

LEXSEE 1995 PA. PUC LEXIS 179

Thomas C. States v. Pennsylvania Electric Company and United Electric Cooperative,
Inc.

Docket No. C-00945488

PENNSYLVANIA PUBLIC UTILITY COMMISSION

1995 Pa. PUC LEXIS 179

November 29, 1995

PANEL: [*1] JOHN H. CORBETT, JR., Administrative Law Judge

OPINION: INITIAL DECISION

Before John H. Corbett, Jr., Administrative Law Judge

History of the Proceeding

On January 14, 1994, Thomas C. States ("Complainant") filed a formal complaint with the Pennsylvania Public Utility Commission ("Commission") against the Pennsylvania Electric Company ("Penelec") and the United Electric Cooperative, Inc. ("Unilec"). The Complainant generally alleges that he had constructed a new house near Punxsutawney in Jefferson County, which is in Unilec's service territory. However, he desires service from Penelec and asks the Commission to "change the territorial laws" so he can receive service from Penelec, instead of from Unilec.

On February 17, 1994, Unilec answered the complaint and filed new matter denying the Complainant's allegations. It avers that under the Unincorporated Area Certified Territory Law (the "Territory Law") n1, Unilec is properly the exclusive supplier of electric service to the Complainant's new residence. On the same date, Penelec answered that it possesses insufficient knowledge or information to respond to the truth or accuracy of the allegations in the complaint, but admits the new house [*2] is closer to Unilec's 1975 distribution line than to Penelec's. On February 23, 1994, Penelec replied to the new matter of Unilec generally denying the legal conclusions therein set forth.

n1 15 Pa. C.S. §§ 7351-7359.

A hearing was held on May 2, 1994 in the Commission's offices in Pittsburgh. The Complainant appeared pro se. Alan M. Seltzer, Esquire, represented Penelec. Patricia Armstrong, Esquire, represented Unilec. The hearing generated 55 pages of notes of testimony. One exhibit sponsored by the Complainant and five exhibits sponsored by Unilec and one prepared statement of direct testimony of a Unilec witness were admitted into the record. Penelec presented no testimony nor did it submit any exhibits. Both Penelec and Unilec filed main briefs on June 22, 1994. On July 7, 1994, Penelec filed a reply brief and Unilec filed a letter-reply brief. On this latter date, the record closed.

After reviewing the record, reading the briefs and studying the applicable law, it became apparent that the record was incomplete [*3] and several pertinent questions remained unanswered. Accordingly, I issued an Interim Order on September 9, 1994 reopening the record to receive testimony or a stipulation in lieu thereof answering a number of questions concerning facts, which I believed were not adequately addressed during the earlier hearing. This Order was served upon all parties, including Unilec, which filed an exception and motion to reconsider that Order on September 20, 1994. In its motion, Unilec argued the Order to reopen the record was unauthorized and called for facts irrelevant for the disposition of this case. On September 26, 1994, I issued a Second Interim Order denying the exception and motion.

A hearing scheduled for December 19, 1994 was canceled at the request of the parties due to the unavailability of an essential witness and the need to complete discovery on the questions raised in the September 9, 1994 Order. In response to a letter I sent on February 24, 1995 inquiring about the progress of the discovery process, the parties indicated they had scheduled a conference in April at the site of the Complainant's property to resolve these matters. A further

hearing scheduled for May 1, 1995 was [*4] canceled at the request of the parties, who were then circulating among themselves proposed stipulations of fact in response to the September 9, 1994 Order. Having received no response to my letter of April 25, 1995 giving the parties ten days to submit properly executed stipulations, a telephonic prehearing conference was scheduled for June 8, 1995.

When the Complainant failed to appear at that conference, a further telephonic hearing was then scheduled for June 28, 1995. Veronica States, wife of the Complainant, appeared pro se. Janet E. Arnold, Esquire, represented Penelec. Patricia Armstrong, Esquire, represented Unilec. The hearing generated an additional 34 pages of notes of testimony. Penelec and Unilec sponsored joint stipulations and two exhibits, which were admitted into the record. The Complainant objected to the stipulations and exhibits as more fully discussed below. No further briefs were filed. The record closed on July 28, 1995. Due to my recent illness, the Commission granted an extension to file this decision. n2

n2 See, 66 Pa. C.S. § 332(g).

[*5]

For the following reasons, the complaint will be denied.

Findings of Fact

1. The Complainant is Thomas C. States, who resides with his wife and four children at P.O. Box 155-A, R.D. 7, Punxsutawney, Pennsylvania 15767 (N.T. 7, 13, 61-62).

