an aggrieved person secures a stay of such order by affirmative act.[36] If a stay is not ordered, "a public utility may charge only the rates fixed by its current Commission-approved tariff and that the Commission is prohibited from engaging in retroactive ratemaking."[37] The Supreme Court of Ohio is clear that

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[34] *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 49, 134 Ohio St.3d 29, 979 N.E.2d 1229; *see also In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 26 (Oct. 07, 2020).
[35] *Keco Indus., Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257, 141 N.E.2d 465 (1957).
[36] *Id.* ("[A] utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.")
[37] *In the Matter of the Application of Ohio Power Company to Update its Gridsmart Phase 2 Rider*, PUCO Case No. 17-1156-EL-RDR, Consideration of the Application for Rehearing, ¶19 (April 25, 2018) (emphasis added).

> the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court.[38]

The Supreme Court of Ohio recently reaffirmed that

> no public utility may charge a rate for a service or commodity furnished by it unless that rate is approved by the commission and set down in tariff schedules filed with the commission. Likewise, the utility's customers are bound to pay the rate that is set forth in the utility's tariff filing. In short, the [conduct] rule applies to all citizens of this state and <u>does not exempt any part of the public from its purview</u>.[39]

Here, the Commission approved the Opt-out Customer Charge in July 2020 and held that "the provisions of Ohio Adm.Code 4901:1-10-5 contain all of the necessary and appropriate consumer protections for customers who participate in Rider AMO."[40] CEI then filed its revised tariff pages reflecting the Opt-out Customer Charge in August of 2020 and proceeded by collecting the rates and charges set by the Commission pursuant to Ohio law. By approving the tariff, the Commission already determined that the Rider AMO provision is neither unjust nor unreasonable on its face.[41] Accordingly, CEI must charge the Opt-Out Customer Charge and, under Ohio law, does not have the discretion to waive it for particular customers.

It is clear from the Complaint that Complainant is simply unwilling to pay the Opt-Out Customer Charge in Rider AMO. But CEI cannot grant Complainant a waiver. O.A.C. 4901:1-10-05(J) and CEI's tariff require Complainant to pay CEI's opt-out charge if she declines the installation of a smart meter. CEI's refusal to exempt Complainant from this tariffed charge

[38] *Keco Indus.*, 166 Ohio St. 254, 259, 141 N.E.2d 465, 469.
[39] *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 49, 134 Ohio St.3d 29, 979 N.E.2d 1229 (emphasis added).
[40] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of New Tariff Language*, PUCO Case No. 20-0385-EL-ATA, Finding and Order, ¶ 10 (July 29, 2020).
[41] *In the Matter of the City of Reynoldsburg v. Columbus S. Power Co.*, Case No. 08-846-EL-CSS, Opinion and Order at 14 (Apr. 5, 2011).

applicable to all opt-out customers does not support a finding that CEI's actions were inadequate, unjust, or unreasonable.[42] Indeed, if CEI were to exempt Complainant from this Commission approved tariff charge, it would be discriminatory treatment, in violation of R.C. 4905.35. Accordingly, the Commission must dismiss the Complaint.

d. **The Complainant Fails to Set Forth Reasonable Grounds for Her Complaint.**

Finally, Complainant fails to set forth reasonable grounds for her Complaint, as required by R.C. 4905.26. The arguments the Complaint advances also fail to satisfy Complainant's burden of proof, which is that Complainant must prove the allegations in the Complaint by a preponderance of the evidence.[43] The Commission is clear that allegations of health concerns associated with smart meters are insufficient for a complainant to meet her burden under this standard.[44] And where, as here, an electric utility offers customers the option to opt-out of its smart meter program and instead pay an opt-out fee, the Commission has held that "any potential health or safety risk is rendered moot because [the electric utility] has allowed [complainant] to retain his [non-emitting] meter."[45] Accordingly, assessing the Commission approved Rider AMO is not, as a matter of law, unreasonable, unlawful, or discriminatory.[46]

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[42] *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 49; *see also In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 26 (Oct. 07, 2020).
[43] *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189, 190, 214 N.E.2d 666 (1966).
[44] *See In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 27 (Oct. 07, 2020) (holding that the Complainant's allegations of smart meter health risks did not meet the burden of proof and that the utility acted in accordance with its tariff and Commission rules).
[45] *Id.* ¶ 27; *see also In the Matter of the Complaint of Kenneth B. Logan, v. Ohio Power Company*, PUCO Case No. 17-1943-EL-CSS, Opinion & Order, ¶ 25 (Jan. 16, 2019) ("Although there is no evidentiary support for the Complainant's claim that smart meters present a health hazard, the Complainant may alleviate this concern by requesting the installation of a non-emitting meter and paying the applicable fee.").
[46] *See In the Matter of the Complaint of Ned Bushong v. American Electric Power Company*, PUCO Case No. 18-1828-EL-CSS, Opinion & Order, ¶ 26 (Oct. 07, 2020).

Because the Commission recently determined that the charging of the Opt-out Customer Charge, even when a waiver is requested for health reasons, is not discriminatory, Complainant's Complaint should be dismissed.

4. CONCLUSION

WHEREFORE, CEI respectfully requests an Order dismissing the Complaint with prejudice and granting CEI all other necessary and proper relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 22, 2021, the foregoing document was filed on the Public Utilities Commission of Ohio's Docketing Information System. The PUCO's e-filing system will electronically serve notice of the filing of this document on all parties of record in this proceeding. A service copy has been sent by U.S. Mail on this 22nd day of December 2021 to the Complainant at the following address:

Judy DeFrench
1156 East Miner Road
Mayfield Heights, OH 44124

/s/ Christopher A. Rogers
Attorney for The Cleveland Illuminating Company

2020 WL 5877007 (Pa.P.U.C.)

Wilmer Baker
v.
Sunoco Pipeline, L.P.

Docket No. C-2018-3004294

Pennsylvania Public Utility Commission

September 17, 2020; Entered September 23, 2020

OPINION AND ORDER

Before Dutrieuille, Chairman, Sweet, Vice Chairman, Coleman, Jr., and Yanora, Commissioners.

BY THE COMMISSION:

***1** Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Sunoco Pipeline, L.P., (Sunoco or the Company) filed on January 9, 2020, to the Initial Decision (I.D. or Initial Decision) of Administrative Law Judge (ALJ) Elizabeth H. Barnes, served on the Parties on December 20, 2019, in the above-captioned proceeding. On January 21, 2020, Wilmer Baker (Mr. Baker or Complainant) filed Replies to Exceptions. The Initial Decision granted in part and denied, in part, the Formal Complaint (Complaint) filed by Mr. Baker on August 10, 2018. For the reasons discussed below, we shall grant in part, and deny in part, the Company's Exceptions, adopt the Initial Decision of ALJ Barnes, as modified, and grant the Complaint, in part, and deny it, in part, consistent with this Opinion and Order.

I. Background

This case involves a Complaint concerning Sunoco's operation of Mariner East Pipeline (ME1) transporting highly volatile liquids (HVL) and constructing Mariner East 2 (ME2) and Mariner East 2X (ME2X) of its Mariner East pipeline project in Lower Frankford Township, Cumberland County. Complaint at 2-10. Mr. Baker, a *pro se* complainant, has alleged that Sunoco has violated 52 Pa. Code § 59.33, promulgated pursuant to 66 Pa. C.S. § 1501, which require that hazardous liquid utilities shall have minimum safety standards consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 CFR Parts 191-193, 195 and 199.

Mr. Baker further requested that Sunoco be required to furnish public awareness information as required by the 49 CFR 199, and an alarm system and odorant additive to alert all residents living within 1,000 feet of the potential blast zone and training for emergency personnel. Also, he requested that the old iron pipeline be replaced with American-made steel. I.D. at 1.

II. History of the Proceeding

On August 10, 2018, [1] Mr. Baker filed the instant Complaint alleging that Sunoco failed on multiple counts to reasonably communicate with the Complainant regarding public awareness of safety matters related to the installation of Sunoco's ME1 pipeline, transporting HVL. Specifically, the Complainant requested, *inter alia*, that Sunoco be directed to: (1) put in an alarm system for all residents living within the 1,000 foot blast zone; (2) hold public outreach meetings; (3) train emergency personnel; and (4) replace old iron pipeline with American-made steel. Complaint at 1-3; I.D. at 2.

***2** On September 17, 2018, the Company filed an Answer to the Complaint and New Matter (Answer and New Matter), admitting to certain communication with Complainant, and denying the material allegations of the Complaint. Sunoco asserted by way of New Matter, that the Complainant's property is approximately 1,300 feet from the Company's ME1 pipeline. Answer and New Matter at 1-3; I.D. at 2.

Also, on September 17, 2018, Sunoco filed Preliminary Objections, claiming that the Complaint failed to state a claim upon which relief could be granted and should be dismissed. I.D. at 3-4. [2] The Preliminary Objections were denied by Order entered on November 1, 2018. I.D. at 4.

On July 8 and 9, 2019, Comments in support of the Complaint were filed by Carrie Gross and Margaret Quinn. On or about July 9, 2018, Maxine Endy and Uwchlan Twp. Supervisor Kim Doan filed Comments. I.D. at 4.

On July 16, 2019, Virginia Marcille-Kerslake filed a Petition to Intervene. [3]

On July 17 and 18, 2019, an evidentiary hearing was held as scheduled. The Complainant appeared *pro se* and testified on his behalf. The Company appeared represented by counsel.

The hearing transcripts were filed on July 22 and 23, 2019, respectively.

By Interim Order on July 25, 2019, the ALJ directed that the record would close upon filing of briefs.

On August 29, 2019, Susan Britton Seyler filed a Comment. On August 30, 2019, the Complainant and the Respondent filed their Main Briefs and Virginia Marcille-Kerslake filed an *Amicus Curiae* brief. On September 18, 2019, Sunoco filed a Motion to Strike portions of the Complainant's Main Brief. Also on September 18, 2019, the Respondent and the Complainant filed their Reply Briefs. On September 24, 2019, Sunoco filed Attachment A to its Motion to Strike Portions of the Complainant's Main Brief. On October 1, 2019, Sunoco filed a Motion to Strike Portions of Reply Brief. On October 7, 2019, the Complainant filed a Reply to Sunoco's Motion to Strike Portions of Complainant's Main Brief. On October 21, 2019, the Complainant filed a Reply to Sunoco's Motion to Strike Portions of Complainant's Reply Brief. I.D. at 4.

In the Initial Decision issued on December 20, 2019, the ALJ granted the Complaint in part, and denied it, in part. I.D. at 1, 20, 24.

As previously noted, Sunoco filed Exceptions on January 9, 2020, and the Complainant filed Replies to Exceptions on January 21, 2020. [4]

III. Discussion

A. Legal Standards

***3** As the party seeking affirmative relief from the Commission, the complainant in a formal complaint proceeding has the burden of proof. 66 Pa. C.S. § 332(a). The evidence necessary to meet that burden must be substantial. 2 Pa. C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938). 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).

To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent 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). The offense must be a violation of the Public Utility Code (Code), a Commission Regulation or Order or a violation of a Commission-approved tariff. 66 Pa. C.S. § 701. 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). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof is comprised of two distinct burdens: (1) the burden of production; and (2) the burden of persuasion. *Hurley v. Hurley*, 2000 Pa. Super. 178, 754 A.2d 1283 (2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Initial Decision issued May 11, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *See Id*. It may shift between the parties during a hearing. A complainant may establish a *prima facie* case with circumstantial evidence. *See Milkie v. Pa. PUC*, 768 A.2d 1217, 1220 (Pa. Cmwlth. 2001) (*Milkie*). If a complainant introduces sufficient evidence to establish legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See Moore*.

***4** If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant, who must provide some additional evidence favorable to the complainant's claim. *See Milkie*, 768 A.2d at 1220*; see also, Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

Having produced sufficient evidence to establish legal sufficiency of a claim, the party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *See Milkie*, 768 A.2d at 1220; *see also, Riedel v. County of Allegheny*, 633 A.2d 1325, 1328, n. 11 (Pa. Cmwlth. 1993); *see also*, *Burleson*, 443 A.2d at 1375. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See Moore.* In determining whether a complainant has met the burden of persuasion, the fact-finder [5] may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See Moore*, citing *Suber v. Pa. Comm'n on Crime and Delinquency*, 885 A.2d 678 (Pa. Cmwlth. 2005), *appeal denied*, 586 Pa. 776, 895 A.2d 1264 (2006).

At the hearing, a complainant may prove his/her claim through the complainant's own personal testimony and/or "the testimony of others as well as other evidence that goes to that issue." *Romeo v. Pa. PUC*, 154 A.3d 422, 430 (Pa. Cmwlth. 2017) (*Romeo*).

***5** Pursuant to Section 1501 of the Code, a public utility has a duty to maintain "adequate, efficient, safe, 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. *See,* 66 Pa. C.S. § 1501. Section 1501 of the Code, 66 Pa. C.S. § 1501, provides, in pertinent part, as follows:

> 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 and facilities shall be in conformity with the regulations and orders of the commission.

The term "service" is defined broadly under Section 102 of the Code to include any and all acts done or 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).

The Commission Regulations at 52 Pa. Code § 59.33, promulgated pursuant to 66 Pa. C.S. § 1501, require that hazardous liquid utilities shall have minimum safety standards consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 CFR Parts 191-193, 195 and 199. The Commission Regulations adopt federal safety standards for hazardous liquid facilities. These standards include what materials must be used for new hazardous liquid pipelines, how those pipelines should be constructed, as well as corrosion control, maintenance and testing of existing hazardous liquid pipelines. The standards also address emergency preparedness and public awareness plans. 49 CFR § 195.440 (relating to public awareness). A pipeline operator utility should use every reasonable effort to properly warn and protect the public from danger and shall exercise reasonable care to reduce the hazards to which employees, customers and others may be subjected to by reason of its equipment and facilities. 52 Pa. Code § 59.33(a).

