

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MISTY KUHNS

Complainant

vs.

**PPL ELECTRIC UTILITIES
CORPORATION,**

Respondent

COMPLAINT DOCKET

NO. F-2013-2366279

BRIEF OF PPL ELECTRIC UTILITIES CORPORATION

PPL Electric Utilities Corporation (PPL Electric), by its attorney, Gross McGinley, LLP, pursuant to the Briefing Order dated August 23, 2013 and the Revised Briefing Order dated September 19, 2013, hereby files its brief in opposition to Complainant's Complaint filed on or about May 31, 2013 as follows:

I. PROPOSED FINDINGS OF FACT:

1. On or about July 3, 2013, Complainant, Misty Kuhns ("Complainant" and/or "Kuhns"), filed a complaint alleging incorrect charges on her PPL electrical bill supplied to her residence located at 2023 East Grand Avenue, Tower City, PA 17980 ("Residence"), which she occupies with her minor son. (N.T. 22-24).

2. On about June 20, 2013, Respondent PPL Electric Utilities Corporation ("PPL Electric") filed an Answer admitting that Kuhns is a PPL Electric customer residing at the Residence, but denying all material allegations concerning improper or incorrect charges.

3. By way of pertinent, background, Kuhns filed a petition under Chapter 13 of the bankruptcy code with the United States Bankruptcy Court for the Middle District

of Pennsylvania on or about October 28, 2011. Kuhns alleged that she provided some form of notice to PPL Electric vial mail of her intent to file for bankruptcy prior to October 2011 in which she claims to have provided some kind of “temporary case number”. (N.T., pg. 10-12).

4. Complainant further alleges to have spoken to someone at PPL Electric in or around October 2011 about her bill but did not otherwise provide any meaningful details to identify with who she may have spoken. (N.T. page 11-13).

5. Kuhns concedes that she did not list PPL Electric as a creditor in her bankruptcy. (N.T., pgs. 10-11). Her bankruptcy schedules, D (secured creditors), E (creditors holding unsecured priority claims), and F (creditors holding unsecured non priority claims) confirmed that Kuhns did not list PPL Electric as a creditor. Further, a review of the mailing matrixes/recipient notices reveals that PPL Electric was not provided with notice of the bankruptcy filing, the proposed Chapter 13 plan, the proof of claim deadline, the 341 creditors meeting, or creditor’s notice of deadline to object to confirmation of the proposed plan, which was confirmed June 6, 2012. In fact, PPL Electric was not aware of (and did not become aware of) Kuhn’s bankruptcy until February 2013, almost a year and a half after the bankruptcy filing (N.T. pgs. 30 and 34).

6. From April 2012 through October 2012, Kuhns was enrolled in the On-Track Program (“On-Track”), a program to help financially troubled customers with over due balances, provided the customer meets the requirements. (N.T. pg 41-43).

7. An outstanding balance on the account is one prerequisite for qualifying for On-Track and the customer must have attempted a payment arrangement in the prior 12 month period. (*Id.* page 42). On-Track has a limit of \$850.00 for non electrical heat

users, like Kuhns (*Id.* pgs., 42-43), and thus Kuhns was removed from On-Track once she exceeded the benefits cap in or around October 2012 (N.T. pg. 43).

8. Pursuant to its internal practices applicable to all bankruptcy customers and in an attempt to place Kuhns in the same position had she properly informed PPL Electric about her bankruptcy, PPL Electric recalculated Kuhn's account as if it had known about the Kuhn's bankruptcy in October 2011. So, PPL Electric wrote off the balance due and owing as of October 28, 2011 (\$1233.00), created a new account as of October 29, 2011 and calculated the electrical bills from that time, less payments made up until February 2013. (N.T. pgs., 39-43).

9. Based upon its calculations, PPL Electric determined that Complainant was not entitled to On-Track payments because she had paid more (\$1006.00) than the actual bills incurred (\$890.86). Accordingly, once the \$1233 credit was written off, there was no overdue balance due in April 2012 and thus Claimant did not qualify for On-Track. Indeed, she failed to qualify as there had been no attempts to make payment arrangements between the bankruptcy filing and April 2012. (*Id.* pgs., 44-45).

10. Upon this recalculation, PPL Electric determined that \$1231.96 was owed for which Kuhns now seeks to obtain a credit. (*Id.* at 17-18).

11. As of the August 7, 2013 telephone hearing, Complainant owed PPL Electric \$2417.67 (*Id.* at 45).

II. PROPOSED CONCLUSIONS OF LAW:

1. Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), provides that the party seeking relief from the Commission has the burden of proof. Kuhns seeks relief from the Commission, and, therefore, has the burden of proof in this proceeding. 66 Pa. C.S. § 332(a).