2. Unilec is an electric cooperative corporation, which is organized and operated pursuant to the Electric Cooperative Law of 1990, the Act of December 19, 1990, P.L. 834, No. 198, 15 Pa. C.S. §§ 7301, et seq., and furnishes retail electric service to all or portions of Jefferson, Clearfield, Armstrong, Cambria, Centre, Clarion, Elk, Forest and Indiana Counties (Unilec St. 1 at 1).

3. The Complainant's residence lies within the service territory of Unilec, but electric service facilities of Penelec are in proximity to the Complainant's property (N.T. 8; Unilec St. 1 at 2-3, Unilec Exhs. A, B & C). n3

n3 The exact location of the Complainant's property boundary lines in relation to the facilities of Penelec are in dispute (Tr. 65-68).

4. The Complainant is temporarily receiving [*6] electric service from Unilec at this residence pending a final decision in this case (N.T. 61-62).

5. The Complainant desires obtaining electric service from Penelec, instead (N.T. 8-9).

6. The Complainant purchased the property in approximately 1987 and began building a one story frame ranch house on this site in October 1993 (N.T. 7-8).

7. The Complainant's building site is on an undeveloped tract of land of approximately 60 acres that was formally a strip mine in a rural area (N.T. 16; Unilec St. 1 at 2).

8. When the Complainant requested electric service for his proposed residence from Penelec, that utility sent a crew to view the property; they informed the Complainant that for Penelec to provide the service to the new home, the Complainant would have to obtain a waiver from Unilec, since the structure was in the service territory of Unilec (N.T. 8-9).

9. Unilec runs power line facilities across the Complainant's property approximately 450 feet from his house (N.T. 13).

10. The Complainant's nearest neighbor lives 1700 feet away; the nearest town, Punxsutawney, is approximately two miles distant (N.T. 12).

11. The Complainant objects to the proposed service of Unilec, because [*7] he believes Unilec customers experience an abnormal number of outages; with four children in the household, he asserts this type of service is not feasible (N.T. 13-17).

12. Two of the Complainant's neighbors, Robert W. Riggie and Steven D. Piszker, living approximately 1500 and 1700 feet away respectively, receive electric service from Penelec (N.T. 17).

13. The Complainant is uncertain where the boundary lines lie between the service territories of Penelec and Unilec in relation to his property (N.T. 17).

14. The Complainant's property surrounds the Riggie property and the corner of the Complainant's property is within 300 to 400 feet of existing Penelec lines that serve the Piszker property (N.T. 22).

15. If he is given permission to do so by the Commission in this case, the Complainant will build a garage near the existing facilities of Penelec, take service from that utility at that point and run a line from the garage to bring service to his house (N.T. 20-25).

16. A coal company owns 400 to 500 acres, which surround the Complainant's property (N.T. 25).

17. The nearest neighbor to the Complainant receiving service from Unilec lives in the Town of Adrien, approximately one-half [*8] mile away (N.T. 25, 39).

18. Unilec provides electric service to facilities of Pennsylvania-American Water Company, which are across a state highway from the Complainant's property (N.T. 38).

19. The Complainant's residence receives electric service from Unilec's Robertsville substation, which is approximately four miles away (Unilec St. 1 at 2).

20. Pursuant to the Certified Territory Act, Unilec and Penelec undertook a joint mapping effort of their distribution facilities and jointly filed a map with the Commission in 1980 (Unilec St. 1 at 3; Unilec Exh. C).

21. Unilec submitted maps depicting its facilities in proximity to the Complainant's property. Unilec has a 336 MCM distribution circuit traversing this property. The circuit is approximately two years old and is fed by the Robertsville substation with approximately four miles of intervening 6A Cooperweld feeds. This three-phase line is designed and constructed for 25 kV, but is presently energized at 12 kV. The previous 7200 volt single-phase line traversing the property was built in 1954 (Unilec St. 1 at 3-4).

22. The Complainant receives electric service from this line of Unilec, approximately 450 feet from his house (Unilec [*9] St. 1 at 4-5).

23. Under Unilec's line extension policy, Unilec did not charge the Complainant for building the one or two pole span to serve his residence (Unilec St. 1 at 4).

24. Penelec's facilities bear off of a state road several thousand feet south of Unilec's facilities and terminate at a home several thousand feet from the Complainant's house (Unilec St. 1 at 4; Unilec Exh. D).

25. Unilec has a preventative maintenance program to ensure system reliability. Recently, Unilec developed and submitted a comprehensive Two Year Work Plan to the Rural Electrification Administration ("REA"), a division of the United States Department of Agriculture. The REA has approved and is financing a prioritized extensive work plan costing \$ 5.6 million to be completed by 1995. The REA oversees the implementation of this plan. This system improvement plan includes replacing and upgrading all system protection including reclosures, cutouts and surge arrestors in all 19 substations and the areas they serve. Unilec will replace 36 miles of conductors and 400 poles in the work plan. Unilec inspects its 40-50,000 poles on an 8-10 year cycle and has a 6 year tree trimming cycle (Unilec St. 1 at 6). [*10]

26. All Unilec crews visually inspect poles during their daily travels throughout its system; in addition, Unilec conducts a more formal visual inspection on a five year cycle (Unilec St. 1 at 7).