***6** Finally, 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).

B. ALJ's Initial Decision

In the Initial Decision, ALJ Barnes made one hundred and twenty-one Findings of Fact (FOF) and reached twenty-five Conclusions of Law (COL). I.D. at 4-19, 55-59. 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.

ALJ Barnes' analysis addressed the Complainant's allegations of Sunoco's failures associated with the Company's operation of ME1 and constructing ME2 and ME2X of its Mariner East pipeline project in Lower Frankford Township, Cumberland County, in violation of the Commission Regulations and the Code, 52 Pa. Code § 59.33, promulgated pursuant to 66 Pa. C.S. § 1501, which require that hazardous liquid utilities shall have minimum safety standards consistent with the pipeline safety laws at 49 U.S.C. §§ 60101-60503 and the regulations at 49 CFR Parts 191-193, 195 and 199. I.D. at 25.

The ALJ specifically addressed: (1) the applicability of the Pipeline Safety Act to ME1; (2) Public Awareness and Emergency Response Training, pursuant to the Code of Federal Regulations, Part 195.440. CFR § 195.440 (including print materials to the public, public awareness and education meetings, and emergency training); and (3) the Complaint's requested relief to require Sunoco to institute an early warning alarm system and odorant to detect leaks. I.D. at 26-28; 28-30; 31-41; 42

The ALJ found that the pipeline operator has acted outside the guidelines of API Recommended Practice 1162 as incorporated in 49 CFR Part 195.440 pertaining to public awareness practices without good cause, thus violating the Public Utility Code at 66 Pa. C.S. § 1501, and Commission Regulation at 52 Pa. Code § 59.33. The ALJ concluded that because there have been no personal injuries or property damage as a result of the violation and the number of individuals affected is small, a civil penalty in the amount of $1,000 is appropriate given an additional directive designed to enhance and improve the pipeline operator's public awareness and emergency training. I.D. at 54.

***7** The ALJ found that, pursuant to API Recommended Practice 1162 as incorporated in 49 CFR Part 195.440, 66 Pa. C.S. § 1501, and 52 Pa. Code § 59.33, the pipeline operator is directed: (1) to contact the Lower Frankford Township Supervisors and Cumberland County Commissioners; (2) to schedule a public awareness/education meeting to be held in Cumberland County; and (3) absent exigent circumstances, to make an appearance at the scheduled meeting. The ALJ further concluded that "the pipeline operator is directed, in the public interest, to provide additional training to emergency officials/responders in Cumberland County as requested in a timely manner in addition to its CORE and MERO training." I.D. at 54.

The ALJ also directed Sunoco to file, within 90 days of a final order, a plan to enhance its public awareness and emergency training plans and record keeping including but not limited to addressing: (1) the broadening of communication coverage areas

beyond 1,000 feet; (2) shortening intervals for communications; (3) use of response cards and social media; (4) supplemental program enhancements to emergency training programs; (5) internal or external audits to evaluate the effectiveness of its programs; and (6) corrective action plans to address any insufficiencies or weaknesses revealed through its evaluations and audits. I.D. at 54-55.

The ALJ rejected the Complainant's request for relief for an early warning alarm system for residents residing within 1,000 feet of the Mariner East pipeline facilities and a directive that an odorant be added to the highly volatile liquids of ethane, butane and propane being transported. The ALJ concluded that such matters should be vetted through a rulemaking proceeding at docket number L-2019-3010267 in order to not deprive the pipeline operator and other interest groups their due process rights. Further, the ALJ denied the request for an alarm and odorant as an accommodation under the Americans With Disabilities Act (ADA) for lack of jurisdiction to grant accommodations under the ADA in a proceeding before the PUC. Finally, the ALJ denied the Complainant's request that Sunoco be directed to replace ME1, “an 80 year old pipe,” with American-made steel for lack of jurisdiction to direct the relief requested. I.D at 55.

C. Exceptions, Replies, and Disposition

The Company's Exceptions assert that the ALJ made four errors of fact and seven errors of law, and therefore the ALJ's decision should be modified, and the Complaint dismissed with prejudice.

Specifically, Sunoco asserts that the ALJ erred as a matter of fact by finding: (1) that the Complainant's property is within 1,000 feet of the Mariner East Pipeline; (2) that the Complainant had received Sunoco's public awareness brochure; (3) that Lower Frankford Township had not received Sunoco's public awareness brochure; and (4) that certain allegations were facts, where the allegations were irrelevant to the Complaint or were allegations the Complainant otherwise lacks standing to assert. Exc. Nos. 1, 3, 5 and 7.

***8** With respect to alleged errors of law, the Company asserts that the ALJ erred by finding: (1) that Sunoco was required to mail Complainant a public awareness brochure every two years; (2) that it was relevant to consider either (i) mailing public awareness brochures addressed to “resident” at apartment buildings or (ii) Ms. Van Fleet's receipt of Sunoco's public awareness brochures; (3) that Sunoco was or is required to hold or attend a public outreach meeting in Lower Frankford Township or Cumberland County; (4) that Sunoco is required to conduct additional emergency responder training.; (5) that injunctive relief is warranted where it is not narrowly tailored to the alleged and unfounded violations of law; (6) that hearsay documents were admissible into the record of this proceeding; and (7) that the Pipeline Safety Laws and Regulations are applicable to existing pipelines. Exc. Nos. 2, 4, 6, 7, 8, 10, and 11.

1. Sunoco's Exceptions Alleging Errors of Fact

a. Sunoco's Exception Nos. 1, 3, 5 and 9

In Sunoco's Exception No. l, Sunoco asserts that Mr. Baker's primary “public awareness” claim, which the ALJ granted, that Sunoco failed in its obligation to provide Mr. Baker a public awareness brochure in 2018 because he resides within 1,000 feet of the pipeline has no basis in fact. Sunoco avers that because Mr. Baker himself did not testify that his property is within 1,000 feet, and because the Complainant did not affirmatively dispute Sunoco's verified statement in its Answer and New Matter that Mr. Baker's property is in fact over 1,300 feet from the Mariner East pipelines, the ALJ was precluded from finding, as a matter of fact, that Mr. Baker resides within 1,000 feet of ME1. Exc. at 5-6.

Sunoco avers that the ALJ improperly advocated for the Complainant by “eliciting testimony from another witness for the Complainant” (the Complainant's son who also resides within 1,000 feet of ME1), who testified that Mr. Baker's property was less than 1,000 feet from the pipelines. Sunoco maintains that the ALJ's reliance on that “guess” as fact disregarded both Sunoco's verified pleading and the testimony of Sunoco's Senior Vice President to conclude that Sunoco was in violation of the

duty to provide public awareness information to Mr. Baker and impose a penalty of $1,000, was in error. Sunoco' avers it was reversible error of fact for the ALJ to conclude Mr. Baker lives within the 1,000-foot mailing zone of required public awareness information dissemination in 2018. Exc. at 6-7.

In its Exception No. 3, Sunoco further asserts that the Initial Decision's finding that Mr. Baker received a public awareness brochure five years ago is unsupported by the record evidence. Sunoco acknowledged it has an obligation to provide such brochures every two years. In 2014 and 2016, its public awareness program voluntarily provided brochures to residents within 1,320 feet of the pipelines (even though the regulation only requires distribution to those residing within 660 feet). Sunoco conceded Mr. Baker's home was within 1,320 feet and acknowledged that it had mailed the brochures to Mr. Baker in 2014 and 2016. Exc. at 13.

***9** Sunoco asserts that no mailing was made to Mr. Baker in 2018 because in the interim Sunoco revised its distance requirement to 1,000 feet, which Sunoco asserts it was and is entitled to do. Sunoco asserts its Answer to the Complaint which contained the admission that Sunoco had mailed Mr. Baker a public awareness brochure "approximately five years ago" was insufficient for the ALJ to conclude, as a "matter of fact" that the last brochure Mr. Baker received was sent five years before the complaint was filed. Therefore, Sunoco argues that no substantial evidence of record supports the ALJ's finding that "Wilmer Baker received a safety manual entitled, "Important Safety Message" from Respondent five years ago." Exc. at 13, I.D. at p. 4, FOF 4.

In its Exception No. 5, Sunoco avers that there is not substantial evidence to support the ALJ's factual finding that Lower Frankford Township did not receive Sunoco's public awareness brochures. Exc. at 16. Sunoco asserts that the only evidence to support the factual finding was inadmissible hearsay and therefore, on this basis, Sunoco avers that the ALJ's Initial Decision must be modified to correct FOF No 19. Exc. at 16-17.

Finally, in its Exception No. 9, Sunoco avers that the ALJ erred as a factual matter by reaching findings of fact which were either irrelevant to the Complaint or for which the Complainant lacks standing to pursue. Based on a lack of relevancy and lack of standing, Sunoco specifically excepts to FOF 15-20, 29-31, 42-44, 52, 62-66, 70-71, 73, 76-80, and asserts that ALJ's decision should be modified to exclude those findings. Exc. at 35-36.

b. Complainant's Replies [6]

In the Complainant's Replies to the Exceptions, the Complainant generally asserts that the ALJ's findings of fact were supported by substantial evidence of record and references portions of the record and briefs relied upon by the ALJ in support of this position. R. Exc. at 1-5.

In summary, the Complainant asserts that Sunoco's arguments should be rejected and the ALJ's findings of fact should be adopted without modification. R. Exc. at 1-5.

c. Disposition

Upon review of Sunoco's Exceptions alleging that the ALJ made several errors of fact, the Complainant's Replies thereto, the ALJ's Initial Decision, and the record in this proceeding, we conclude the ALJ made no error of fact which requires modification. In reviewing Sunoco's allegations of errors of fact, we are mindful that the Code and Commission Regulations vest the Commission's ALJs with authority to preside over the receipt and render determinations on the relevance of evidence at hearings.

***10** We expressly consider the presiding ALJ's broad authority to oversee and rule on the scope of and admissibility of evidence in a proceeding, as set forth in statute at Section 331(d)(3) of the Code, 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and Commission Regulations, including: at Sections 5.483 (pertaining to authority of presiding officer); 5.403

(pertaining to control of receipt of evidence); 5.103 (pertaining to authority to rule on motions); 5.222 (pertaining to prehearing conference in nonrate proceedings to oversee evidentiary matters for orderly conduct and disposition of the proceeding and furtherance of justice); and 5.223 (pertaining to authority of presiding officer at conferences). 52 Pa. Code §§ 5.483, 5.403, 5.103, 5.222, and 5.223. In view of this authority, ALJs retain broad discretion to determine the scope and admissibility of evidence as relevant to a given proceeding. The Commission will typically not disturb the ALJ's evidentiary rulings or findings of fact unless it is determined to be an abuse of discretion or otherwise lacks substantial evidence.

In the present case, we find that the ALJ relied upon sufficient record evidence and retained discretion to conclude that the Complainant's property was within 1,000 feet of ME1 and therefore, within the 1,000 foot zone to be provided public awareness information by Sunoco. We reject Sunoco's assertion that the ALJ was precluded from questioning the Complainant's son, who appeared as a witness for the Complainant, regarding the distance of the Complainant's property from ME1. It is within the ALJ's authority as the presiding officer to make *sua sponte* inquiries of witnesses on relevant matters. Further, the ALJ may rely upon the credible testimony of a witness to render a finding of fact, where, as here, the ALJ concludes the testimony is more credible than the contrary evidence presented.

We also find that it was within the ALJ's purview to find as fact that the last brochure sent to the Complainant was five years ago, based on Sunoco's Answer that contained an admission that the Company had mailed Mr. Baker a brochure "approximately 5 years ago" and that Mr. Baker testified that he had received the brochure five years ago.

With respect to Sunoco's assertion, that the ALJ's finding that Lower Frankford Township did not receive Sunoco's public awareness brochures may not have been supported by substantial evidence, we conclude the error, if it occurred, was not material to the ALJ's finding that Sunoco failed to meet its obligations to mail public awareness brochures to the Complainant. Therefore, we will not reexamine the finding for evidentiary purposes.

***11** We note that the ALJ referenced the fact that Lower Frankford Township was not provided the brochures in the context of the question whether Sunoco's participation at public outreach meetings was reasonable and adequate, however again, she did not rely upon the factual finding as material to the disposition of the question at issue. *See*, I.D. at 33, citing N.T 42. Because we do not find the alleged error of fact to be material to the disposition of any issue, we shall not disturb the evidentiary finding and find no basis for modification of the Initial Decision.

We also note that Sunoco's assertion that the Lower Frankford Township's letter requesting to be provided with a copy of the brochure fails to establish that it was never provided the brochure is a matter of interpretation. Exc. at 16-17. In this case, the ALJ concluded that Lower Frankford Township was not provided with a copy of the brochure, based upon the Complainant's testimony that the Township sought a copy from him. In viewing the testimony of the Complainant, the ALJ also considered the testimony of Sunoco's witnesses, which only provided aggregate data on mailing to local authorities, and provided no evidence or testimony to establish that Lower Frankford Township was specifically provided copies of the public awareness brochure.

Finally, with respect to Sunoco's Exception No. 9, in which Sunoco avers that the ALJ erred as a factual matter by reaching findings of fact on issues the Complainant lacks standing to pursue or issues irrelevant to the Complaint. We disagree. The ALJ retains authority to determine the scope and relevancy of evidence in a proceeding, which the Commission will not set aside unless there is a finding of an abuse of discretion or that the finding lacks substantial evidence.

The findings referenced by Sunoco, (*i.e.,* FOF 15-20, 29-31, 42-44, 52, 62-66, 70-71, 73, 76-80), are findings within the ALJ's reasonable discretion to determine to be relevant to the present proceeding related to the Company's actual practices regarding operation of the Mariner East Pipeline within the Commonwealth. While the facts found may not be material to any given disposition ultimately reached by the ALJ, the ALJ is free to admit to the record whatever relevant evidence is presented at hearing by the parties. We find nothing in Sunoco's argument to persuade us that the ALJ's findings were not relevant to the present proceeding concerning the Company's practices regarding operation of the Mariner East Pipeline.