2. “Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

3. If a complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, a complainant will prevail. If the utility rebuts complainant's evidence, the burden of going forward with the evidence shifts back to a complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a complainant. *Replogle v. Pennsylvania Electric Company*, 54 Pa. PUC 528 (1980), and *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980).

4. If Respondent submits evidence of “co-equal” weight to refute Complainant's evidence, Complainant has not satisfied the burden of proof unless it presents additional evidence opposing Respondent's evidence. *Morrissey v. PA Dept. of Highways*, 225 A.2d 895 (Pa. 1967), and *Burleson v. Pa. P.U.C.* 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234.

5. The decision of the Commission must be supported by substantial evidence. 2 Pa. C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. 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. P.U.C.*, 413 A.2d 1037 (Pa. 1980).

6. Bankruptcy court approval is not even necessary to terminate a bankrupt customer’s electric usage for a post-bankruptcy payment default, even in a Chapter 13. See 11 U.S.C.A. § 366(b); See, In Re Jones, 368 B.R. 745 (BAP 1st 2007).

7. Where PPL Electric is authorized to terminate services (not attempt to collect on the debt but simply terminate services) for failure to pay post-bankruptcy utility bills, it is proper that the PUC, in fact, has jurisdiction to decide post-petition payment matters and thus should have jurisdiction to decide Ms. Kuhn’s issue despite the chapter 13 bankruptcy remaining open.

8. A utility in its capacity as a post-petition creditor for service provided after commencement of a Chapter 13 bankruptcy, is not bound by provisions of the debtor’s confirmed plan, particularly where it has not filed a proof of claim on customer’s post petition account, nor sought to participate in the plan. In re Weisel, 400 B.R. 457, 61 Collier Bankr. Cas. 2d (MB) 820 (Bankr. W.D. Pa. 2009), aff’d, 428 B.R. 185, Bankr. L. Rep. (CCH) P 81754 (W.D. Pa. 2010).

9. Complainant cannot take advantage of the bankruptcy protections and the discharge of her debt, seek a credit for which she was not entitled, and claim she does not owe PPL Electric for electric usage when her actions or inactions created the situation. Because PPL Electric received no instructions to terminate the service, the responsibility

for the electric service after October 28, 2011 is Ms. Kuhn's responsibility. *52 Pa. Code § 56.16 (a)*.

10. Complainant has failed to carry her burden of proving that PPL Electric violated any Law, Regulation, or Rule.

III. ISSUES PRESENTED FOR DISCUSSION:cc

A. Whether the PUC has jurisdiction to resolve this matter dealing with post Chapter 13 bankruptcy electric bills/credits?

Suggested Answer: It should

B. Whether Kuhns has provided substantial competent evidence sufficient to prove that she is entitled to credit for post Chapter 13 bankruptcy electrical services, where she failed to provide PPL Electric with appropriate or timely notice of her bankruptcy or any bankruptcy proceedings and PPL Electric otherwise treated her just like any other customer when it discovered her bankruptcy?

Suggested Answer: No.

IV. DISCUSSION:

Complainant's pending Chapter 13 bankruptcy should not deprive the PUC of jurisdiction to deal with credits sought when her Chapter 13 bankruptcy petition is still pending, as it relates to post petition, and in fact, post plan confirmation, charges.

Initially, the ALJ raised a question about PUC jurisdiction to deal with challenges to electric bills or credits arising after Ms. Kuhn's Chapter 13 bankruptcy. It has been observed that the Commission does not have jurisdiction over arrearages for utility service that accrued prior to the filing of a bankruptcy petition due to the bankruptcy stay. Federal bankruptcy law provides that the filing of a bankruptcy petition... operates as a stay, applicable to all entities, of ... the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the

commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. 11 U.S.C. § 362(a)(1);

Section 366 of the bankruptcy code deals specifically with protections to both customers and utilities the purpose and policy of which is “to prevent the threat of termination from being used to collect prepetition debts while not forcing the utility to provide services from which it may never be paid”. *Begley v. Philadelphia Electric Co.*, 760 F.2d 46, 49 (3rd Cir. 1990).

The PUC has held that it lacks jurisdiction over a debtor with an active Chapter 13 bankruptcy proceeding, even where the subject involves a post-petition arrearage. *Derrick Mathis v. PECO Energy Company*, 2013WL4414568 , July 24, 2013 (emphasis added)(attached), citing, *Michelle Chavous v. PECO Energy Co.*, Docket No. F-2010-2215689, Initial Decision (made final via Order dated Dec. 20, 2011) and citing *John C. McGrath v. PECO Energy Co.*, Docket No. C-2012-2284024, Initial Decision (made final via Order dated July 2, 2012). PUC apparently takes this position because of the continuing nature of the bankruptcy court's oversight of the debtor under Chapter 13 of the bankruptcy code.