27. Unilec owns four bucket trucks, four line trucks, a mobile substation, two 8x8 all-terrain vehicles, a tracked digger and numerous pick-up trucks to maintain its system (Unilec St. 1 at 7).

28. Unilec employs 21 maintenance people and contracts with another 15 maintenance workers for rebuilding line, replacing conductor and other duties associated with its work plan. It employs four crews of tree trimmers clearing new right-of-way and maintaining existing right-of-way. Unilec also has an additional half dozen contractors available to provide emergency assistance during major storms or other problems (Unilec St. 1 at 7).

29. Unilec maintains a computer outage report system listing outages and their causes. Unilec prepared an exhibit showing outages occurring during 1993 on that part of its system where the Complainant resides (Unilec St. 1 at 8; Unilec Exh. E).

30. On March 5, 1993, a major winter snow storm interrupted electric service in that area, including not only Unilec, but also [*11] Penelec as well (Unilec St. 1 at 8; Unilec Exh. E).

31. On March 30, 1993, an outage occurred involving one of the phases in the three-phase line traversing the Complainant's property, while the remaining two phases stayed in service (Unilec St. 1 at 8; Unilec Exh. E).

32. Penelec's service in this area is single phase (Unilec St. 1 at 8).

33. On June 18 and November 20, 1993, outages occurred when trees fell into Unilec's facilities (Unilec St. 1 at 8; Unilec Exh. E).

34. Four additional outages occurred, when power supplied by the Penelec system to a Unilec substation failed (Unilec St. 1 at 8; Unilec Exh. E).

35. Unilec recently installed a new telephone system with 10 incoming lines to improve its responses to calls of power outages. It has a formal emergency plan and line of authority for responding to problems caused by major storms. It is programming its system so it can locate a customer based upon their telephone number. Its communications operators are provided with frequent updates to allow them to convey to its customers the most current information available regarding the status of an outage (Unilec St. 1 at 9).

36. Unilec has conducted a series of public meetings to [*12] obtain input to address customer concerns (Unilec St. 1 at 11).

37. If Penelec and Unilec entered into a borderline agreement, Penelec could serve the Complainant's property (N.T. 47-48).

38. According to Penelec's measurements, the Complainant's residence is 380 feet from Unilec's distribution facilities and 1280 feet from Penelec's distribution facilities (N.T. 47).

39. At the present time, the Complainant has not built a garage for his residence. If the Commission decides in this case that he can run his own electric line from the garage to his house, he will build the garage within Penelec's territory. If the decision is to the contrary, he will build it within Unilec's territory (Stip. at 1-2). n4

n4 "Stip." refers to the stipulated responses of Unilec and Penelec to the questions propounded to the parties by the Interim Order entered September 9, 1994 and admitted into the record during the hearing on June 28, 1995 (N.T. 85).

40. Complainant plans to build a two-three car single-story garage, which will contain [*13] a tool/workshop area (Stip. at 2).

41. If the Complainant is permitted to run his own electric line from his garage to his house, he will build his garage in Penelec's service territory, which will probably be approximately 800 to 1500 feet west of the house. The possibility may exist, depending upon the exact boundary of the Complainant's property, that a small portion of the northeast corner of this property could be located in Penelec's territory near a state highway (N.T. 68; Stip. at 3, 5).

42. If the Complainant cannot run an electric line from his garage to his house, he will build his garage somewhere north of the house, between Unilec's three-phase distribution line and his house, probably within 100 feet of the house (Stip. at 3).

43. The purpose of the garage will be to park vehicles, storage and a tool/workshop area, as well as a dog kennel; electricity will provide general lighting for the structure and power for any electric tools normally associated with a workshop (N.T. 68-69; Stip. at 3-4).

44. When the parties met to confer at the site of the Complainant's property on April 4, 1995 to formulate responses to the questions propounded in the Interim Order entered September [*14] 9, 1994, the Complainant had not settled upon any specific site for the location of his garage in the service territory of either utility (Stip. at 4).

45. Pursuant to this meeting on April 4, 1995, Unilec and Penelec prepared a map reflecting the approximate locations of their respective facilities in relation to the local roads and the approximate location of the Complainant's property based upon the Jefferson County tax map (Stip. at 4; Parties' Exh. A).

