

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE COMPLAINT FILED)	
BY JAMES R. THOMEN AGAINST DELMARVA)	
POWER & LIGHT COMPANY FOR DAMAGES TO)	PSC COMPLAINT DOCKET
HOUSEHOLD EQUIPMENT AS THE RESULT OF)	NO. 347-07
AN OVER-VOLTAGE AT HIS PREMISES AT 201)	
GREENOCK DRIVE, WILMINGTON, DELAWARE)	
MONTCHAN SUBDIVISION)	
(FILED JULY 30, 2007))	

ORDER NO. 7507

AND NOW, this 19th day of February, 2009;

WHEREAS, the Commission having received and considered the November 25, 2008 Findings and Recommendations of the Hearing Examiner ("Report") issued in the above-captioned docket, which was submitted after a duly-noticed public evidentiary hearing;

AND WHEREAS, the Hearing Examiner recommends that the Commission deny the relief sought in the Complaint filed on July 30, 2007 by James R. Thomen and against Delmarva Power & Light Company ("Delmarva Power"), without any finding of liability on the part of Delmarva Power;

AND WHEREAS, for the reasons provided in the Report, the Commission accepts the Hearing Examiner's recommendations; now, therefore,

NOW, THEREFORE, IT IS HEREBY ORDERED BY THE AFFIRMATIVE VOTE OF NOT FEWER THAN THREE COMMISSIONERS:

1. That, by and in accordance with the affirmative vote of a majority of the Commissioners, the Commission hereby adopts the Findings and Recommendations of the Hearing Examiner, appended to the original hereof as "Exhibit A."

2. That the Commission hereby denies the relief sought by the Complaint filed on July 30, 2007 by James R. Thomen and against Delmarva Power & Light Company, without any finding of liability on the part of Delmarva Power & Light Company.

3. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

/s/ Joann T. Conaway
Commissioner

/s/ Jaymes B. Lester
Commissioner

/s/ Dallas Winslow
Commissioner

/s/ Jeffrey J. Clark
Commissioner

ATTEST:

/s/ Karen J. Nickerson

Secretary

E X H I B I T "A"

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

DATED: November 25, 2008

RUTH ANN PRICE
SENIOR HEARING EXAMINER

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FINDINGS AND RECOMMENDATIONS OF THE HEARING EXAMINER

Ruth Ann Price, duly appointed Hearing Examiner in this Docket pursuant to 26 *Del. C.* § 502 and 29 *Del. C.* ch. 101 reports to the Commission as follows:

I. APPEARANCES

On behalf of the Complainant, James R. Thomen:

JAMES R. THOMEN, 201 Greenock Drive, Wilmington, DE 19807

On behalf of Respondent, Delmarva Power & Light Company ("Delmarva" or "the Company"):

TODD L. GOODMAN, ESQUIRE

On behalf of the Public Service Commission Staff ("Staff"):

MALAK S. MICHAEL, Administrative Engineer

II. BACKGROUND

1. This matter involves a formal complaint filed by James R. Thomen, a resident of the Montchan subdivision in Greenville, Delaware. Mr. Thomen alleges that in the early morning of October 13, 2006, an over-voltage event occurred on the power line that serves

Mr. Thomen's residence located at 201 Greenock Drive, Wilmington, Delaware. As a result of the over-voltage event, Mr. Thomen sustained damage to two individual surge protectors. Mr. Thomen claimed a loss in the amount of \$220.00 for the surge protectors, for which Delmarva has denied liability.

2. After negotiations with Delmarva failed, Mr. Thomen filed a formal complaint with the Commission on July 30, 2007. On September 5, 2007, Delmarva filed its answer to the Complaint, denying any liability.

3. On September 12, 2007, Mr. Bruce Burcat, Executive Director of the Commission, referred this matter to me pursuant to Rule 17(b) of the Commission's Rules of Practice and Procedure for development of a full and complete record on the factual allegations of the complaint.