We expressly reject Sunoco's reliance on the Court's analysis in *Sunoco Pipeline, L.P. v. Dinniman*, 217 A.3d 1283, 1287 (Pa. Cmwlth. 2019) (holding lack of personal standing where "[t]he Complaint did not allege harm to Senator Dinniman's property nor harm to his person, and the hearing before the ALJ did not yield evidence of either type of harm.") (*Dinniman*), as a basis to conclude that the ALJ's factual findings were in error. The holding in *Dinniman* did not review an ALJ's evidentiary finding based on relevancy, but rather, narrowly focused on the Commission's consideration of the Complainant's standing to bring a complaint. *Dinniman* has no application where, as here, the Complainant has established standing to raise questions and offer all relevant evidence pertaining to the reasonableness of Sunoco's practices regarding operation of the Mariner East Pipeline in Cumberland County including, public awareness in the form of both direct mailings to individuals and the public outreach meetings conducted, the adequacy of safety alarms, and materials used in construction of the pipeline which operates in close proximity to the Complainant's residence, and through the County in which the Complainant resides.

***12** Therefore, based on the forgoing discussion, we shall deny Sunoco's Exception Nos. 1, 3 5, and 9.

2. Sunoco's Exceptions Alleging Errors of Law

a. Sunoco's Exception Nos. 2, 4, 6, 7, 8, 10 and 11

In Sunoco's Exception No. 2, Sunoco avers that the ALJ erred as a matter of law by finding a violation of the Company's duty to send public awareness brochures on the basis that Sunoco did not mail Mr. Baker a public awareness brochure every two years. Sunoco asserts that to make this finding, the ALJ incorrectly found that Mr. Baker resides within 1,000 feet of the pipelines, and unjustly took judicial notice of facts not in evidence, of prior testimony offered by Sunoco's witness in a prior proceeding *(i.e., Dinniman*). Exc. at 7-8.

Sunoco argues that it was reversible legal error for the ALJ to *sua sponte* raise, misinterpret, and rely on extra-record evidence from a previous proceeding. Sunoco avers that the ALJ did not provide notice that excerpts of prior testimony in a separate proceeding would be considered and was thus deprived of the opportunity to be heard on the point. Exc. at 8-11. Sunoco asserts that the ALJ misinterpreted the prior testimony and precluded Sunoco from presenting alternative or additional facts, thus violating Sunoco's right to due process. Exc. at 11-14.

In its Exception No. 4, Sunoco avers that there is not substantial evidence that the Complainant's witness Van Fleet did not receive Sunoco's public awareness brochures. Sunoco also avers that the ALJ erred as matter of law by imposing an incorrect standard for addressing public awareness mailings and by directing that Sunoco conduct a review of its mailing practices on the basis of the testimony of witness Van Fleet. Exc. at 14-17.

In its Exception No. 6, Sunoco avers that, contrary to the ALJ's finding, Sunoco is under no legal requirement to attend a meeting open to the public and its actions have not violated law or regulation. Sunoco argues the ALJ findings misinterprets the applicable public awareness standards, imposing on Sunoco standards it believes the regulations should require, thereby creating a new standard in violation of Sunoco's due process rights, the Commonwealth Documents Law, the Independent Regulatory Review Act, and Sunoco's right to exercise managerial discretion. Exc. at 17-22.

Sunoco argues that the ALJ's findings ignore that public awareness regulations and standards are performance based, not prescriptive, and that Sunoco's public awareness program is achieving the required regulatory objectives without attending or holding the meetings. Exc. at 24-27.

Finally, Sunoco avers that the ALJ erred as a matter of law by misinterpreting the record evidence concerning cancellation of the meetings, which established that it was public officials rather than Sunoco, who were responsible for canceling the Sunoco's scheduled meeting with the Cumberland County Commissioners. Exc. at 27-29.

***13** In its Exception No. 7, Sunoco avers that the ALJ erred as a matter of a law by ordering relief where it did not find a violation regarding Sunoco's emergency responder outreach and training. Moreover, Sunoco alleges the ALJ disregarded substantial evidence that Sunoco goes above and beyond regulatory requirements with its MERO training program held in Cumberland County from 2014-2017. The record shows Sunoco is willing to provide additional training, has offered to do so in Cumberland County, and Sunoco asserts it remains willing to do so. Exc. at 29-31.

In its Exception No. 8, Sunoco avers that the injunctive relief ordered is improper, even if the Commission were to adopt the ALJ's finding of a violation of a duty based on Sunoco's failure to mail Mr. Baker a public awareness brochure every two years. Exc. at 31. Sunoco argues this is especially true since the ALJ found in fact no harm to the Complainant occurred from this alleged violation. Exc. at 31-32.

Sunoco argues that where the violation is found to have been harmless and impacting very few in number, it is legal error for the ALJ to grant prospective and significant injunctive relief which goes to matters well beyond the alleged violation of failure to mail a brochure to a Complainant every two years. Exc. at 32-33.

Sunoco argues that the ALJ is not empowered to craft remedies or directives beyond the confines of the Complainant's case. In doing so, the Initial Decision ignores black letter legal principles that injunctive relief must be narrowly tailored to abate the alleged harm complained of, and that mandatory injunctions such as ordered here require a very strong showing in order to obtain relief. Sunoco avers that based on the Complaint and evidence presented, the only injunction appropriate to the alleged violation would be to require Sunoco to mail the Complainant a public awareness brochure, rather than a wholesale reworking of Sunoco's public awareness program. Exc. at 33-34.

Sunoco further avers that the relief ignores Sunoco's public awareness program, which shows Sunoco is already implementing much of the relief ordered. As a result, Sunoco avers the ALJ's order amounts to an unlawfully promulgation of regulations. Sunoco argues the ALJ's error is egregious, especially, where the ALJ concedes that the issue of proper standards for effective public outreach is pending before the Commission in ongoing rulemaking proceedings. Exc. at 34-35.

In its Exception No. 10, Sunoco avers the ALJ committed an error of law by admitting various hearsay documents. Specifically, Sunoco takes Exception to the admission of the Complainant's Exhibits Nos. 7, 9 12, 13, 14 15, 18, 23, and Complainant Cross Exhibit 1, as a violation of the hearsay rule, because they were admitted over valid objection. Exc. at 36-37.

In its Exception No. 11, Sunoco avers that the ALJ committed reversible legal error by incorrectly interpreting the Pipeline Safety Laws and Regulations to *existing* pipelines, and therefore finding Sunoco in violation of the duty to mail public awareness information or attend a public meeting under the recommended practice of API 1162 as incorporated in 49 CFR § 195.440, as incorporated in 52 Pa. Code § 59.33 and 66 Pa. C.S. § 1501. Sunoco asserts that the ALJ misapplied the language of the 49 CFR § 195.440, which Sunoco asserts applies only to pipeline constructed after adoption of the regulations. Therefore, Sunoco avers that the ALJ's application of the regulation to ME1, which was constructed prior to the adoption of the regulation at issue, amounts to retroactive application of the regulation, and should be reversed. Exc. at 37-38.

b. Replies

***14** In the Complainant's Replies to the Exceptions, the Complainant generally asserts that the ALJ's legal conclusions were correct and supported by substantial evidence of record. In support, the Complainant references portions of the record and briefs relied upon by the ALJ in support of this position. R. Exc. at 1-5.

In summary, the Complainant asserts that Sunoco's arguments should be rejected and the ALJ's legal conclusions should be adopted without modification or that the Commission modify the Initial Decision if necessary. R. Exc. at 6.

c. Disposition

Upon review of Sunoco's Exceptions alleging that the ALJ's findings constituted reversible errors of law, the Complainant's Replies thereto, the ALJ's Initial Decision, and the record in this proceeding, as discussed more fully *infra*., we conclude the ALJ committed reversible error in granting injunctive relief to require Sunoco to revise its public outreach and emergency response training practices beyond the relief directly responsive to the allegations in the Complaint, and shall so modify the ALJ's Initial Decision to strike the directives under Ordering Paragraph Nos. 9-12. [7] In all other respects, we conclude the legal conclusions reached in the ALJ's Initial Decision require no modification.

At the outset, we note that as an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (*Schneider*), citing *Fusaro v. Pa. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d at 15 (Pa. Cmwlth. 1984), citing *Township of Middleton v. The Institute District of the County of Delaware*, 293 A.2d 885 (Pa. Cmwlth. 1972), *aff'd*, 450 Pa. 282, 299 A.2d 599 (Pa. Cmwlth. 1973). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hospital Ass'n of Western Pennsylvania v. Pa. PUC*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

With respect to Sunoco's Exception No. 2, averring legal error where the ALJ found a violation of the Company's duty to send public awareness brochures, based upon the assertion that the ALJ incorrectly found that Mr. Baker resides within 1,000 feet of the pipelines, we shall deny the Exception. As discussed *supra*., the ALJ properly found that the Complainant resided withing 1,000 feet of ME1 and on that basis held Sunoco to its own public awareness standards, to send safety awareness brochures to residents within the 1,000 foot public awareness mailing zone.

***15** With respect to Sunoco's argument in Exception No. 2, that Sunoco's due process rights were violated where the ALJ took judicial notice of prior witness testimony in the *Dinniman* case, we decline to review the finding for a due process violation, where the judicial notice was taken albeit, without affording Sunoco notice and opportunity to be heard on the point- where Sunoco introduced the facts in *Dinniman* to support its position in the present case. Further, we conclude that even if the Commission were to find there was legal error to take judicial notice of prior testimony in violation of Section 331 (g) (setting forth the requirement for notice and opportunity to be heard in taking judicial notice), we nevertheless conclude the error would be harmless where the ALJ did not rely on the information for which judicial notice was taken as material to rendering a determination on the matter at issue.

In this case, the ALJ's conclusion that Sunoco was in violation of the duty to provide the Complainant with a public awareness brochure, was predicated upon the finding that the Complainant resided within the 1,000 foot public awareness zone, a fact which was irrelevant to the facts for which the ALJ took judicial notice (*i.e.,* that the Company's prior witness testimony was that the public awareness zone was more expansive than 1,000 feet). Stated another way, the ALJ's official notice of the fact that the Company's prior testimony was that the public awareness zone was previously wider than 1,000 feet, is not material to the ALJ's finding that the Complainant resides within the present public awareness zone of 1,000 feet. Therefore, we conclude that Sunoco's Exception No. 2 fails to state a basis for modifying the ALJ's Initial Decision.

Sunoco's Exception Nos. 4, 6 and 8 challenge the ALJ's grant of injunctive relief which Sunoco alleges goes far beyond the relief sought in the Complaint, and for which Sunoco alleges the Complainant lacks standing to pursue. Specifically, Sunoco challenges the ALJ's findings and conclusions which underlie Ordering Paragraphs in the Initial Decision, as follows:

7. That Sunoco Pipeline, L.P. is directed to contact the Lower Frankford Township Supervisors and Cumberland County Commissioners within thirty (30) days of the date of entry of a final order for the purpose of scheduling a public awareness/ education meeting(s) to be held in Cumberland County.

8. That absent exigent circumstances, Sunoco Pipeline, L.P. is directed to appear at the scheduled meeting referenced in Ordering Paragraph No. 7

9. That Sunoco Pipeline, L.P. is directed to meet with the Cumberland County Department of Public Safety and Cumberland County Board of Commissioners with thirty (30) days of the entry of the Final Order in this proceeding to discuss additional communications and training and that Sunoco is directed to provide such training as requested by those parties.

***16** 10. That within ninety (90) days of the Final Order in this proceeding, Sunoco Pipeline, L.P. shall submit to the Commission for review a written plan to enhance its public awareness and emergency training plans and record keeping including but not limited to addressing: 1) the broadening of communication coverage areas beyond 1,320 feet; 2) shortening intervals for communications; 3) use of response cards and social media; 4) supplemental program enhancements to emergency training programs; 5) internal or external audits to evaluate the effectiveness of its programs; and 6) corrective action plans to address any insufficiencies or weaknesses revealed through its evaluations and audits.

11. That included as part of its plan referenced in Ordering Paragraph No. 10, Sunoco Pipeline, L.P. shall at minimum complete or plan to complete in a timely manner an audit or review of its public awareness program and shall ultimately submit to the Commission within six (6) months from the date of entry of a final order a baseline evaluation of its public awareness program through either an internal self-assessment using an internal working group or through third-party auditors where the evaluation is undertaken by a third-party engaged at Sunoco Pipeline, L.P.'s cost.

12. That the plan referenced in Ordering Paragraph No. 10 shall also be served upon the Commission's Bureau of Technical Utility Services, which shall review the plan and issue a staff determination Secretarial Letter within ninety (90) days of the filing of the plan indicating if the plan is in compliance with the directives in Ordering Paragraph Nos. 10 and 11.
I.D. at 60-61.

Upon review of the record, while we agree with the ALJ's directive in Ordering Paragraph Nos. 7 and 8 above, we also agree with Sunoco that the ALJ's grant of injunctive relief in Ordering Paragraph Nos. 9-12, directing Sunoco to: (1) meet with the Cumberland County Board of Public Safety and Board of Commissioners to provide training "as directed by those parties;" (2) within a prescribed period, submit a written plan to enhance its public awareness and emergency training plans and record keeping; and, (3) within a prescribed period, complete an audit of its public awareness program and submit a baseline evaluation of such program to be conducted by the a third-party engaged at Sunoco's cost, were directives by the ALJ which exceeded the scope of relief sought by the Complaint and were not justified on the basis of the finding of a violation of the duty to meet public awareness and outreach obligations under 49 CFR § 199.440.

As noted by Sunoco, the ALJ's broad directives are presently encompassed under proposed rulemaking by the Commission. As the ALJ acknowledged:

On June 13, 2019, the Commission initiated a regulatory rulemaking proceeding through the issuance of an Advance Notice of Proposed Rulemaking Order. *Advance Notice of Proposed Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. code Chapter 59*, Docket No. L-2019-3010267 (Order entered June 13, 2019). The Commission is currently reviewing comments submitted by stakeholders and interest groups regarding numerous issues, including those pertaining to operators' interactions with local government officials regarding emergency response planning, requirements of periodic public awareness meetings with municipal officials and the public, and Pennsylvania specific enhancements to public awareness programs. *Id.* at 19.
***17** I.D. at 41.