46. Recorded deeds for the Complainant's property do not offer metes and bounds descriptions (Stip. at 4-5).

47. The Complainant claims the county tax map is inaccurate as it depicts the boundary lines of this property (N.T. 65-67, 75, 78-81; Stip. at 5).

48. Both Unilec's and Penelec's engineers agree the 800 foot secondary service line the Complainant wants to run from the proposed garage in Penelec's service territory to his residence will experience substantial voltage losses resulting in inadequate service at the residence (Stip. at 5).

49. If the garage is built anywhere within 800 feet of the Complainant's house, it will be within Unilec's service territory (Stip. at 7).

50. If the garage is built within Unilec's service [*15] territory, the Complainant will build it within 400 feet of Unilec's facilities (Stip. at 7).

51. Unilec and Penelec prepared and submitted into the record a videotape giving a 360 [degrees] view of the Complainant's property from his front yard (Stip. at 7; Parties' Exh. B).

52. The Riggie and Piszker residences both lie within Penelec's service territory, having initially received service from that utility in 1967 and 1976 respectively; both currently receive electric service from Penelec (Stip. at 8-9).

Discussion

This case presents the issue of which retail electric supplier, Unilec or Penelec, will be entitled to serve the Complainant's property in Jefferson County. Unilec claims an exclusive right and obligation to provide this service. The Complainant wants to obtain service from Penelec, instead. Penelec stands willing and able to provide the desired service. The resolution of this conflict requires a review of the Territory Law.

A. Relevant Provisions of the Territory Law

The statutory law applicable to this case is found in the Unincorporated Area Certified Territory Law of 1990, *15 Pa. C.S. § § 7351-7359* (the "Territory Law").ⁿ⁵ This statute establishes certified [*16] territory between retail electric suppliers, where one supplier is an electric cooperative corporation (Unilec) and the other supplier (Penelec) is subject to the jurisdiction of the Commission for rates, terms and conditions for electric service. *15 Pa. C.S. § 7351*. The State Legislature has determined it to be in the public interest to establish exclusive retail electric service territories within this Commonwealth. The Legislature, at *15 Pa. C.S. § 7353*, has identified certain policy reasons for this decision:

" . . . to encourage the orderly development of retail electric service in unincorporated areas, to avoid wasteful duplication of distribution facilities, to avoid unnecessary encumbering of the landscape of the Commonwealth, to prevent the waste of materials and natural resources, to minimize inconvenience, diminished efficiency and higher costs in serving the consumer and otherwise for the public convenience and necessity, the Commonwealth is divided into geographical areas, establishing the unincorporated areas within which each retail electric supplier is to provide retail electric service on an exclusive basis."

The Commission is charged with the responsibility [*17] to enforce compliance with this law. *15 Pa. C.S. § 7358*.

ⁿ⁵ The Territory Law repealed and substantially reenacted its predecessor statute, i.e., the Retail Electric Supplier Unincorporated Area Certified Territory Act ("Act 57"), the Act of July 30, 1975, P.L. 113, as amended, *15 P.S. § § 3277-3287*. Due to the substantial similarities between Section 7354 of the Territory Law, *15 Pa. C.S. § 7354*, and Section 4 of Act 57, *15 P.S. § 3280*, and between Section 7355 of the Territory Law, *15 Pa. C.S. § 7355*, and Section 5 of Act 57, *15 P.S. § 3281*, appellate court and Commission decisions based upon Sections 4 and 5 of Act 57 are reliable precedent for application of Sections 7354 and 7355 of the Territory

Law. See, Sections 1961 and 1962 of the Statutory Construction Act of 1972, *1 Pa. C.S. §§ 1961-1962* (when a statute substantially reenacts a repealed statute, the provisions common to both statutes date from their first adoption).

Section 7352 of the Territory Law, *15 Pa. C.S. § 7352*, defines several pertinent terms: [*18]

"Certified territory." An unincorporated area as certified pursuant to section 7354 (relating to boundaries of certified territories; hearings).

"Electric-consuming facilities." Everything that utilizes electric energy from a central station source.

"Existing distribution line." An electric line of a design voltage of 35 kV phase to phase or less which on July 30, 1975:

1. was located in an unincorporated area; and
2. was or had been used for retail electric service.

"Retail electric supplier." Any person, exclusive of a municipal corporation, engaged in the furnishing of retail electric service. The term shall apply only to a retail electric supplier which is subject to the jurisdiction of the Commission for rates, terms and conditions for electric service and has a mutual boundary in an unincorporated area with an electric cooperative corporation.

"Unincorporated area." A geographical area outside the corporate limits of cities and boroughs.