4. By letter dated September 19, 2007, I informed the parties that I would hold a conference call on September 25 at 9:00 a.m. to discuss the issues in this case. Further, in that letter, I advised Messrs. Thomen and Goodman that based upon the Delaware Supreme Court's holding in Artesian Water Company v. Cynwyd Club Apartments, Inc., 297 A.2d 387, 388-90 (Del. 1972), the Commission lacks the authority to award monetary damages in the event that the Commission found Delmarva was legally liable for the damage caused to Mr. Thomen's surge protectors. In order to collect any damages, Mr. Thomen would need to file his case in a court of general jurisdiction. I also advised the parties that either party at the

conclusion of this matter could appeal my decision regarding damages to the Commission if they desired.

5. On September 20, 2007, I forwarded a letter to each of the parties asking that they provide me with certain documents relevant to this matter no later than October 12, 2007. The documents produced in response to this letter became the crux of the discovery exchanged in this matter.

6. A conference call with Mr. Thomen, Delmarva, and Staff was held on September 25, 2007. During the conference call, it was decided that I would conduct a site visit of the location where the tree had contacted the power lines causing the over-voltage event. In addition, the parties agreed that the evidentiary hearing in this matter would be held on October 23, 2007.

7. On October 23, 2007, I visited the site where the tree made contact with Delmarva's power lines causing the over-voltage event. While conducting the early morning visit, I was accompanied by the Complainant, James Thomen; Todd L. Goodman, Esquire, Counsel for Delmarva; Michael S. Malak, Commission Staff Administrative Engineer; Michael Trotta, Delmarva's Arborist; Kenneth Barnaby, a friend and neighbor of Mr. Thomen's and, during a portion of the visit, Albert Forwood, D.C., D.A.C.A.N., the owner of the property adjacent to the location of the subject fallen tree.

III. SUMMARY OF THE EVIDENCE

8. On October 23, 2007, an evidentiary hearing was held at the Carvel State Office Building in Wilmington, Delaware. The record, as developed at the hearing, consists of a 159-page verbatim transcript

and 16 exhibits, including a post-hearing composite exhibit admitted into evidence by the Hearing Examiner.¹ I have prepared an exhibit log listing all exhibits. I have also considered all of the record evidence and, based thereon, I submit for the Commission's consideration these Findings and Recommendations.

9. **Complainant's Testimony.** The Complainant, James R. Thomen,² testified that, on October 13, 2006, his residence located in the Montchan subdivision, experienced an over-voltage event that damaged two (2) independent, computer surge protectors. Tr. 6. The cost of replacing the computer surge protectors was alleged to be \$220.00.³ The surge protectors which were damaged were produced by Mr. Thomen to Delmarva which admitted that a "voltage swell" caused Mr. Thomen's surge protectors to become inoperable. Ex. 15A at pp. 5-6.

10. Mr. Thomen testified that he believed the over-voltage event was caused by Delmarva's negligence in failing to clear a split tree from the proximity of the power lines located in the Rockland

¹References to the transcript of the evidentiary hearing are cited as "Tr. ___." Exhibits shall be referred to as "Ex. ___."

²After the conclusion of the evidentiary hearing, by electronic mail dated October 30, 2007, Mr. Al Forward sent me a letter purporting to clarify certain facts for the record. Mr. Forward's letter states that he was requested to send the letter by Complainant, Mr. Thomen. I distributed Mr. Forward's letter to the other parties in the case. On that same day, Mr. Goodman, counsel to Delmarva, filed an objection to admission of the letter on the ground of hearsay as well as the fact that it was out-of-time. For purposes of this report, I sustain Delmarva's objection to the document, but the parties should understand that I have read and considered the contents of the letter. I find had Mr. Forward's letter been admitted into evidence the facts and statements set forth therein would not have changed the conclusions that I have reached in this report.

³Mr. Thomen testified that he and a friend, Kenneth Barnaby, did the work to replace the damaged surge protectors. Therefore, he claimed no labor costs for fixing the protectors. Further, at the evidentiary hearing, Mr. Thomen brought two observers, Messrs. Kenneth Barnaby and Richard Rowe.