Therefore, we conclude that the relief in the present case as outlined above should be considered at the proposed Rulemaking Docket, subject to input by all concerned parties, and that the relief in the present case should be confined to the allegations in the Complaint and the findings relevant thereto.

In the present case, the ALJ found the Complainant has met his burden of proof to show that Sunoco violated its public awareness program by not sending him public awareness printed materials on a 2-year interval within the past 5 years even though the Complainant resides within 1,000 feet of the ME1 right of way. I.D. at 58, COL No. 17. The ALJ concluded that a penalty of $1,000 was reasonable and warranted. I.D. at 53-54. We agree.

The ALJ also found that Sunoco had abruptly cancelled a public outreach meeting, without good cause shown and with no notice, at which the Complainant was in attendance. The ALJ viewed the abrupt cancellation to be unreasonable in the circumstances, and explained:

Although Sunoco's witnesses have testified that they have a public awareness program that engages the community, utilizing a variety of methods, including meetings, mailings, and specialized training (SPLP Exhibit No. 2 at N.T. 589-590), the evidence in this case is substantial to show there have been insufficient public outreach meetings in Cumberland County. N.T. 129, 126, 132, 136-148, Complainant Exhibit Nos. 10 and 11. Sunoco is avoiding media presence and potential litigation and has cancelled at least one public meeting at Lower Frankford Township and another meeting in the Borough of Carlisle was cancelled for unknown reasons. Sunoco's excuses do not constitute good cause for cancellation, especially on short notice within 24 hours of a scheduled public meeting.
I.D. at 34.

Although, as Sunoco argues, the applicable federal regulations do not require Sunoco's attendance at any public outreach meeting, Section 1501 of the Code *does* require that the Company act in a reasonable manner in the performance of its public outreach duties. In this case, the Company cancelled its attendance at a scheduled public outreach meeting at which the Complainant and county officials were in attendance, providing less than 24-hours notice of the cancellation. The Company did not offer a valid excuse for the short notice or reasons for cancelling, in addition to which the ALJ concluded there have been insufficient public outreach meetings in Cumberland County. On that basis, the ALJ concluded Sunoco's failure to attend the scheduled public outreach meeting in Cumberland County was unreasonable. The ALJ then concluded it was reasonable to require Sunoco's attendance at one public outreach meeting in Cumberland County and directed that, absent exigent circumstances, Sunoco schedule and attend, at a minimum, one such public outreach meeting. We agree.

However, given the present public health concerns due to the COVID-19 pandemic, we shall expressly provide that the public outreach/education meeting be conducted in accordance with applicable guidelines from the Commonwealth of Pennsylvania and the Center for Disease Control, allowing for virtual participation, provided the meeting remains open to public participation and viewing.

***18** Based on the forgoing discussion, we shall grant Sunoco's Exception Nos. 4, 6 and 8, in part, and deny them, in part. We shall direct that the relief directed by the Initial Decision's Ordering Paragraph Nos. 7 and 8, be adopted, and that the relief directed by Ordering Paragraph Nos. 9-12 be denied as matter more appropriately addressed under the present rulemaking at *Notice of Proposed Rulemaking Regarding Hazardous Liquid Public Utility Safety Standards at 52 Pa. Code Chapter 59*, Docket No. L-2019-3010267 (Order entered June 13, 2019)

With respect to Sunoco's Exception No. 10, averring that the ALJ committed an error of law by admitting various hearsay documents, including Complainant's Exhibits Nos. 7, 9 12, 13, 14 15, 18, 23, and Complainant Cross Exhibit 1, we shall deny the Exception.

As discussed *supra*., under our discussion of the alleged errors of fact, the presiding ALJ retains broad authority to oversee and rule on the scope of and admissibility of evidence in a proceeding, as set forth in statute at Section 331(d)(3) of the Code, 66 Pa. C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and Commission Regulations, including: at Sections 5.483 (pertaining to authority of presiding officer); 5.403 (pertaining to control of receipt of evidence); 5.103 (pertaining to authority to rule on motions). Where, as here, the alleged error in admission of hearsay is not asserted to be the basis for a

material finding in the determination of any issue, the Commission will not engage in a review of the ALJ's evidentiary rulings where the allegation amounts to harmless error. Therefore, we shall deny Sunoco's Exception No. 10.

Finally, with respect to Sunoco's Exception No. 11, asserting that the ALJ misapplied the language of the 49 CFR § 195.440 to ME1, since ME1 was constructed prior to the enactment of the regulation, we shall deny the Exceptions.

Sunoco asserts that 49 CFR § 195.440 applies only to pipeline constructed after adoption of the federal regulations, and therefore, the ALJ's application of the regulation to ME1, which was constructed prior to the adoption of the regulation at issue, amounts to retroactive application of the regulation, and should be reversed. We disagree.

We agree with the ALJ's analysis regarding the applicability of the public awareness provisions of 49 CFR § 195.440 to ME1, wherein the ALJ explained:

Portions of ME1 have been inspected, repaired, replaced, and expanded continuously since 1931 and the design, purpose and content of ME1 changed this past decade from transporting primarily petroleum products like diesel fuel and heating oil from the Marcus Hook Facility along the Delaware River to the western portions of the State, to transporting propane and ethane under higher pressures from the western portion of the state to the Marcus Hook Facility. Considering these factors, the Pipeline Safety Act requirements should apply to ME1 as well as ME2 and ME2X. Thus, I find that when the pipeline began transporting highly volatile liquids in 2014, Part 195 covered and applied to ME1. See 49 CFR § 195.1(a)(1). As ME1 was transporting HVLs during the period relevant to the instant Complaint proceeding and continues to transport HVLs, Part 195 may be generally applied to the facts in the instant case unless there is a specific and express grandfather clause to a specific section of Part 195. ***19** I.D. at 24-25.

Upon review of the language of Part 195, we conclude that Sunoco's proposed restrictive reading of the statutory language is incorrect. We further conclude that the ALJ's analysis of the language was correctly applied in this case to conclude that Sunoco is obligated to meet the minimum standards required by Part 195. Accordingly, we shall deny Sunoco's Exception No. 11, and adopt the ALJ's conclusion that 49 CFR Part 195 is applicable to ME1 ME2 and ME2X, including the public awareness and outreach provisions.

Conclusion

Based upon our review of the record and the applicable law, we shall grant Sunoco's Exceptions, in part, and deny them, in part, and adopt the Initial Decision, as modified by this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by Sunoco Pipeline, L.P., on January 9, 2020, are granted, in part and denied, in part, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Elizabeth H. Barnes, issued on December 20, 2019, at Docket No. C-2018-3004294, is adopted, as modified by this Opinion and Order.

3. That the Formal Complaint filed on August 10, 2018, by Wilmer Baker versus Sunoco Pipeline, L.P., at Docket No. C-2018-3004294, is granted, in part, and denied in part, consistent with this Opinion and Order.

4. That within thirty (30) days of the date of entry of a Final Order, Sunoco Pipeline, L.P. shall pay a civil penalty in the amount of $1,000 by certified check or money order made payable to “Commonwealth of Pennsylvania” and sent addressed as follows:

Secretary Rosemary Chiavetta

Pennsylvania Public Utility Commission

Commonwealth Keystone Building, Second Floor

400 North Street

Harrisburg, PA 17120

5. That Sunoco Pipeline, L.P. is directed to contact the Lower Frankford Township Supervisors and Cumberland County Commissioners within thirty (30) days of the date of entry of a Final Order for the purpose of scheduling a public awareness/ education meeting to be held in Cumberland County and conducted in accordance with applicable guidelines from the Commonwealth of Pennsylvania and the Center for Disease Control, allowing for virtual participation, provided the meeting remains open to public participation and viewing.

6. That absent exigent circumstances, Sunoco Pipeline, L.P. is directed to participate at the scheduled meeting referenced in Ordering Paragraph No. 5.

7. That this proceeding at Docket No. C-2018-3004294 be marked closed.

Footnotes

1 The Complaint was served upon the Respondent Company on August 27, 2018. I.D. at 2.

2 Sunoco did not raise as a preliminary objection lack of standing until the briefing stage in this proceeding.

3 Ms. Marcille-Kerslake's Petition to Intervene was denied on procedural grounds after oral argument held at the evidentiary hearing. However, Ms. Marcille-Kerslake was given an opportunity to file an *Amicus Curiae* brief by the main brief deadline, which she did. I.D. at 4, N.T. 387-388.

4 We note that on March 11, 2020, Sunoco filed a Motion to Strike portions of the Complainant's Replies which Sunoco asserted included arguments and facts not in evidence in the record below. On March 31, 2020, the Complainant filed an Answer to the Motion disputing Sunoco's allegations. It is well-established that parties cannot introduce new evidence at the exceptions stage. *Application of Apollo Gas Co.*, 1994 Pa. P.U.C. Lexis, at *8-14 (Order entered February 10, 1994) (*Apollo Gas*). If found to be information introduced for the first time in the Complainant's Replies to Exceptions, such information is not in the record and is therefore, extra-record evidence which cannot be admitted into the record at this current procedural stage of the case. However, because we do not rely in the alleged extra-record evidence in our consideration and disposition of this matter, we conclude that Sunoco's Motion to Strike is moot, and shall make no *Apollo Gas* determination on the admissibility of the alleged extra-record evidence.

5 In formal complaint proceedings, the Commission, not the ALJ, is the ultimate fact-finder; it weighs the evidence and resolves conflicts in testimony. When reviewing the initial decision of an ALJ, the Commission has all the powers that it would have had in making the initial decision except as to any limits that it may impose by notice or by rule. *Milkie*, 768 A.2d at 1220, n. 7 (citing, *inter alia*, 66 Pa. C.S. § 335(a)).

6 We acknowledge that the format of the Complainant's Replies to the Exceptions does not strictly comply with the format prescribed under Section 5.535 of our Regulations, 52 Pa. Code § 5.535. Nevertheless, particularly because the Complainant is appearing *pro se*, we will accept the Replies to Exceptions as filed, pursuant to Section 1.2(a) and (d) of our Regulations, 52 Pa. Code § 1.2(a) and (d), in order to secure a just, speedy, and inexpensive determination.

7 We further direct that the mention of, now deleted, Ordering Paragraph No. 9 be deleted from Ordering Paragraph No. 13, for compliance purposes.

End of Document

2015 WL 664226 (Pa.P.U.C.)

Ronald P. Harper, Jr.
v.
PPL Electric Utilities Corporation

Docket No. F-2014-2422449

Pennsylvania Public Utility Commission

January 27, 2015
INITIAL DECISION

Barnes, Administrative Law Judge.BY THE COMMISSION:

HISTORY OF THE PROCEEDING

***1** Ronald P. Harper, Jr. (Complainant or Mr. Harper) filed a formal complaint against PPL Electric Utilities Corporation (Respondent or PPL) on May 12, 2014. [1]

Complainant seeks relief in the form of a payment arrangement. Complainant further seeks civil penalties against PPL for violating Commission regulations by: 1) erroneously terminating his electric service on September 13, 2013 and April 21, 2014, respectively; and 2) refusing to comply with Complainant's request that he not be telephoned because he has Posttraumatic Stress Disorder [2] (PTSD), but rather communicated to through writing in accordance with the Americans With Disabilities Act (ADA). Complainant requests the Commission direct an investigation into PPL's compliance with the ADA, and direct PPL train its staff to comply with the ADA.

On May 21, 2014, the Complaint was served upon PPL. On May 22, 2014, Kimberly Krupka, Esquire entered her appearance for PPL.

On June 9, 2014, PPL served its Answer admitting it terminated Complainant's service on April 21, 2014 for non-payment of $7,920.56 due and owing on Mr. Harper's account. Service was restored on April 23, 2014. PPL denies the termination was erroneous or that it violated any regulations or the ADA in its communications with Complainant. PPL denies Complainant is entitled to a further payment arrangement.

On June 17, 2014, a Hearing Notice was issued assigning this case to me and scheduling an in-person evidentiary hearing on July 31, 2014. On June 20, 2014, I issued a Prehearing Order. On July 23, 2014, the hearing was rescheduled to August 26, 2014. On August 20, 2014, Graig M. Schultz, Esquire, entered his appearance for PPL. On or about August 22, 2014, I received an e-mail request from Graig M. Shultz, Esquire, counsel for PPL, requesting that he and his witness appear by telephone at the hearing scheduled for August 26, 2014. In response to this e-mail, I e-mailed Mr. Harper and Mr. Shultz advising the parties that due to Mr. Shultz' request, I would like to convert the hearing to a telephonic hearing. Mr. Harper objected to a telephonic hearing and moved for a continuance stating that he was seeking counsel to represent him. The motion for continuance was unopposed and the hearing was rescheduled by notice dated August 26, 2014, for October 27, 2014 as an in-person hearing.

***2** On October 17, 2014, PPL pre-served PPL Hearing Exhibits Nos. 1 through 4B upon Complainant and the presiding officer through regular mail. The hearing was held on October 27, 2014. The record was held open until the transcript was filed, giving Complainant additional time to file a post-hearing exhibit regarding his income for 2014, his brother-in-law's drivers license, and/or medical documentation, if he desired. N.T. 202 — 203. Complainant did not file any post-hearing exhibits. A 203 page transcript was filed on November 18, 2014. The record closed on November 18, 2014. This case is ripe for a decision.

FINDINGS OF FACT

1. Complainant in this case is Ronald P. Harper, Jr. N.T. 5.

2. Respondent in this case is PPL Electric Utilities Corporation, an electric distribution company operating in the Commonwealth of Pennsylvania.

3. Complainant currently resides alone at the service property, 1 Harper Lane, Stevens, Pennsylvania. N.T. 5.

4. Complainant is 50 years old and claims he has been diagnosed with and suffers from Posttraumatic Stress Disorder for six years since he was 44 years old. N.T. 88-91, 132-133.