To fulfill the policy objectives of the legislation, Section 7354 of the Territory Law, *15 Pa. C.S. § 7354*, states in pertinent part:

(a) Exclusive territories. -- Except as otherwise provided in this section, a retail [*19] electric supplier shall not furnish retail electric service in the certified territory of another retail electric supplier.

(b) Establishment of boundaries. -- Except as otherwise provided in this section, the boundaries of the certified territory of each retail electric supplier in any unincorporated area are hereby set as a line or lines substantially equidistant between its existing distribution lines and the nearest existing distribution lines of any other retail electric supplier in every direction with the result that there is hereby certified to each retail electric supplier such unincorporated area which in its entirety is located substantially in closer proximity to one of its existing distribution lines than the nearest existing distribution line of any other retail electric supplier.

Concerning the provision of retail electric service by one retail electric supplier in the certified territory of another retail electric supplier, Section 7355 of the Territory Law, *15 Pa. C.S. § 7355*, states in pertinent part:

(a) Service within certified territory. -- Except as otherwise provided in this section, each retail electric supplier shall be obligated (upon receipt of an [*20] application in accordance with its tariffs, rules, regulations or bylaws) and shall have the exclusive right to furnish retail electric service to all electric-consuming facilities located within its certified territory and shall not furnish, make available, render or extend its retail electric service to a consumer for use in electric-consuming facilities located within the certified territory of another retail electric supplier

(b) Service to new electric-consuming facilities. -- Except as provided in subsections (c) and (e), any new electric-consuming facility located in an unincorporated area which has not as yet been included in a map

issued by the Pennsylvania Public Utility Commission pursuant to section 7354 (c) (relating to commission certification of service territories) shall be furnished retail electric service by the retail electric supplier which has an existing distribution line in closer proximity to the electric-consuming facility than is the nearest existing distribution line of any other retail electric supplier. Any disputes under this subsection shall be resolved by the commission.

B. The Complainant's Residence

Certain facts are not in dispute [*21] in this record. Clearly, Unilec and Penelec are "retail electric suppliers" within the meaning of the Territory Law. Unilec is an electric cooperative corporation and Penelec is a public utility subject to the jurisdiction of the Commission for rates, terms and conditions of service. In the area of the Complainant's residence, Unilec and Penelec both had distribution lines existing in 1975. The Complainant's residence is an "electric consuming facility" as the Territory Law defines that term. Finally, the parties do not dispute the fact that the Complainant's residence is situated closer to Unilec's 1975 existing distribution line than to those of Penelec.

The exclusive right of a retail electric supplier to provide service based upon the closer proximity of its existing distribution lines to an electric-consuming facility in an unincorporated area is well-settled law. See, *Valley Rural Electric Cooperative, Inc. v. Pa. P.U.C.*, 143 Pa. Commonwealth Ct. 131, 598 A.2d 627 (1991); *United Electric Cooperative, Inc. v. Pa. P.U.C.*, 130 Pa. Commonwealth Ct. 359, 568 A.2d 306 (1990); *Central Electric Cooperative, Inc. v. Pa. P.U.C.*, 111 Pa. Commonwealth Ct. 223, 533 A.2d 1084 (1987); [*22] *Somerset Rural Electric Cooperative, Inc., et al., v. Pennsylvania Electric Company*, Docket No. C-00945626 (Initial Decision of July 11, 1995; Commission Order pending); *Artemus E. Aungst v. Valley Rural Electric Cooperative, Inc.*, Docket No. C-00913761 (Order entered August 26, 1992); *Walter C. Prave v. Pennsylvania Electric Company, et al.*, Docket No. C-00913535 (Order entered June 11, 1992); *United Electric Cooperative, Inc., et al., v. Pennsylvania Electric Company, et al.*, Docket No. C-00913366 (Order entered January 17, 1992); *Salvadge, et al., v. Pennsylvania Electric Company, et al.*, Docket No. C-00882191 (Order entered May 10, 1990); *Buehler v. Pennsylvania Power & Light Company*, Docket No. C-00892231 (Order entered June 29, 1989); *Troutman v. Somerset Rural Electric Cooperative, Inc., et al.*, Docket No. C-00861129 (Order entered October 8, 1987).

Given the uncontroverted facts of the case sub judice, the Complainant's residence must be deemed to be within the exclusive service territory of Unilec within the meaning of Section 7354(b) of the Territory Law, 15 Pa. C.S. § 7354(b). Thus, Unilec possesses both the obligation and the exclusive right [*23] to furnish retail electric service to the Complainant at his residence pursuant to Section 7355(a) of that Law, 15 Pa. C.S. § 7355(a). The question then becomes whether the Complainant's proposed garage is a separate and distinct "electric-consuming facility" from his residence within the meaning of the Territory Law.