Road area serving his home. *Id.* Mr. Thomen stated that the tree was split at some time in the past and that there was "callus growth," measuring approximately an inch and a half wide, around the edges of the split tree; both on the split portion and the standing portion of the tree. *Id.* However, Mr. Thomen concluded that given the amount of callus growth he believed the tree had been split for some period of time. *Id.* Mr. Thomen stated that on October 13, 2006, the previously split tree connected with a 34,000 kv line which contacted a 12,000 kv line that served his house. Tr. 7. Mr. Thomen alleged at the evidentiary hearing that Delmarva was "negligent in failing to recognize this failed tree and to have removed it from the hazard it presented to the power lines." Tr. 7.

11. In a letter dated February 8, 2007 to C. Larry Bishop, Delmarva's Claims Coordinator, Mr. Thomen asserted that he believed that the tree falling on October 13, 2006 and the resulting power surge could have been avoided if Delmarva reasonably patrolled its power lines and trees growing near such lines. Had Delmarva patrolled the trees in this area, Delmarva should have realized the poor condition that this tree was in long before it fell. Ex. 2. However, Mr. Thomen testified that he never saw the tree leaning. Tr. 135.

12. Mr. Thomen further asserted that he disagrees with Delmarva's practice of automatically closing the breaker after it has been opened resulting from an over-voltage event. *Id.*; Tr. 146-47. Complainant contends that this practice results in customers receiving two (2) separate over-voltage events. If a customer has a surge protector installed, the surge protector is damaged by the first over-

voltage event and the customer's equipment is damaged by the second over-voltage event (caused by automatically closing the open breaker).

Ex. 2. Mr. Thomen's complaint was not that Delmarva was not following the utility industry's standard utility breaker practice, but rather Mr. Thomen "challeng[ed] the standards themselves." Tr. 146-47.

13. **Testimony of Richard A. Rowe.** Mr. Thomen also proffered the testimony of Richard A. Rowe, a neighbor whose property is located at 100 Montchan Drive. Mr. Rowe testified that he was going to bed at approximately 1:30 p.m. on the morning of October 13, 2006 when suddenly he saw a tremendous flash with a boom. Tr. 110. Mr. Rowe noted that the weather was clear and bright. He thought that someone had thrown a grenade. On second thought, because the incident seemed close, Mr. Rowe thought that there had been an explosion at the DuPont Experimental Station which is located not far from his home. Tr. 111. In response to the light and the noise, Mr. Rowe closed the curtain and proceeded to bed. However, less than a minute after the first event, there was another loud boom accompanied by hissing and a clicking noise around the house. He did not hear any sirens or other noises so he went to bed. The next morning he found that his fax machine was out of order. *Id.* Mr. Rowe attributes the incident to the over-voltage event. *Id.* Mr. Rowe contends that he incurred sixty-nine dollars and no cents (\$69.00) for damages to his fax machine. Tr. 112. Mr. Rowe also testified that there was an over-voltage in his area on February 2, 2003.

14. **Company's Direct Testimony.** Delmarva first presented the testimony of Michael Trotta, an Arborist certified by the

International Society of Arboriculture and a Delmarva employee. Tr. 23. In addition, Mr. Trotta obtained a Bachelor of Science Degree (B.S.) in Forestry from Pennsylvania State University, has practiced as a Forester since 1988, and has been a Utility Forester since 2000. Further, Mr. Trotta testified that in order to maintain his certification as an arborist he must take thirty (30) continuing education credits within a three-year period. Id. Mr. Trotta was qualified by the Hearing Examiner as an expert witness in Forestry. Tr. 35. Mr. Trotta also testified as a fact witness.