5. On or about July 10, 2013, Mr. Harper received a notice of termination letter from PPL. N.T. 104-106. PPL Exhibit 2.

6. On July 15, 2013, PPL received a medical certification valid for 30 days regarding Mr. Harper's brother-in-law, Christopher Blakesley, who was temporarily residing at the service property. N.T. 52, 76, 106. PPL Exhibit 2.

7. Mr. Harper entered PPL's website on or about July 22, 2013 to update his account information to change his e-mail address. N.T. 146.

8. Mr. Harper or someone using his credentials entered PPL's website on July 24, 2013 and selected that there was no medical condition in the household and the system provided energy assistance information to him. N.T. 147.

9. On August 27, 2013, PPL sent Mr. Harper a service termination letter for nonpayment of an arrearage of $7,054.19, with a proposed shut-off date of on or after September 9, 2013. N.T. 51-55. PPL Exhibit 2 at 4.

10. On September 12, 2013, PPL noted in its records that the previous medical certification received needed validation because it was not for the customer and not for a permanent resident of the service property; therefore, the order was made on September 12 to cut service. N.T. 59, 75-76, 81, 148, 155-156. PPL Exhibit 2.

11. On September 15 or 16, 2013, Mr. Harper's service was terminated; but a cut-in order was issued September 16, 2013 because Mr. Harper filed an informal complaint at the Bureau of Consumer Services (BCS) at Case No. 3149300 and a renewal of the 30-day medical certification was provided to PPL by Jeanette (registered nurse) after termination. N.T. 60-65, 80, 107. PPL Exhibit 2.

12. When service was terminated on September 15 or 16, 2013, the last payment PPL had received from Complainant was on September 24, 2009 in the amount of $250, and prior to that was June 27, 2008 in the amount of $147.88. PPL Exhibit 4B.

***3** 13. On September 16, 2013, service was restored to the service property and a $50 reconnection charge was added to Complainant's account. N.T. 156.

14. On September 20, 2013, BCS issued a Commission-ordered payment arrangement based upon the criteria that 4 adults and one minor child were residing at 1 Harper Lane, Stevens, Pennsylvania, and there was a combined monthly income of $6,303 per month, which is between 250% — 300% the federal poverty guidelines, placing the customer at a level three pursuant to 66 Pa.C.S. § 1405(b)(3), and giving the customer 1 year to pay his arrearage of approximately $4,000.

15. On September 23, 2013, Mr. Harper was referred to OnTrack via e-mail correspondence and notified to “be on the lookout for a gold envelope” in his regular mail which contained an OnTrack application. N.T. 157.

16. On September 27, 2013, Nellie Solivan-Ruth, an employee of PPL, added Mr. Harper's phone number to his account. N.T. 158.

17. In late September, 2013, Mr. Harper sent a facsimile to PPL indicating he wished to communicate through e-mail and not via telephone. N.T. 65-66. PPL Exhibit 2.

18. On October 4, 2013, Nellie Solivan-Ruth, a Customer Service Representative, e-mailed Mr. Harper stating: "We can appreciate your situation. However, you still need to call our office since there is quite a bit of information we need to review with you. Again, we have a credit specialist that needs to speak with you since as I mentioned before, with your current situation, I cannot help you the way our credit specialist can. We do want to help you. I can even have our Rep call you to avoid having you go through the automated system. We just need your phone number. Sincerely, Nellie, Customer Service, PPL E.U." Complainant's Exhibit 2.

19. On October 11, 2013, Complainant filed another informal complaint at BCS Case No. 3160079, complaining that the company would not communicate to him through his preferred form of communication, e-mail or facsimile. N.T. 108.

20. A BCS Decision was rendered on October 30, 2013, reinstating the payment arrangement that had been ordered on or about September 20, 2013.

21. On October 31, 2013, Customer Service Representative Bonnie entered in PPL's account records that Mr. Harper was to pay $779 per the PUC Commission-ordered payment agreement issued in September. N.T. 159. PPL Exhibit 1.

22. Mr. Harper was to pay the monthly budget billing amount plus $644 beginning in November, 2013. N.T. 160.

23. Other than a $300 payment posted on October 25, 2013 and $435 posted on November 26, 2013, there were no more payments made on the account; therefore, Mr. Harper breached his Commission-ordered payment agreement. N.T. 161. PPL Exhibits 3, 4A and 4B.

24. Mr. Harper attempted to efile his appeal of the BCS Decision on November 11, 2013, but this attempt was rejected by the Commission's Secretary who sent him a subsequent letter on April 17, 2014.

***4** 25. PPL was not copied on the April 17, 2014, letter from the Commission's Secretary to Mr. Harper regarding his attempt to file an appeal of a BCS decision. N.T. 163.

26. On March 7, 2014, PPL sent Mr. Harper an e-mail to remind him to apply for a LIHEAP Crisis Program. N.T. 158.

27. On April 3, 2014, PPL sent a standard residential 10-day termination notice with a proposed termination date of on or after April 15, 2014, for non-payment of $7,920.56, a delinquent account balance. N.T. 159, 161-162.

28. On or about April 8, 2014, Mr. Harper e-mailed Mr. Worthington expressing his belief that he had filed a formal complaint. N.T. 164, 181.

29. Mr. Worthington checked PPL's records and contacted one of the BCS investigators and found nothing to substantiate Mr. Harper's claim that he had filed a formal complaint and responded same to Mr. Harper through e-mail. N.T. 164, 181-183.

30. On April 12, 2014, PPL posted a 72-hour notice of termination at the service property. N.T. 162.

31. As of April 21, 2014, PPL had not received formal notice that a formal complaint had been filed at the Commission appealing the BCS decision. N.T. 162.

32. On April 21, 2014, a PPL technician went to the service property to terminate Mr. Harper's service for lack of payment. N.T. 27, PPL Exhibit 2.

33. Mr. Harper argued with the technician that his service should not be terminated because Mr. Harper had a letter from the Commission dated April 17, 2014, which he showed the technician.

34. The letter from the Commission's Secretary dated April 17, 2014, informed Mr. Harper that on November 11, 2013, the Commission rejected Mr. Harper's attempt to appeal a BCS determination through e-filing.

35. The letter dated April 17, 2014 further instructed Mr. Harper that in order to appeal the BCS determination, he must sign and submit the attached signature page of the formal complaint form that he attempted to e-file. The Commission would consider the appeal timely if the signature page provided an original signature and was filed by May 15, 2014.

36. On April 21, 2014, the service technician at the service property contacted the metering supervisor, Sharon Brooks, who reported back to the technician that there was no formal notice of a pending complaint filed by Mr. Harper in PPL's system. N.T. 32-33. PPL Exhibit 2.

37. On April 21, 2014, Mr. Harper's service was terminated. N.T. 162.

38. The technician cut the power on April 21, 2014, informing Mr. Harper that there was nothing on record that there was a complaint filed. PPL Exhibit 2.

39. At the time PPL terminated service, it had knowledge that two BCS decisions had been rendered and the cases closed on September 20, 2013 and October 30, 2013 respectively. N.T. 166.

40. After termination on April 21, 2014, the Commission's Secretary had a conversation with Tim Dahl, a supervisor at PPL, and as a result of the conversation, PPL restored service because the Secretary had given Mr. Harper until May 15 to properly file his appeal; therefore, if no complaint was properly filed by May 15, then termination would proceed again. N.T. 34-35; 165-166. PPL Exhibit 2.

***5** 41. On April 22, 2014, a PPL service technician tried to restore service but was unable to unblock the meter due to too much load on it. No one answered a knock on the door of the service property and there was no phone number on file to call the customer on April 22, 2014. N.T. 167.

42. PPL's service technician returned on April 23, 2014, and restored power, and a $30 reconnection fee was added to Mr. Harper's account. N.T. 168. PPL Exhibit 1.

43. Mr. Harper reattempted filing an appeal of the BCS Decision on May 12, 2014, and his filing was accepted by the Commission's Secretary. Complaint.

44. PPL received formal service of the complaint on May 21, 2014, and the complaint contained a mobile phone number as well as Mr. Harper's e-mail address in the contact information, although it states “use this to contact!” next to the e-mail address. Complaint at 1.

45. In an attempt to negotiate a payment arrangement with Mr. Harper, on May 22, 2014, Mae F. Dorris, a customer service representative of PPL, left a voicemail message on Mr. Harper's mobile phone requesting he telephone her to discuss Mr. Harper's formal complaint. N.T. 47-48.

46. On or about May 23, 2014, Mae F. Dorris mailed Mr. Harper a letter requesting he telephone her to negotiate a payment agreement. Complainant's Exhibit 1, N.T. 39.

47. Julie Krzywiec also left a message on Mr. Harper's voicemail on June 9, 2014, in an attempt to negotiate a payment agreement with Mr. Harper. N.T. 17-18, 114. PPL Exhibit 2.

48. On June 9, 2014, Mae F. Dorris again left voice messages on Mr. Harper's mobile phone in an attempt to negotiate a payment agreement. N.T. 16-17, 48. PPL Exhibit 2.

49. These phone calls and messages happened after Mr. Harper had requested by facsimile on September 20, 2013, that he not be telephoned, but rather communicated to through e-mail and after he filed his formal complaint complaining that the company had violated the ADA by telephoning him instead of corresponding through written correspondence. PPL Exhibit 2.

50. Dennis R. Worthington is a Senior Quality Assurance Specialist at PPL. N.T. 11.

51. Mr. Harper is the only customer out of approximately 1.4 million customers Mr. Worthington is aware of who objects to communications through telephone. N.T. 67.

52. On June 9, 2014, Mr. Harper's mobile phone number was removed from his account per Dennis Worthington's instructions because Mr. Harper did not want the company calling him for any reason. PPL Exhibit 2.

53. Mr. Worthington intervened as supervisor of quality assurance to direct Mae Dorris to remove Mr. Harper's phone number, and Mr. Worthington instructed Ms. Dorris to read the entire complaint before phoning a customer who is requesting a payment agreement. N.T. 20.

54. PPL has a mechanism to receive communications from customers through e-mail, but the company does not negotiate payment agreements through e-mail. N.T. 67.

55. PPL does not negotiate payment agreements through e-mail because service could be in jeopardy, and exchanging e-mails can take hours or days involving basic questions regarding a customer's finances and household needs before a payment agreement can be offered. N.T. 68.

***6** 56. Service could be terminated while there is an exchange of e-mails going on between the customer and PPL. N.T. 68.

57. PPL has taken corrective action to prevent customer service representatives from telephoning Mr. Harper in the future regarding his account. N.T. 20.

58. PPL has a call center so the first way it conducts business with its customers is through the telephone. N.T. 22.

59. Telephone, e-mail, and regular mail are three ways a customer can communicate with PPL. N.T. 23.

60. A customer may communicate through interfacing with PPL's website and through an Interactive Voice Response (IVR) system at any hour of the day. N.T. 23, 84, 144.

61. Any time a customer telephones PPL's office, he or she is presented with options including setting up a payment agreement for a delinquent account through IVR by answering a series of questions regarding household size and income. N.T. 140.

62. If a customer had previously established a payment agreement, the IVR system would look to repair a broken agreement, ask for a catch-up amount, and the customer does not have to speak to a live person with IVR, but may interact using his phone's keypad. N.T. 141.

63. PPL's website offers options for a customer to make a payment agreement by answering questions regarding income and household size by entering data on a computer. N.T. 142.

64. Mr. Harper complained there is no option with IVR or the website other than to pay a lump sum catch up amount even if he can't pay it. N.T. 142.

65. Complainant felt harassed and overwhelmed by telephone calls from PPL customer service representatives and letters requesting he telephone PPL to negotiate a payment agreement. N.T. 88, 134-135.

66. It is easier for Complainant to ignore e-mails, or to review them in time and respond, than it is for Complainant to answer ringing telephones, or knocks at doors which give him more anxiety. N.T. 135-136.

67. Complainant does not dispute that he owes PPL $9,112 for services rendered. N.T. 89-92, 102-103.

68. Complainant requests a payment arrangement whereby he pays his monthly budget bill of $57.69 plus $200 per month towards the arrearage until it is current. N.T. 92.

69. Complainant has been self employed as a political consultant for 20 years. N.T. 93.

70. Complainant has been out of business for the past six years and is trying to get back in it and do the things he used to be able to do. N.T. 92-94.

71. Complainant built his house at 1 Harper Lane, supported a family of seven and was more able to manage his finances and pay his bills in a timely manner until approximately six years ago. N.T. 91-94.

72. Complainant wants to pay the arrearage and does not want to apply for free money and assistance money because he does not believe in it. He wants to work and earn and pay the money back. N.T. 91.

73. Complainant testified his current gross income for 2014 was approximately $6,000 for 10 months as of the date of the hearing in October, which averages approximately $600 per month for 2014, although Complainant did not provide written documentation to support this claim of income. N.T. 94, 122-125.

***7** 74. The BCS Commission-ordered payment arrangement issued September 16, 2013 was based upon the criteria of a household income of $6,303 per month for 4 adults and one minor child, or an annual household gross income of 75,636 for 5 persons. N.T. 126, PPL Exhibit 4A and 4B.

75. The BCS Commission-ordered payment arrangement provided for repayment of the arrearage amount within 12 months (a level 3 customer requirement) instead of 60 months, which a level one customer would be entitled to. PPL Exhibit 4A-4B.

76. Complainant was never enrolled in the OnTrack program and his arrearage does not consist of any Customer Assistance Program (CAP) arrearage. PPL Exhibit 4B.

77. Complainant's five children are all over the age of 18 and do not reside with Complainant. N.T. 91-95.

78. Complainant resides at the service property alone with his dog. N.T. 95.

79. Complainant attempted to use PPL's website to communicate and had difficulty with it. N.T. 97.

80. Complainant did not attempt to use the Interactive Voice Response (IVR) system to negotiate a payment arrangement because it involved using the telephone. N.T. 119, 140.