C. The Complainant's Garage

1. Ripeness

Penelec argues the issues raised concerning the Complainant's hypothetical garage are not ripe for adjudication, because the garage does not currently exist and may never be built. It rightfully contends a case must be ripe for adjudication before it can be heard. *Woods Schools v. Department of Education*, 100 Pa. Commonwealth Ct. 375, 514 A.2d 686 (1986); *Sgarlat v. Board of Adjustment of Kingston Borough*, 407 Pa. 324, 180 A.2d 769 (1962). There must be actual, palpable injury before a case will be ripe for adjudication. *Concerned Taxpayers v. Commonwealth of Pennsylvania*, 33 Pa. Commonwealth Ct. 518, 382 A.2d 490 (1978). Hence, hypothetical or abstract questions are precluded. *Raezer v. Raezer*, 428 Pa. 163, 236 A.2d 513 (1968); [*24] *Silver v. Zoning Board of Adjustment*, 381 Pa. 41, 112 A.2d 84 (1955). This requirement applies with equal force to formal proceedings before administrative agencies. *Process Gas Consumers Group v. Pa. P.U.C.*, 84 Pa. Commonwealth Ct. 76, 480 A.2d 1273 (1984).

The doctrine of ripeness ensures a court or administrative agency actually has a case or controversy before it for adjudication. The requirement of ripeness assures that a court or administrative agency does not render advisory opinions on merely hypothetical questions. No such danger exists in this case.

The Complainant has just recently completed construction of his new residence. There is no doubt, based upon his testimony and demeanor during the hearings in this case, of his intention to build a garage, as well. The only hypothetical aspect of this case concerns the location of the garage, which the Complainant forthrightly acknowledges will depend upon which utility will provide him with electric service. Therefore, little danger exists of the Commission render-

ing an advisory opinion on a hypothetical question, which may never come [*25] to pass. Certainly, the ripeness doctrine should not be so stringently construed as to require an individual to risk the expense of building a structure upon a given location with the hope that he or she will ultimately prevail in a legal proceeding to obtain electric service of his/her choice to that site. Clearly, the Complainant here pursued the more prudent course of seeking the Commission's decision before erecting his garage. Accordingly, the rationale for application of the doctrine of ripeness does not exist here. Thus, I will address the merits of his claim.

2. The Complainant's Claim

The present record unequivocally reveals the Complainant's intention to build a garage at a location on his property in Penelec's territory, where he will be able to obtain service from Penelec. Thereafter, he states he will run his own service line from the garage to his residence. In this manner, he will be able to obtain Penelec's electric service for his residence, instead of using Unilec. Placement of the garage will depend solely upon which utility the Complainant will be able to obtain service from. If placed within Penelec's territory, the proposed garage will serve merely as a means [*26] of bringing electric service to the Complainant's house. Clearly, it is not the intention of the Complainant to build two structures, which are entirely separate and independent from each other. In other words, the Complainant's intention is to create a single "electric-consuming facility" within the meaning of the Territory Law. 15 Pa. C.S. § 7352. This conclusion is fully supported by prior Court decisions and Commission opinions.

In *United Electric Cooperative, Inc. v. Pa. P.U.C.*, *supra.*, ("Reitz"), the Commonwealth Court was also faced with the question of whether a residence and garage were separate and distinct electric-consuming facilities within the meaning of the Territory Law. While the Court determined there that each structure in itself was a separate electric-consuming facility, the law of that decision is instructive here. There, a residence north of the highway was properly served by Penelec. The customer subsequently applied to Penelec for additional service to a mobile home, also within Penelec's territory. Penelec provided pole service for that purpose. The mobile home never materialized. Instead, the pole service [*27] provided power to a Christmas display and to another mobile home used only during a couple weeks every year. *Id.* at 306-307.

The customer extended a line from the pole service, across a highway, to a garage, which stored approximately 12 automobiles. This garage and storage facility situated south of the highway were within Unilec's territory and closer to the facilities of that retail electric supplier. The Court held this garage was a separate electric-consuming facility from the residence and mobile home located north of the highway and should be served by the closer facilities of Unilec. *Id.* In reaching this result, the Court noted the express purpose of the Territory Law is to serve public, as well as private, interests. The Territory Law encourages the orderly development of retail electric service in rural areas. This goal is defeated when individuals are permitted to erect secondary service lines to obtain electric service from the retail supplier of their choice. Another express purpose of this statute is to avoid unnecessarily encumbering the landscape with electric lines. *Id.* at 308.