15. Mr. Trotta testified that during the night before he found the fallen tree, there had been isolated thunderstorms that may have caused the tree to fall. Tr. 24. Mr. Trotta visited the site of the fallen tree around 7:00 a.m. or 8:00 a.m. on the morning the power surge occurred. Tr. 50, 24. He found a split, smoking, Ailanthus tree laying on both the 34,000 kilovolt (kv) line and the 12,000 kv line, which served Mr. Thomen's house and the general neighborhood. Tr. 26, 29. The fallen tree was located on a seventy-two (72) foot wide parcel of land upon which Delmarva admitted it had a right-of-way. Tr. 50; Ex. 15A, pg 3. At the time Mr. Trotta found the fallen tree, the power was out. (Tr. 26-27.) Accordingly, Mr. Trotta moved the fallen tree off of the land above the two (2) power lines and called Delmarva line crews who came and restored the power. Tr. 26-27.

16. Mr. Trotta testified that Delmarva follows the utility industry's standard of Vegetation Management, *i.e.* inspecting and cutting back vegetation (such as trees) from utility equipment, by

performing a four (4) year "circuit" around the approximately two thousand (2,000) miles of Delmarva's rights-of-ways. Tr. 33, 36, 50.

17. Mr. Trotta testified that Delmarva had inspected and cut vegetation in the specific area where the subject tree had fallen less than two (2) years before the subject tree fell on October 13, 2006. Vegetation in the area where the tree fell was inspected and cut by Delmarva during the period of October 29, 2004 through November 17, 2004. Tr. 31; See also Ex. 15A.

18. Mr. Trotta testified that Delmarva's four (4) year Vegetation Management Circuit includes inspection, maintenance, and "identifying a hazard tree, a tree that may be decayed, dead, or overhanging with dead branches." Tr. 36. Delmarva also removes trees which are "leaning in a threatening way." Tr. 76.

19. Delmarva's standard practice is to remove or cut seven (7) to eight (8) feet of vegetation growth from around its utility equipment. Tr. 37. Mr. Trotta testified that, assuming normal vegetation growth, Delmarva's Vegetation Management Circuit is designed to prohibit vegetation from interfering with Delmarva's utility equipment during the four (4) year maintenance cycle. Tr. 39.

20. Delmarva's Tariff, Leaf 24, Section X, entitled "Continuity of Service By Company," Paragraph A, provides, in pertinent part, as follows: "[the Company] shall not be liable for any loss, cost, damage or expense to any person occasioned by any change in, interruption or phase reversal of the Company's electric service due to any cause beyond the reasonable control of the Company." Ex. 15B.

21. Mr. Trotta objected to Mr. Thomen's conclusion that the amount of "callus growth" on both portions of the tree indicated that the tree had been split for a long period of time prior to this voltage variation. Tr. 28-29.

22. According to Mr. Trotta's expert opinion, both portions of the fallen tree had "compression wood" caused by "where the tree is growing out of the ground and forcing itself together." Tr. 29. Mr. Trotta testified that the growth on the tree portions was caused by normal tree growth. Id.

23. Russell Alan Erlich. Delmarva next presented the direct testimony of Russell Alan Erlich, an Electrical Engineer employed by Pepco Holdings Inc.; the Holding Company of Delmarva Power & Light Company. Tr. 78. Mr. Erlich is the Regional Account Manager who addresses consumers' concerns with their utility's system or equipment. Tr. 79. Mr. Erlich obtained a Bachelor of Science Degree (BS) in Electrical Engineering from the University of Delaware. Id. Mr. Erlich has practiced as an Electrical Engineer in the Utility industry for approximately the last fifteen (15) years. Id. Mr. Erlich was qualified as an expert witness in Electrical Engineering, specifically protection systems for utilities. Tr. 99. Further, Mr. Erlich also testified as a fact witness.

24. Mr. Erlich's testimony related to Delmarva's practice of automatically closing the breaker after it has been opened resulting from an over-voltage event. Tr. 146-47.

25. In addition to visiting the site, Mr. Erlich twice met with Mr. Thomen and neighbors in the Montchan development. Tr. 82, 84.

Mr. Erlich also had a third meeting solely with Mr. Thomen to discuss the issue of the circuit breaker and the power surge. Tr. 127.