81. Complainant never initiated a telephone call to PPL to negotiate a payment arrangement. PPL Exhibit 4A and 4B.

82. Complainant sent a facsimile to PPL and the Commission in September, 2013, complaining about his power being shut off and that despite his repeated demands to be contacted through writing, PPL demands he telephone them requesting PPL answer his facsimile through e-mail instead of calling him. Complainant requested assistance from the Commission through e-mail. N.T. 98. Complainant's Exhibit 4.

83. In response to the facsimile in September, 2013, Thomas Brandon, an employee in the Commission's Bureau of Consumer Services, telephoned Complainant, which annoyed Complainant. N.T. 98-99. Complainant's Exhibit 4.

84. Although Mr. Harper was referred to PPL's OnTrack assistance program, he never completed the application process because it would have involved calling a toll free phone number. N.T. 99, 108-113. Complainant Exhibit 4.

85. Mr. Harper has made two payments to PPL since the September 20, 2013 Commission-ordered payment arrangement, one on October 25, 2013 in the amount of $300 and one on November 26, 2013, in the amount of $435. N.T. 101. PPL Exhibit 1.

86. There is no evidence to suggest that Mr. Harper ever received LIHEAP assistance in paying his arrearage. PPL Exhibit 1.

87. Complainant's roommate, brother-in-law, sister, and a minor child were living with Complainant in April — September 2013 on a temporary basis. N.T. 120.

88. In September 2013, there were four adults and one minor child residing at the service residence and one of the adults had a medical condition. N.T. 62, 120.

89. Complainant's roommate, Ken, had been paying Complainant rental income in 2013; however, he moved out of the service property on February 20, 2014, and discontinued his rental payments. N.T. 126, 137.

***8** 90. Complainant's brother-in-law, sister and the minor child moved out of his house on or about Sunday, April 13, 2014, the day after Complainant's father passed away. N.T. 138.

91. On or about October 3, 2014, Mr. Harper received written notice from PPL that his present budget amount was higher than needed to cover his then current electric use; therefore, PPL decreased Mr. Harper's budget amount to $10 per month. The letter further provided a toll free number Mr. Harper could call if he had any questions about budget billing. The letter head provided a fax number. N.T. 168-169. Complainant's Exhibit No. 3.

92. Complainant was enrolled in PPL's Budget Billing Plan during the time period in question; however, on or about October 3, 2014, Complainant has a deferred credit of $427.04. N.T. 168-169.

93. Mr. Harper still has an overdue balance even though he has a credit on his budget. N.T. 169.

DISCUSSION

As the proponent of a rule or order, Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code. 66 Pa.C.S. § 332(a). "Burden of proof" means a duty to establish one's case by a preponderance of the evidence, which requires that the evidence be more convincing by even the smallest degree, than the evidence presented by the other side. *Se-Ling Hosiery, Inc. v. Margulies,* 364 Pa. 45, 70 A.2d 854 (1950). To satisfy the burden of proof against a utility, a complainant must show that the utility is responsible or accountable for the problem described in the complaint, *Feinstein v. Philadelphia Suburban Water Company,* 50 Pa. PUC 300 (1976), or that the utility has violated either its duty under the Public Utility Code or the orders or regulations of the Commission. 66 Pa.C.S. § 701.

To establish a sufficient case and satisfy the burden of proof, a complainant must show that Respondent public utility is responsible or accountable for the problem described in the complaint. *Patterson v. Bell Telephone Company of Pennsylvania,* 72 Pa. PUC 196 (1990); *Feinstein v. Philadelphia Suburban Water Company,* 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n,* 134 Pa. Cmwlth. 218, 221-222, 578 A.2d 600, 602 (1990); alloc. den., 602 A.2d 863 (1992). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Commonwealth, Pa. Pub. Util. Comm'n,* 67 Pa. Cmwlth. 597, 447 A.2d 1100 (1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n,* 154 Pa. Cmwlth. 21, 623 A.2d 6 (1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n,* 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review,* 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center,* 85 Pa. Cmwlth. 23, 480 A.2d 382 (1984).

***9** Under these principles, Complainant, as the party seeking relief, has the burden of proof. In the instant case, Complainant has the burden of proving, by a preponderance of the evidence, that Respondent is responsible or accountable for the problems described in his complaint, i.e. that the 10-day termination notices were in error, the terminations on September 15 or 16, 2013 and April 21, 2014 were in error, and that he is entitled to another Commission-ordered payment arrangement for the outstanding balance. See, *Feinstein, supra.*

American With Disabilities Act

Complainant contends PPL violated the Americans With Disabilities Act (ADA) when its customer services representatives repeatedly telephoned him and left voicemail messages in addition to mailing him letters requesting he telephone them to negotiate payment arrangements after Complainant filed informal and formal complaints at the Commission. Mr. Harper claims that the dozens of phone calls which he received from PPL were a form of criminal harassment. N.T. 199. Complainant contends the customer service representatives who contacted him knew or should have known that he had explained his condition and requested he be contacted only through written communication i.e. by electronic mail or facsimile. Complainant contends PPL could have negotiated a company payment arrangement with him by electronic mail or via facsimile prior to the termination of his electric service.

Complainant wants PPL to have a system in place for persons similar to him suffering from PTSD, the elderly, the hard of hearing, or other people who do not want others helping them, but would rather be independently able to read an offer and make their own decisions. N.T. 197-198. Complainant contends Mr. Worthington had Mr. Harper's e-mail address in early April, 2014, but still the customer service representatives continued to phone him in May and June, 2014, leaving him voicemail messages instead of communicating through e-mail.

PPL contends it has many ways Complainant could have communicated with PPL to negotiate a payment arrangement including: through its IVR or through its website. Mr. Harper could have applied for OnTrack assistance by filling out the application and providing income information with his application. He could have designated an adult residing at the service property to telephone PPL and negotiate a payment arrangement on his behalf. An adult designee could have also telephoned for LIHEAP assistance and OnTrack assistance on Complainant's behalf. PPL contends Mr. Harper was capable and willing to use the web-

based interface mechanism; however, he was dissatisfied with the amount PPL's website computed and told him to pay, and Mr. Harper elected not to call a customer service representative to discuss alternative payment arrangements.

PPL argues that although its customer service representatives, Mae F. Dorris and Julie Krzywiec, did attempt to contact Mr. Harper via telephone after the formal complaint was filed, none of the phone calls were in a threatening tone, none demanded immediate payment, and none threatened termination of service. Therefore, none of the calls constituted harassment. Rather, they were an attempt to negotiate a company payment arrangement with an existing customer. Further, Mr. Worthington stepped in to assure quality service and took action to correctively train certain customer service representatives and to remove Mr. Harper's mobile phone number from his account to ensure that Mr. Harper is not telephoned by representatives in the future. Also, PPL did communicate with Complainant through e-mail and regular mail as was requested. PPL contends none of the language in Complainant's Exhibits 1-3 was threatening, offensive, harassing, or improper. Therefore, none of these statements constituted ""unreasonable service" within the meaning of Section 1501 of the Public Utility Code, 66 Pa.C.S.§ 1501.

Disposition

***10** It is well settled that the Commission may not exceed its jurisdiction and must act within it. *City of Pittsburgh v. Pa. Pub. Util. Comm'n.,* 43 A.2d 348 (Pa. Super 1945) (*Pittsburgh*). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano, 235 A.2d 602 (Pa. 1967) (Roberts).* Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. Pa. State Police,* 619 A.2d 390 (Pa. Cmwlth 1992) (*Hughes*). As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. §§ 101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell,* 383 A.2d 791 (Pa. 1977) (*Feingold*). The Commission does not have jurisdiction to enforce the ADA or to even determine whether Mr. Harper has a disability or impairment which substantially limits his major life activities as defined by the Act at 42 U.S. Code § 12102, *et. seq.*

The Commission is not a federal court, which is designed to make such determinations regarding violations of the Americans With Disabilities Act.[3] *See also*, *MidAtlantic Power Supply Assoc. v. PECO Energy Co.,* Docket No. P-00981615, 1999 Pa PUC LEXIS 30 (entered May 19, 1999) (*MAPSA*) (wherein the Commission did not have jurisdiction to find a violation of the federal Unfair Trade Practices Act). Accordingly, I find in favor of Respondent on this issue.

Reasonableness of Service

However, the facts as averred raise an issue regarding whether after Mr. Harper requested communications in writing, if the customer service representatives' phone call messages and mailings requesting Mr. Harper telephone PPL back to negotiate a payment arrangement constitute unreasonable service under the Pennsylvania Public Utility Code, 66 Pa.C.S.§ 1501. An electric utility's "service" within this section is not limited to the distribution of electrical energy, but also includes any and all acts that relate to that function. *West Penn Power Co. v. Pa. Pub. Util. Comm'n,* 578 A.2d 75, (Pa.Cmwlth. 1990). By "unreasonable service" the standard does not require perfect service to the individual subjective expectations of each and every customer. Rather, an objective "reasonable person" standard is inferred.

***11** Complainant claims he suffers from and was medically diagnosed with Posttraumatic Stress Disorder (PTSD); however, there was no corroborative medical documentation presented to substantiate Complainant's testimony that he had been medically diagnosed with PTSD. However, reviewing the record as a whole, I find Complainant's testimony credible that he has PTSD. It is unclear to what extent this condition interferes with Complainant's ability to carry on conversations via telephone. Complainant was articulate and showed no hesitation or shyness in conversing face-to-face at the in-person hearing. However, I am persuaded by the evidence in the form of Complainant's testimony, actions, exhibits and refusal to use the telephone, to find he did attempt to avoid communications by telephone, and expressed a preference to PPL staff and Commission staff that he be contacted in person or in writing. There is insufficient evidence to find Complainant was incapable of communicating via telephone,

but there is sufficient evidence to find he had anxiety about such communications, especially when he was facing a possible termination of electric service for inability to pay.

The key issue is whether the telephonic communications by Mae Dorris and Julie Krzywiec to Complainant would have been offensive to a reasonable person, sufficient to constitute a violation of Section 1501. . *Pub. Util. Comm'n v. Best Limousine Company, Inc., t/a Dave's Limousine Service,* A-00105095C9902, (Opinion and Order adopted July 13, 2000). The instant case may be distinguished from the *Best Limousine* case wherein a racial slur was uttered by a driver of a limousine in the presence of a customer, and the Commission found the act was done during the ordinary course of business for his employer, Best Limousine Company, Inc., and a reasonable listener would have been offended by the remark. Thus, the Commission found a violation of Section 1501 occurred, and it imposed a $250 civil penalty upon the employer. Unlike the *Best Limousine* case, in the instant case, there is no racial slur averred in the Complaint. Rather, Complainant argues the dozens of phone calls he received including automated calls in the midst of an impending service termination and the termination itself in April, 2014 was traumatic. N.T. 115-117.

Generally, the credibility of a witness is a question of fact to be determined by the presiding officer. In *Danovitz v. Pornoy,* 161 A.2d 146 (Pa. 1960), the Supreme Court of Pennsylvania recognized the purview of a presiding judge as follows:
In determining the weight to be attached to the testimony of a witness it is proper to consider his appearance, general bearing, conduct on the stand, demeanor, manner of testifying, such as candor or frankness, or the clearness of his statement, and even the intonation of his voice. So the positiveness of the witness, as well as his uncertainty as to the facts as to which the testimony is given may be considered.

***12** 161 A.2d 149.

Mr. Harper appeared at the hearing to be neatly dressed, alert, intelligent, and candid, with no physical disabilities regarding his eyesight, hearing, or his ability to walk or speak. Although he was a *pro se* litigant, he appeared confident in his ability to represent himself. He asked many questions of Mr. Worthington on cross examination, and he brought exhibits with him. He also brought with him his mobile telephone, which he used to play a voicemail message of Mae Dorris during the hearing.

I find Mr. Harper's testimony to be credible that he has heightened anxiety in communicating via telephone and that a knock on his door can be traumatizing to him. N.T. 115-117. It is not clear to me whether Mr. Harper always has difficulty communicating via telephone, or just during the time period his electric service was in jeopardy. The evidence shows Mr. Harper prefers communicating with employees of PPL and employees of the Commission regarding this case either in-person or through written communication, i.e. electronic mail or facsimile. However, the evidence does not suggest that Mr. Harper is hearing impaired or entirely incapable of using a telephone to communicate with others, as Mr. Harper played a voicemail message on his mobile phone of Mae Dorris' message at the hearing, which the court reporter transcribed. I find Mr. Harper's testimony that he is technically savvy as he was educated at a technical institute, worked for a computer consulting company, and has operated a web-based media company for the past 20 years to be credible. N.T. 97. I infer such an occupation would probably involve using the telephone on occasion to communicate.

Complainant has demonstrated an unwillingness to use the phone and claims he was offended by the voicemails of the customer service representatives, which occurred after his formal appeal of the BCS decision was filed on May 12, 2014 and served upon PPL. I also find credible Mr. Harper's testimony that when BCS representative Thomas Brandon telephoned Mr. Harper, this saddened him. N.T. 98-99. Complainant's Exhibit 4. I do not find there is sufficient evidence to show that any of these phone calls or communications to Complainant to be considered sufficiently offensive to a reasonable person such as to constitute a violation of Section 1501. There is no evidence to suggest the language was offensive, disrespectful or threatening. There may have been a mistake or misunderstanding about Mr. Harper's aversion to telephonic communications, but this does not constitute unreasonable service. It is apparent from the complaint form that Mr. Harper completed, that he included his mobile phone number. Complaint. Although, he indicates next to his e-mail address “Use this to contact!” the phone number is also

on the complaint. I don't believe there was any malice intended by the customer service representatives who later attempted to contact Mr. Harper using this phone number.

***13** I am persuaded by Mr. Worthington's testimony that payment arrangements are better negotiated through the web, IVR, or via telephone because service may be in jeopardy and these are more expeditious ways of creating a payment arrangement and avoiding termination than the exchange of facsimiles or electronic mailings, which could take hours or days with the customer.