Likewise, in *Pennsylvania Rural Electric Association v. Pa. P.U.C.*, ("Pa.R.E.A."), 81 Pa. Commonwealth Ct. 466, 473 A.2d 1134 (1984), [*28] the Commonwealth Court held that a department store, located inside a mall, did not constitute a separate electric-consuming facility. The Court noted the mall had a single roof and all tenants had access to the common areas of the mall. More importantly, the Court noted that finding the department store to be a separate facility would lead to results, which would be contrary to the legislatively declared purpose of the statute. When construction of the mall began, Penelec installed an underground cable, which encircled the mall and was capable of serving the entire mall. The Court found it significant that if the individual store located within the complex was deemed a separate facility, unnecessary duplication of electric facilities would result contravening the Legislature's declared policy in enacting the statute. *Id.* at 1137. The public policy considerations the Commonwealth Court found significant in *Reitz* and *Pa.R.E.A.* support finding that the Complainant's residence and garage in the present case constitute but a single electric-consuming facility to be served by a single retail electric supplier.

Unilec already has existing facilities upon the Complainant's property [*29] capable of supplying the desired electric service. Unilec has a three-phase distribution circuit passing within 380 feet of the Complainant's residence, while Penelec's single-phase distribution circuit is at least 1280 feet distant. If the Commission decides Unilec is the proper retail electric supplier, the Complainant will build his garage within 100 feet of his house. To permit the Complainant to receive electric service from Penelec in Penelec's territory will clearly result in the wasteful duplication of distribution facilities contravening the public interest so important to the Legislature in enacting the Territory Law. 15 Pa. C.S. § 7353. It will not only unnecessarily encumber the landscape, which is a concern for future owners of this land, but also pose service problems for the retail electric supplier.

Engineers for both Unilec and Penelec agree that any secondary service line the Complainant constructs greater than 800 feet will experience substantial voltage losses resulting in inadequate service at the residence. Such a long secondary service line will pose problems for Penelec, which must meet the reasonably adequate service standards of Section 1501 of the Public [*30] Utility Code. *66 Pa. C.S. § 1501*. Prohibiting the Complainant from receiving service from Penelec will eliminate future litigation concerning whether Penelec has met this service standard. It will also meet the policy objective of the Legislature in minimizing "diminished efficiency" in serving the consumer, as well as the public convenience and necessity. *15 Pa. C.S. § 7353*.

None of the policy objectives the Legislature deemed important in enacting the Territory Law will be honored, if the Complainant's request is granted. In fact, the Complainant's expressed intention is to circumvent this statute. This circumvention impedes the orderly development of retail electric service in rural areas, which is the primary purpose of this Law. Reitz, *supra*, at 308. It violates the express language of the statute, which prohibits a retail electric supplier from furnishing retail electric service in the certified territory of another retail electric supplier. *15 Pa. C.S. § 7354(a)*. It violates the exclusive right and obligation of each retail electric supplier to furnish retail electric service to all electric-consuming facilities located within its certified territory. *15 Pa. C.S. § 7355(a)*. [*31] The proposed action also violates the prohibition against a retail electric supplier from "... furnish[ing], mak[ing] available, render[ing] or extend[ing] its retail electric service to a customer for use in electric-consuming facilities located within the certified territory of another retail electric supplier." *Id.* By this language, the Legislature clearly intended to prohibit the type of circumvention the Complainant contemplates in this case. In similar cases, the Commission has declined to permit the express provisions of the law to be ignored.

In *United Electric Cooperative, Inc., et al., v. Pennsylvania Electric Company, et al.*, Docket No. C-00913366 (Order entered January 17, 1992), Penelec properly provided pole service to a mobile home on the customer's property within its territory. The customer thereafter extended service to a new residence in Unilec's territory. The Commission upheld granting a motion for summary judgment in favor of Unilec, finding the customer could not erect his own private service line from Penelec's pole to his residence, which was within the exclusive territory of Unilec.

In *Salvadge, et al., v. Pennsylvania Electric Company, et al.*, [*32] Docket No. C-00882191 (Order entered May 10, 1990), two customers owning adjacent properties were receiving electric service from the closer facilities of Penelec. Mr. Smith's barn, shed and former house were within the exclusive service territory of Penelec. Similarly, Mr. Salvadge's sewerage pump was within the exclusive territory of Penelec. The customers then ran underground cables to bring electric service from these facilities to their respective residences, which were in the exclusive territory of Tri-County Rural Electric Cooperative, Inc. In order to prevent the continuing circumvention of the statute, the Commission directed Penelec to cease and desist providing electric service to these customers, if they did not disconnect their underground electric cables.

These cases clearly illustrate the point that the Territory Law implicitly gives predominance to the interests of the public in general over the particular preference of a customer for a certain retail electric supplier. While normally customer preference is a factor to be considered, it is not controlling. Customer preference cannot prevail where exclusive territory areas are assigned. An individual has no property [*33] right to be served by a particular utility, merely because he/she deems it advantageous to himself/herself. *Glade Park East Home Owners Association v. Pa. P.U.C.*, *156 Pa. Commonwealth Ct. 466, 628 A.2d 468* (1993). While understandable, customer preference, if left unchecked, will defeat the orderly development of retail electric service in unincorporated areas. *15 Pa. C.S. § 7353*.