26. In order to attempt to lessen the likelihood of an over-voltage event occurring in the Montchan area, in early 2007 Delmarva moved the power supply of Montchan residents from the B Phase Conductor to the C Supply Phase Conductor on Buck Road. Tr. 87. No over-voltage events have occurred since this move, although some voltage sags and power outages have occurred from out-of-the-ordinary events. Tr. 89-90. For example, auto accidents and squirrels can cause such out-of-the-ordinary events to occur. Tr. 89-90.

27. Mr. Erlich testified that, in his expert opinion, Delmarva was following the utility industry's standard breaker practice. Over-current relays are a "worldwide" utility standard of detecting faulted or overloaded conditions. Once the over-current relays that supervised the subject utility substation breakers picked-up, the following sequence was observed: The normal sequence for a circuit breaker operation is to open and close on what is termed an instantaneous shot. If the faulted condition is still sensed by the relay, the breaker opens and waits for five (5) seconds to allow the fault to clear. The breaker then closes again. If the fault is still present, the breaker opens and waits fifteen (15) seconds and attempts to close. After that, if the fault still exists the breaker locks out or opens. Tr. 130; Ex. 15A at p 5.

28. Commission Staff Administrative Engineer, Malak Michael. Commission Staff Engineer, Malak Michael, testified that the burst of light and the loud sound that follows immediately thereafter is the

result of the higher voltage connecting with lower voltage. Tr. 117. In this case, a 34,000 kv line fell into a 12,000 kv line. It is a type of short circuit. Further, short circuits occur when an animal, such as a squirrel, makes contact with the line or there is contact between the live line and the ground. *Id.* Mr. Michael noted that during the site visit of the area he observed that the facilities are in a wooded area. Given the density of the woods, Mr. Michael believed that another tree could fall at some time. Tr. 140. Mr. Malak stated, "My main problem is, not the tree that caused that problem, that case. I will not be surprised if other trees may fall any time." Tr. 140.

29. Mr. Michael noted that where there is one circuit on the line, there is not an over-voltage event. If one circuit is contacted, it normally brings the voltage down. Tr. 142. The over-voltage event here came because there were two lines with different voltages. When the 34,000 kv line contacted the 12,000 kv line, the voltage was increased causing the flash of light and the loud sound. Tr. 142. Mr. Michael concluded that Delmarva should pay more attention to areas where there are two lines of different voltages because those areas can experience an over-voltage event. Tr. 143.

30. Further, Mr. Michael stated that he did not believe that trimming vegetation on a four-year cycle was sufficient. Tr. 144. He stated that he thought a two-year vegetation-trimming schedule would ensure greater reliability and the public safety. Tr. 145.

IV. DISCUSSION AND RECOMMENDATIONS

31. The Commission has jurisdiction in this matter pursuant to 26 Del. C. § 362. I have considered all of the evidence of record in this case, and I hereby submit for the Commission's consideration these Findings and Recommendations.

A. VEGETATION REMOVAL

32. As testified to by Delmarva's Arborist expert, Mr. Trotta, I find that Delmarva complied with the Commission's Vegetation Management standard described below, Delmarva's standard and the utility industry's standard, by trimming and maintaining the vegetation in the area where the tree fell less than two (2) years before the tree fell.

B. DELMARVA'S COMPLIANCE WITH COMMISSION'S REGULATIONS

33. Delmarva introduced into evidence Section 7.3 of the State of Delaware Public Service Commission's "*Electric Service Reliability and Quality Standards*", entitled *Inspection and Maintenance Program*, which provides as follows: "... each EDC [Electric Distribution Company such as Delmarva] shall inspect all right-of-way vegetation at least once every four (4) years and trim or maintain as necessary." Ex. 15D. It is uncontroverted that the tree fell sometime during the evening on October 13, 2006. Mr. Trotta testified that he had maintained the vegetation in the area of the falling tree between October 29, 2004 and October November 17, 2004. Tr. 31; See also Ex. 15A.

34. While there were some differences of opinion regarding the tree's condition at the time this tree fell, I find that, based upon

Delmarva's Arborist expert's testimony, that the fallen tree had "compression wood."