Further, it was communicated to Mr. Harper that he had options other than speaking directly to a customer service representative about his account. He could have had an adult designee use the phone for him and speak to a customer service representative. He could have used the PPL website or IVR system.

Finally, I find Mr. Worthington's testimony to be credible that he has taken steps at PPL to ensure Mr. Harper is not disturbed by phone calls from PPL's customer service representatives by having Mr. Harper's phone number removed from his account information, and by instructing representatives to more thoroughly read complaints and account notations from prior service representatives. This shows a willingness on the part of the company to accommodate Mr. Harper in the future and to train its employees to be more sensitive and understanding of those with PTSD and their ability to communicate. Accordingly, I find PPL's service was reasonable, and I find no violation of 66 Pa.C.S.§ 1501.

Service Termination on September 15 or 16, 2013

Complainant asserts that the September 15 or 16, 2013 termination was erroneous because a valid medical certification was in effect at the time of termination and it was incumbent upon PPL to investigate whether Christopher Blakely was still residing at 1 Harper Lane when the 10-day Notice was issued, the 72-hour notice was posted, and the service was terminated on or about September 15 or 16, 2013. Mr. Harper argues PPL could have telephoned Mr. Blakely to ask if he was still a resident at the service property, or could have telephoned the doctor or nurse practitioner (Jeanette) for a renewal of the medical certification, but chose not to and this constitutes unreasonable service and an erroneous termination.

Mr. Harper argues the medical certification given to PPL on July 15, 2013 was valid and in full force and effect for 90 days and that the company disregarded it in terminating service on September 15, 2013. Complainant argues PPL has an obligation to protect the person who has the medical certification and the company did not take enough steps to ensure the person who was named on the certificate was not actually residing at 1 Harper Lane. According to Mr. Harper, his brother-in-law was living with him in September, 2013, because the brother-in-law's house was condemned in Lancaster at the time and if PPL would have called his brother-in-law, this would have been relayed to PPL. N.T. 196.

PPL claims it acted reasonably and pursuant to Commission regulations when it terminated service in September, having not seen a renewal or further verification of medical certification, and believing the individual for whom the original medical certification was for was a temporary resident at the service property. As soon as it received additional information including an informal complaint at the PUC on or about September 13 — 16, 2013, PPL restored service. N.T. 191-192.

Disposition

***14** Section 1406 of the Public Utility Code provides in pertinent part:
(a) Authorized termination. — A public utility may notify a customer and terminate service provided to a customer after notice as provided in subsection (b) for any of the following actions by the customer:

(1) Nonpayment of any undisputed delinquent account.

(2) Failure to comply with the material terms of a payment agreement.

***

(b) Notice of termination of service. —

(1) Prior to terminating service under subsection (a), a public utility:

(i) shall provide written notice of the termination to the customer at least ten days prior to the date of the proposed termination. The termination notice shall remain effective for 60 days.

(ii) shall attempt to contact the customer or occupant, either in person or by telephone, to provide notice of the proposed termination at least three days prior to the scheduled termination. Phone contact shall be deemed complete upon attempted calls on two separate days, to the residence between the hours of 7 a.m. and 9 p.m. if the calls were made at various times each day.

***

(f) Medical certification. — A public utility shall not terminate service to premises when a licensed physician or nurse practitioner has certified that the customer or a member of the customer's household is seriously ill or afflicted with a medical condition that will be aggravated by cessation of service. The customer shall obtain a letter from a licensed physician verifying the condition and shall promptly forward it to the public utility. The medical certification procedure shall be implemented in accordance with commission regulations.

66 Pa.C.S.§ 1406(a)(b) and (f).

The Commission's Regulation at Section 56.114 (regarding length of postponement; renewals of medical certification) provides in pertinent part.
Service may not be terminated for the time period specified in a medical certification; the maximum length of the certification shall be 30 days.

(1) *Time period not specified.* If no length of time is specified or if the time period as not readily ascertainable, service may not be terminated for at least 30 days.

(2) *Renewals.* Certifications may be renewed in the same manner and for the same time period as provided in §§ 56.112 and 56.113 … and this section if the customer has met the obligation under § 56.116 (relating to duty of customer to pay bills).

52 Pa.Code § 56.114.

Section 1407 of the Public Utility Code (regarding Reconnection of Service) provides in pertinent part:
(b) Timing. — When service to a dwelling has been terminated and provided the applicant has met all applicable conditions, the public utility shall reconnect service as follows:

(1) Within 24 hours for erroneous terminations or upon receipt by the public utility of a valid medical certification.

***15** ***

(4) Within 3 days from April 1 to November 30 for proper terminations.

66 Pa.C.S.§ 1407(b)(1) and (4).

A personal opinion, no matter how strongly held, does not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh,* 532 A.2d 12 (Pa. 1987). Complainant's position that he had a valid medical certification in September when PPL issued the 10-day Notice and ultimately terminated service is without merit. There is no record support for his position. The July 10, 2013 medical certification PPL received for Christopher Blakely, Complainant's brother-in-law who was temporarily residing at 1 Harper Lane, Stevens, Pennsylvania, was valid for 30 days, but under the regulations it was incumbent upon the Complainant or Mr. Blakely to recertify through a nurse practitioner or physician after the 30 day period expired and before the termination occurred on September 15 or 16, 2013. 52 Pa.Code § 56.114. PPL acted in compliance with 52 Pa.Code § 56.117 when the initial certification expired in mid-August, and the company issued a termination notice letter on August 27, 2013, for nonpayment of an arrearage of $7,054.19, with a proposed shut-off date of on or after September 9, 2013. N.T. 51-55. PPL Exhibit 2 at 4.

Further, the evidence supports a finding that once PPL received a second medical certification from nurse practitioner Jeanette on September 16, and once an informal complaint had been initiated by Complainant's facsimile sent to the Bureau of Consumer Services and PPL on or about September 16, 2013, PPL reconnected service within 24 hours in compliance with the Public Utility Code and a $50 reconnection charge was added to Complainant's account. 66 Pa.C.S. § 1407(b)(1). N.T. 156. Therefore, I find in favor of PPL on this issue.

Service Termination on April 21, 2014

Additionally, Complainant argues the 10-day notice and later termination on April 21, 2014 was premature as he had appealed the BCS decision in November, 2013 and a complaint dispute was pending at the time his service was terminated on April 21, 2014. Complainant asserts that as long as an appeal is pending, then PPL is prohibited from terminating his service for any reason. Mr. Harper contends that whether he gave a digital signature through e-filing or whether he actually signed a complaint should have no bearing on the timeliness of an appeal. N.T. 199.

PPL contends at the time it terminated service in April, 2014, there was nothing in the record to show Complainant had successfully filed an appeal of the BCS decision or a separate formal complaint at the Commission. PPL contends the issue of whether or not the Commission properly rejected Complainant's attempt to file an appeal of the BCS decision is irrelevant to whether there was an erroneous termination. That is an issue between Complainant and the PUC. The April 17, 2014 letter from the Secretary to Complainant indicates the process for filing a BCS appeal and informs the Complainant that his appeal will be considered timely only if the attached signature form page is signed, dated and returned to the Secretary's Bureau by May 15, 2014. Additionally, the Commission's complaint forms indicate that appeals of BCS decisions must be in writing and mailed to the Secretary's Bureau.

***16** Further, PPL argues it has the right to terminate if the current undisputed bills are not being paid. PPL describes its reconnection on April 23, 2014 as an act out of accommodation for the Commission.

Disposition

Section 56.141 addresses the procedures for a notice of dispute, generally, and more specifically termination disputes and the utility must proceed according to this section. Specifically, Section 56.141(2) states:
"*Termination stayed.* Except as otherwise provided in this chapter, when a termination dispute or complaint has been properly filed in accordance with this subchapter, termination shall be prohibited **until resolution of the dispute or complaint.** However, the disputing party shall pay undisputed portions of the bill. (Emphasis added).

52 Pa.Code § 56.141(2). (Emphasis added).

PPL argues that although Complainant's appeal of the BCS decision was deemed timely as if it had been filed on November 11, 2013, it was not in fact properly filed, served upon Respondent, and actively pending within the meaning of 52 Pa.Code § 56.141(2) until May 21, 2014, after PPL terminated service on April 21, 2014. Because PPL was not served with formal notice of the complaint until May 21, 2014, it was unaware of a formal complaint pending at the time it terminated service on April 21, 2014. PPL could not confirm Mr. Harper's contentions to Mr. Worthington and the service technician that a formal complaint had been filed and a dispute was pending in April, 2014. PPL contends it is irrelevant to a finding of a violation whether or not the Commission's Secretary deemed the appeal of the BCS decision timely when Complainant filed his original signature to the appeal on May 12, 2014. Therefore, the termination was not stayed at the time it occurred on April 21, 2014, despite Mr. Harper's attempts to convey to Mr. Worthington on April 8, 2014 and the service technician on April 21, 2014, that a complaint dispute was pending as evidenced by a Secretarial Letter dated April 17, 2014. The Secretarial Letter acknowledged Mr. Harper's attempt to efile an appeal of the BCS decision, and granted Complainant until May 15, 2014 to file the original signature required by 52 Pa.Code § 1.35(a); however, PPL was not copied on the letter.

Generally, once the Commission issues its final order disposing of the underlying issues/claims raised in the complaint, the matter is no longer pending at the Commission and the termination stay pursuant to 52 Pa.Code § 56.141(2) is automatically lifted. The instant case raises an issue as to whether there was a pending filed complaint to stay a termination within the meaning of 52 Pa.Code §56.141(2) at the time termination occurred on April 21, 2014. Although Complainant attempted to file a formal appeal of the BCS decision in November, 2013, this attempt was rejected by the Secretary of the Commission as evidenced by the Secretarial Letter dated April 17, 2014.

***17** 52 Pa.Code § 1.35(a) (regarding Execution and Signature of pleadings filed at the Commission) provides in pertinent part:
(a) *Signature.*

(1) *Paper filings.* A pleading, submittal or other document must be signed in ink by the party in interest, or by the party's attorney, as required by subsection (b), and show the office and mailing address of the party or attorney. An original hard copy must be signed, and other copies filed must conform thereto unless otherwise ordered by the Commission.

(2) *Electronic filings.* An electronic filing must include an electronic signature when it is filed on the Commission's electronic filing system by a filing user or authorized agent by means of a user ID and password. A filing must include:

(i) a notation on the first page that it has been electronically filed.

(ii) a signature block and the name, office and e-mail address of the filing user.

52 Pa.Code § 1.35(a)(1) — (2)(i)(ii).

The Commission's regulation at 52 Pa.Code § 56.172 provides as follows:
(a) A request for review of the decision of the Bureau of Consumer Services (BCS) shall be initiated in writing within 20 days of issuance.

(b) Upon receipt of a request for review of the decision of the BCS, the Secretary of the Commission will mail a formal complaint form to the requesting person.

(c) Within 30 days of the mailing of the formal complaint form, the party requesting review of the decision of the BCS shall file the completed complaint form with the Secretary.

(d) Upon the filing of a formal complaint, within the 30-day period and not thereafter except for good cause shown, there will be an automatic stay of the informal complaint decision.

(e) The failure to request review of the BCS decision by filing a formal complaint within the 30-day period does not foreclose a party from filing a formal complaint at a later time except as otherwise may be provided in 66 Pa.C.S. relating to Public Utility Code).

52 Pa.Code § 56.172.

In the instant case, the Secretary rejected Complainant's attempt to efile an appeal from a BCS decision on November 11, 2013, because the efiling contained a digital electronic signature as opposed to an original hand-written signature. Additionally, Complainant did not follow the instructions on the formal complaint form, which stated an appeal of a BCS decision must be signed and filed by mail. The Secretary's letter dated April 17, 2014, stated in pertinent part:
As the PUC staff recently discussed with you telephonically, the Secretary's Bureau is unable to accept an original appeal via efiling. Under PUC regulation 52 Pa.Code Section 1.35(a) an original signature is required for the PUC to accept your appeal. Therefore, if you wish to appeal the BCS determination you must sign and submit the attached signature page for that purpose. The PUC will consider your appeal timely if it receives your signed enclosed form by May 15, 2014.

***18** If you do not wish to appeal the informal BCS determination but instead wish to initiate litigation against PPL Electric Utilities on different issues, you may submit a Formal Complaint form to the PUC. When filing a formal complaint that is not an appeal from a BCS decision, you can efile the formal complaint form. However, our electronic system is not set up to accept a formal complaint when it is an appeal of a BCS decision. We are sorry for any inconvenience or confusion. Please note that proceeding in this manner, as opposed to continuing your appeal, will establish a new formal complaint proceeding against PPL Electric Utilities.

Secretarial Letter dated April 17, 2014.

Section 1.38 provides:

> The Commission may reject a filing if it does not comply with any applicable statute, regulation or order of the Commission.

52 Pa.Code § 1.38.

Section 1.35(a)(2) provides that an electronic filing must include an electronic signature when it is filed on the Commission's electronic filing system by a filing user or authorized agent by means of a user ID and password. Additionally, the filing must include a notation of the first page that it has been electronically filed and a signature block and the name, office and e-mail address of the filing user.

The formal Complaint in this case has attached to it a letter from Mr. Harper to the Secretary dated May 12, 2014. As part of the formal complaint form Mr. Harper received from the Commission, there is an instruction regarding filing appeals by mail only to Bureau of Consumer Services decisions. See Complaint at 6. It further states, “mail the completed form with your original signature and any attachments to the Secretary. Formal complaints sent by fax or e-mail will not be accepted.” Complaint at 6.

This form is not a Commission order or regulations, but it shows the Commission's procedure for filing of formal complaints electronically and the requirement that BCS appeals, which become formal complaints, must be filed with an original signature through certified mail, first class mail, or overnight delivery. The Commission's Secretary determines whether a filing should be accepted or rejected. 52 Pa.Code § 1.38. It appears from the record that the Secretary rejected Complainant's efiling on November 11, 2013, but notified him at least via letter dated April 17, 2014, that if he cured the defect in his filing by signing an attached verification form, and mailing it to the Commission by May 15, 2014, that his appeal of the October 30, 2013 BCS Decision would be deemed timely.