In his complaint, the Complainant urges the Commission to "change or revoke territorial laws giving the consumer the freedom of choice." Further, he requests that the Commission "establish a governing body for Unilec so the consumers can get fair actions against their formal complaints." As a creature of statute, the Commission has only those powers expressly provided to it in the Public Utility Code. *National Fuel Gas Distribution Corporation v. Pa. P.U.C.*, *76 Pa. Commonwealth Ct. 102, 464 A.2d 546* (1983). Under the Territory Law, the Commission only has jurisdiction to enforce compliance with the statute. *15 Pa. C.S. § 7358*. Accordingly, the Commission has no jurisdiction to grant the requested relief and the Complainant [*34] should address these concerns to his local State Representative.

Finally, the Complainant asserts the proffered service of Unilec is inadequate and he should be entitled to receive the service of Penelec.

D. The Complainant's Claim of Inadequate Service

Section 7355(c) of the Territory Law provides an exception to the exclusive provision of retail electric service by a retail electric supplier within its certified territory. *15 Pa. C.S. § 7355(c)*. This provision states:

If the commission, after hearing, determines that the retail electric service being furnished or proposed to be furnished by a retail electric supplier to an electric-consuming facility is inadequate and is not likely to be made adequate, the commission may authorize another retail electric supplier to furnish retail electric service to that facility. (Emphasis added.)

As the party raising the allegation of inadequate service in this proceeding, the Complainant bears the burden of proof. 66 Pa. C.S. § 332(a). The Pennsylvania Supreme Court has held that the term "burden of proof" means a duty to establish a fact by a preponderance of the evidence. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). [*35] The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *Id.* The Commission has held that a complainant, to establish a sufficient case against a utility and satisfy the burden of proof, must show that the utility is responsible or accountable for the problem described in the complaint. *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. P.U.C. 300 (1976). For the following reasons, the Complainant has failed to carry this burden.

The Complainant had no personal experience with the service provided by Unilec prior to the commencement of hearings in this case. n6 He did relate that his wife's family, who lives 10-15 miles away, experienced power outages during the winter of 1992-1993 and they receive service from Unilec. However, the Complainant could provide no details (N.T. 14-16). This testimony is clearly hearsay evidence. Since it is uncorroborated, it may not support a finding on a critical question involved in this proceeding. *Anderson v. Commonwealth, Dept. of Public Welfare*, 79 Pa. Commonwealth Ct. 182, 468 A.2d 1167 (1983); [*36] *Burks v. Commonwealth, Dept. of Public Welfare*, 48 Pa. Commonwealth Ct. 6, 408 A.2d 912 (1979). Furthermore, the record supports finding the service of Unilec is adequate to meet the needs of the Complainant or at least is likely to be made adequate.

n6 Pending a decision in this case, the Complainant began to receive electric service from Unilec for his residence on a temporary basis (N.T. 61-62).

Unilec presented evidence that a major snow storm did cause outages not only for its customers, but also for the customers of Penelec and other electric utilities during the winter of 1992-1993. No retail electric supplier can prevent all outages resulting from storms, equipment failures, lighting, falling trees and the like. Such occurrences are not unusual in a rural area. However, Unilec has shown it has a comprehensive preventative maintenance program and plan to ensure system reliability. It has undertaken efforts to improve its program to respond to outage problems. Unilec [*37] has a program of equipment up-grading and maintenance, as well as line inspection, pole treatment, tree-trimming, and periodic system replacement. The details of Unilec's various programs are set forth in the foregoing section of this decision. In view of this evidence, the Complainant has not shown the service of Unilec to be inadequate presently and incapable of becoming adequate in the near future.

Therefore, the complaint must be dismissed.

Conclusions of Law

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding.
2. The Complainant's residence lies within the exclusive certified territory of Unilec.
3. Under the circumstances of this case, the Complainant's residence and proposed garage constitute a single "electric-consuming facility" within the meaning of the Territory Law.
4. Under the circumstances of this case, the appropriate retail electric supplier of service to the Complainant should be Unilec.

ORDER

THEREFORE,

IT IS ORDERED:

That the complaint of Thomas C. States v. Pennsylvania Electric Company and United Electric Cooperative, Inc., docketed with the Pennsylvania Public Utility Commission at No. C-00945488, is hereby [*38] denied.

Dated: November 29, 1995

JOHN H. CORBETT, JR.

Administrative Law Judge