35. The Commission adopted these Standards regarding Vegetation Management by virtue of Commission Order No. 7002 (Aug. 8, 2006). These standards apply in the instant case because the parties agree the tree fell and the over-voltage event occurred on October 13, 2006 only two months after the standards were adopted. I find no evidence of record that these standards are unreasonable and fail to protect the public safety. Therefore, I am compelled to conclude that Delmarva has complied with the Commission's regulation regarding vegetation maintenance in this case.

C. REASONABLENESS OF COMMISSION'S REGULATIONS

36. Further, there is no evidence presented that any of the standards under which Delmarva maintains vegetation (the Commission's Vegetation Management standard, Delmarva's standard and the utility industry's standard) are unreasonable or that the standards allow conditions to form that permits vegetation to become hazardous. In this case, one tree caused an over-voltage event that caused minimal property damage to at least two customers. In addition, Richard Rowe testified that he knew of another over-voltage event that occurred in February 2003.

37. In my opinion, one occurrence of one falling tree connecting with power lines does not warrant a wholesale review or investigation of the standards for vegetation maintenance. Commission Staff Engineer Malak Michael opined that he would prefer to see a two-year vegetation trimming cycle, rather than the current four-year cycle. However, I note that Mr. Michael's assertion was not supported with any data regarding the frequency of over-voltage events in the Montchan area. Mr. Michael was involved with Mr. Thomen's complaint when it was initially filed. He had ample time to gather and produce the statistics and data to support his opinion. Further, the Commission's regulations had been promulgated only two months prior than the incident that is the subject of this case. Mr. Michael did not provide any testimony regarding why he had not sought a stricter standard for the Company when this matter was under consideration by the Commission. Given that Delmarva is responsible for approximately two thousand miles of right-of-ways, it is reasonable to conclude that

at times vegetation will cause power outages and resulting power surges.

38. While I surmise that trees have fallen in this area before, none of the witnesses stated that these incidents occurred with any regularity. Therefore, I cannot conclude based upon the evidence presented at the hearing that the standards applicable to Delmarva's vegetation removal are unreasonable or that in this case they were not followed.

D. COMPLAINANT'S CLAIM FOR DAMAGES

39. Additionally, Delmarva's Tariff, Leaf 24, Section X, entitled "Continuity of Service By Company," Paragraph A, provides, in pertinent part, as follows: "... [the Company} shall not be liable for any loss, cost, damage or expense to any person occasioned by any change in, interruption or phase reversal of the Company's electric service due to any cause beyond the reasonable control of the Company." Ex. 15B. Under the facts and circumstances of his case, I find that Delmarva is not liable to Complainant because this event, a tree falling in the middle of the night in an area maintained by Delmarva less than two (2) years before, was "beyond the reasonable control of the Company."

E. DELMARVA'S USE OF BREAKERS

40. Further, I also find that, after the over-voltage event occurred, Delmarva prudently followed the utility industry's standard breaker practice in responding to the event. Further, no evidence was presented at the hearing that the utility standard for employing breakers is unreasonable. Once again, Mr. Thomen complains of a

single occurrence that caused harm to his personal property. Delmarva's Electrical Engineering Expert, Mr. Erlich, testified, and I agree, that based upon the evidence in this case, the utility industry's standard breaker practice is sound. There is no evidence that the use of breakers in the manner used by Delmarva pursuant to the industry standard is unreasonable or that it does not maximize safety for the general public good. Further, as testified to by Company representative Russell Erlich, since moving the power supply for Montchan residents to the C Phase conductor on Buck Road, the over-voltage problem appears to have been cured for residents in that area.

41. In summary, and for the reasons discussed above, I recommend to the Commission that it deny the Complainant's request for relief in favor of Delmarva Power & Light Company.

42. A form of Order implementing the foregoing recommendations is attached as Exhibit "A" for the Commission's consideration.

Respectfully submitted,

/s/ Ruth Ann Price
Ruth Ann Price
Senior Hearing Examiner

Dated: November 25, 2008