It also appears from the record that if the original filing on November 11, 2013, had been docketed and served on the Company, the Company might not have proceeded with termination proceedings on April 21, 2014 pending the outcome of that complaint. The fact that the Company had no knowledge of the attempted November 11, 2013 efiling of the appeal of the BCS decision or of the April 17, 2014 Secretarial Letter, is not the fault of the Company. The Secretarial Letter dated April 17, 2014, was neither copied to nor served upon Respondent. Rather, in April, 2014, the Company internally investigated the Complainant's claim that he had a formal complaint pending and found nothing in its records to show a complaint was pending. The behavior of the Company was reasonable under the circumstances and did not violate any statute or regulation of the Commission.

***19** Hearsay evidence can be given its natural probative effect and may support a finding only if it is corroborated by any competent evidence in the record. *Walker v. Unemployment Compensation Bd. Of Rev.,* 367 A.2d 366 (Pa. Cmwlth. 1976). *Goldson v. Metropolitan Edison Co.,* C-2013-2387326, 2014 WL 3555462 (June 30, 2014). Although Mr. Worthington's testimony is hearsay regarding the conversation between the Commission's Secretary and Mr. Diehl, the notations in PPL Exhibit 2 made in the ordinary course of business, corroborate this hearsay testimony and support a finding that a conversation took place between the Commission's Secretary and a PPL employee regarding Mr. Harper's attempt to file an appeal of the BCS Decision. Thus, it appears from the record that possibly as an accommodation to the Commission, service was restored to Complainant on April 23, 2014 with some understanding that in the event Mr. Harper did not cure the defect in his original filing by providing an original signature on or before May 15, 2014, PPL could then resume termination procedures. The record shows PPL did take steps to restore service within 24 hours of termination on April 21, but was unable because of excessive load on the meter, to unblock the meter until April 23rd. Therefore, I find the termination on April 21, 2014 was not erroneous and the reconnection on April 23, 2014 was timely.

Payment Arrangement

Complainant requests a second Commission-ordered payment arrangement regarding the outstanding balance of over $9,000. Mr. Harper admits he did not have the money to continue with the monthly payments due and owing pursuant to the Commission-ordered payment arrangement of September 20, 2013. Later, he could not make the catch-up $2,500 payment the website asked for. He did not have the money. N.T. 200. Mr. Harper contends part of this problem lies with PPL who allowed him to get $9,500 in debt before terminating his service. He requests a monthly budget billing amount of $10 plus $200 towards his arrearage in a new payment arrangement. Mr. Harper does not want assistance. He wants to earn money and make monthly payments totaling approximately $200 per month until his arrearage is paid.

PPL contends it attempted to provide Mr. Harper with a reasonable payment arrangement and to provide him with the benefit of LIHEAP assistance and OnTrack assistance. However, Mr. Harper was unable or unwilling to take advantage of these assistance programs which would have helped him reduce his bills. N.T. 190.

PPL contends that in order to be entitled to a further payment arrangement, Mr. Harper should be required to provide proof of income and he has failed to do that. Additionally, he breached the BCS Commission-ordered payment agreement which was directed based upon the assumption that the customer was at a Level 3. Mr. Harper has only made two payments since October, 2013. He provided vague information about his annual salary but offered no evidence to support his income claim.

Disposition

***20** Generally a public utility is entitled to receive payment for the service it provides. *Scaccia v. West Penn Power Co.,* 55 Pa. PUC 637 (1982). *Kea v. Peoples Natural Gas Co.,* 60 Pa. PUC 215 (1985); *Mill v. Pa. Pub. Util. Comm'n,* 447 A.2d 1100 (Pa. Cmwlth. 1982). PPL has the right to bill and receive payment for the utility service actually supplied. 66 Pa.C.S. § 1303. *Neal v. Philadelphia Gas Works,* Docket No. Z-00971874, (Order entered January 4, 2002); *Angie's Bar v. Duquesne Light Co.,* 72 Pa. PUC 213 (1990). All customers are obligated to pay for utility service. Otherwise, unpaid bills are included in the utility's uncollectible expenses, which all of its remaining customers must pay. *Bolt v. Duquesne Light Co.,* Docket No. Z8712758 (Order entered April 8, 1988).

By definition, a payment arrangement is "[a]n agreement in which a customer or applicant who admits liability for billed service is permitted to amortize or pay the unpaid balance of the account in one or more payments." 52 Pa.Code § 56.2.

Complainant is an Income Level 1 customer whose financial situation (gross annual income) has changed substantially since the last payment arrangement was ordered in September, 2013. Complainant has offered no support for his position other than his testimony that he is living alone and has received $6,000 in gross income for the year 2014 that his outstanding balance should be reduced. Further, Complainant sought and was given one Commission-ordered payment arrangement consistent with Chapter 1405(d) to which he defaulted.

However, I find Mr. Harper's testimony to be credible regarding the change in persons residing at the household, and that there has been a change in household income since September, 2013 to warrant a second payment arrangement consistent with Chapter 1405(d). In fact, the gross household income has decreased significantly from over 250% to less than 100% of the federal poverty level. A payment arrangement, which prevents service termination as long as Complainant complies with it, is a privilege, not a right. *Mandell v. Duquesne Light Co.,* Docket No. C-20030234, (Order entered March 17, 2004).

The Company and Complainant did not come to an agreement before the hearing in this case regarding a further payment arrangement; however, the Commission has the authority to issue a subsequent Commission-ordered payment arrangement even though Complainant defaulted on the previous one as there has been a significant decrease in household income (more than 20%) as required by Chapter 14, 66 Pa.C.S. § 1401, *et seq.*

***21** Complainant has had a poor payment history over the past 4 years. PPL Exhibit 1. However, since the issuance of the BCS Commission-ordered payment arrangement on September 20, 2014, I find the testimony of Mr. Harper to be credible that when the 3 other adults moved out of the service property [4], they took with them the majority of the household income upon which the BCS Commission-ordered payment arrangement was based and the household annual gross income dropped from $75,000 for 5 persons, to $7,200 for one person, which is a change in income of over 20% as required by 66 Pa.C.S.§§ 1403 and 1405(d) for a subsequent Commission-ordered payment arrangement. Complainant's request for a second payment arrangement is granted because he has met the change in income criterion required for issuance of another payment arrangement. 66 Pa.C.S. § 1405(d).

Although Mr. Harper did not offer written documentation to support his claim that the household income was reduced substantially, there did not appear to be a dispute at the hearing that Mr. Harper was living alone at the service property from April 13, 2014, through October 28, 2014, and his consumption of electricity dropped accordingly as evidenced by a reduction in his budget billing to $10 per month. Thus, I find that whereas Mr. Harper was a level 3 customer in September, 2013, he is now a level 1 customer within the meaning of 66 Pa.C.S.§§ 1405(b)(1) — (3).

Section 1403 defines "change in income" as follows: "A decrease in household income of 20% or more if the customer's household income level exceeds 200% of the federal poverty level or a decrease in household income of 10% or more if the customer's household income level is 200% or less of the federal poverty level." 66 Pa.C.S.§ 1403. Accordingly, under Section 1405(d), I find a significant reduction in income of over 20% warrants the establishment of a second Commission-ordered payment arrangement for Mr. Harper even though he did default on the September, 2013 payment arrangement.

Thus, in accordance with Section 1405(a) and (b)(1), as a level 1 customer, the terms of the payment arrangement shall be such that Mr. Harper will be directed to pay his monthly budget billing amount plus 1/60 th of the amount of his arrearage. Mr. Harper will have five years to pay off his arrearage of over $9,000 instead of just one year. Service termination shall be suspended as long as Mr. Harper makes timely, consistent monthly payments. Complainant is cautioned that his payment history is poor and failure to comply with this second payment arrangement will be grounds under 66 Pa.C.S.§ 1405(f) for PPL to terminate Mr. Harper's service.

CONCLUSION

***22** For all of these aforementioned reasons, Complainant's request for a second Commission-ordered payment arrangement with more favorable terms is granted. Beginning with the first bill following the Commission's Final Order in this case, the Complainant is required to pay his budget bill plus an amount equal to one sixtieth (1/60 th) of the balance accrued on his account. If Mr. Harper fails to keep this payment schedule, PPL Electric Utilities Corporation is authorized to suspend or terminate his service in accordance with the Chapter 14 of the Public Utility Code and the Commission's regulations. Complainant's request for civil penalties against PPL for erroneous terminations of electric service on September 15, 2013 and April 21, 2014, respectively is denied. Finally, Complainant's request for civil penalties for violations of the Public Utility Code, Commission regulations, and the Americans With Disabilities Act is denied.

CONCLUSIONS OF LAW

1. The Commission does not have jurisdiction to enforce the Americans With Disabilities Act or to even determine whether Mr. Harper has a disability or impairment which substantially limits his major life activities as defined by the Act at 42 U.S. Code § 12102, *et. seq.*

2. The Commission has jurisdiction over the parties and subject matter of this proceeding regarding the provision of electric service by an electric distribution company to a residential customer. 66 Pa.C.S. §§102, 701, 1405, 1501.

2. As the party seeking affirmative relief from the Commission, Complainant bears the burden of proof. 66 Pa.C.S. § 332(a).

3. To satisfy his burden of proof, Complainant must demonstrate that Respondent violated the Public Utility 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 Telephone Company of Pennsylvania,* 72 Pa. PUC 196 (1990).

4. Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing, by even the smallest amount, than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n,* 578 A.2d 600, 602, *alloc. denied*, 602 A.2d 863 (1992).

5. The Responsible Utility Customer Protection Act, 66 Pa.C.S. §§ 1401, *et seq.*, applies to this proceeding.

6. The Public Utility Code permits the Commission to grant a subsequent payment agreement if there is a change in income, and dictates its terms. 66 Pa.C.S. §1405.

***23** 7. Mr. Harper was a level 3 customer in September, 2013, but he is now a level 1 customer within the meaning of 66 Pa.C.S.§§ 1405(b)(1) — (3).

8. There has been a significant decrease in household gross income at the service property since April, 2014, and this reduction in income of over 20% warrants the establishment of a second Commission-ordered payment arrangement for Mr. Harper even though he did default on the September, 2013 payment arrangement.

9. Complainant has failed to establish that the utility violated the Public Utility Code or a regulation or Order of the Commission in requiring payment from Complainant for the services that it rendered. 66 Pa.C.S. § 701.

10. A public utility is entitled to full payment for service provided to customers and all customers are obligated to pay for utility service provided to them. *Kea v. Peoples Natural Gas Co., 60 Pa. PUC 215 (1985); Scaccia v. West Penn Power Co.,* 55 Pa. PUC 637 (1982).

11. Assertions, personal opinions or perceptions do not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh,* 532 A.2d 12 (Pa. 1987).

12. PPL did not erroneously terminate electric service to the service property at 1 Harper Lane, Stevens, Pennsylvania on or about September 16, 2013 or April 21, 2014 respectively.

13. PPL did timely reconnect electric service at the service property on September 16, 2013 and April 23, 2014.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Ronald P. Harper, Jr. against PPL Electric Utilities Corporation at Docket No. F-2014-2422449 is sustained in part and dismissed in part.

2. That Ronald P. Harper, Jr. shall make monthly payments consisting of his budget bill plus one sixtieth ($1/60^{th}$) of the balance accrued on his account, beginning with the first billing due date following the entry of a final Commission Order in this case until his arrearage is paid in full.

3. That as long as Ronald P. Harper, Jr. keeps the payment schedule stated in this Order, PPL Electric Utilities Corporation shall not suspend or terminate his utility service except for valid safety or emergency reasons or assess late payments or finance charges against his account.

4. That, if Ronald P. Harper, Jr. does not keep the payment schedule stated in this Order, PPL Electric Utilities Corporation is authorized to suspend or terminate his utility service at 1 Harper Lane, Stevens, Pennsylvania in accordance with Chapter 14 of the Public Utility Code and the Commission's regulations.

5. That Ronald P. Harper, Jr.'s request for civil penalties is denied.

6. That the case at Docket No. F-2014-2422449 be marked closed.

Footnotes

1 This is an appeal of the Bureau of Consumer Services (BCS) Decision at Case No. 3160079 dated October 30, 2013. Although Mr. Harper attempted to appeal the BCS Decision electronically via e-filing on November 11, 2013, the appeal was initially rejected by the Secretary's Bureau for failure to provide an original signature. Mr. Harper was informed by the Commission's Secretary via a letter dated April 17, 2014, that the Commission is unable to accept an original appeal via e-filing; therefore, Complainant's signature on the formal complaint form (Notification of Intent to Appeal) was required. Mr. Harper was notified that his appeal would be considered timely if the Commission received a signed formal complaint by May 15, 2014. The letter explained that formal complaints that are not appeals of informal BCS decisions may be initiated through e-filing; however, the formal appeal of an informal BCS decision must contain an original handwritten signature pursuant to 52 Pa.Code § 1.35(a). Mr. Harper submitted an original handwritten signature on the signature page attached to his original appeal of the BCS decision (Complaint) on May 12, 2014.

2 Posttraumatic Stress Disorder (PTSD) is an anxiety disorder resulting after exposure to a traumatic event.

3 The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation. It also mandates the establishment of TDD/telephone relay services. The current text of the ADA includes changes made by the ADA Amendments Act of 2008 (P.L. 110-325), which became effective on January 1, 2009. The ADA is published in the United States Code. The Federal Communications Commission is the federal agency regulating telephone relay services.

4 Mr. Harper's adult roommate, Ken, moved out in February, 2014 and Mr. Harper's brother-in-law, sister, and their minor child moved out April 13, 2014, respectively.

End of Document

Summary: Motion THE CLEVELAND ELECTRIC ILLUMINATING COMPANY'S MOTION TO DISMISS electronically filed by Mr. Christopher Rogers on behalf of THE CLEVELAND ELECTRIC ILLUMINATING COMPANY