Unlike a Chapter 7 bankruptcy proceeding (in which a debtor's estate is expeditiously liquidated and distributed to creditors), a Chapter 13 bankruptcy allows a debtor to repay debts under the management of the bankruptcy trustee, who controls the debtor's estate and makes the distributions (based on determinations of the debtor's income and expenses) until the bankruptcy petition is discharged or dismissed.

(emphasis added) *Id.* (noting that the Commission's Bureau of Consumer Services should not have developed a payment arrangement for the complainant in light of her ongoing Chapter 13 bankruptcy case); *see also*, *Anyanwu v. Philadelphia Electric Co.*, 55 Pa. P.U.C. 221 (1981).

The cases cited above are factually distinguishable, particularly as the bills/credits at issue in this matter relate to a period far removed from the time of the bankruptcy filing (almost a year and a half) and relate to a period after Chapter 13 plan has been confirmed.

Further, notwithstanding the above authority, PPL Electric notes that the debts or credits asserted are not under the auspices of the bankruptcy court. Bankruptcy court approval is not even necessary to terminate a bankrupt customer's electric usage for a post-bankruptcy payment default, even in a Chapter 13. See 11 U.S.C.A. § 366(b); See, In Re Jones, 368 B.R. 745 (BAP 1st 2007) (Utility may terminate service to Chapter 13 customer for post-bankruptcy payment default without bankruptcy court approval and utility has discretion to refuse service to any debtor for any reason that would validly constitute ground for refusal if debtor were not in bankruptcy, with single exception of debtor's nonpayment of prepetition debt for past services) See also e.g., In re Weisel, 400 B.R. 457, 61 Collier Bankr. Cas. 2d (MB) 820 (Bankr. W.D. Pa. 2009), aff'd, 428 B.R. 185, Bankr. L. Rep. (CCH) P 81754 (W.D. Pa. 2010) (utility provider was entitled to unilaterally terminate services when debtors failed to pay bills post-petition; § 366(b) is self-executing if debtors fail within 20 days of order for relief to provide adequate assurance of payment for post-petition services). Even in a Chapter 7 bankruptcy, the Third Circuit Federal Court held that assertion of jurisdiction by the PUC over debtor's plan to deal with post-petition arrearages would not offend the exclusive jurisdiction of the federal courts in bankruptcy matters. *Begley v. Philadelphia Electric Co.*, 760 F.2d 46 (3rd Cir. 1985). Accordingly, if PPL Electric is authorized to terminate services (not attempt to collect on the debt but simply terminate services) for failure to pay post-

bankruptcy utility bills, it would seem nonsensical for the PUC to then deny jurisdiction to a customer who happened to be in a pending chapter 13 from challenging that termination. As such PPL Electric asserts that the PUC, in fact, has jurisdiction to decide post-petition payment matters and thus should have jurisdiction to decide Ms. Kuhn's issue. Such a result is also consistent with the fresh start and anti-discrimination policies of the Bankruptcy Code, since a debtor, relieved of his pre-petition debts, would thus be treated like any other utility customer with respect to post-petition debts.

A. Where Kuhn' failed to include PPL in her Chapter 13 Bankruptcy and did not provide notice to PPL of her bankruptcy, the chapter 13 plan or confirmation, PPL's pre-petition claim is not discharged.

Generally, prepetition creditors are bound by provision of the confirmed chapter 13 plan regardless of whether the claim of that creditor is provided for by the plan or whether that creditor has objected to, accepted or rejected the plan. See, *In re Weisel*, above. Unlike pre-petition creditors however, post petition creditors cannot be forced to participate in a Chapter 13 plan, though they may elect to voluntarily do so. *Id.* A utility in its capacity as a post-petition creditor for service provided after commencement of a Chapter 13 bankruptcy, is not bound by provisions of the debtor's confirmed plan, particularly where it has not filed a proof of claim on customer's post petition account, nor sought to participate in the plan. *Id.*

In this matter, PPL Electric was not even aware of the Kuhn's bankruptcy, the proposed plan or confirmation and may arguably pursue its prepetition claim (11 U.S.C. 523(a)(3)(A) a debt is not discharged when neither listed nor scheduled in time to permit timely filing of claim, unless creditor had notice or actual knowledge of bankruptcy),

however, PPL Electric elected to write off the pre-petition claim and place Kuhn's in the same position had she provided PPL with notice of her bankruptcy. (N. T. pgs. 50, 34-41)). Accordingly, it wrote off the pre-petition arrearage of \$1233, opened a new account (05601-37028), recalculated the bills for service and payments made after the bankruptcy filing date, and determined that Ms. Kuhn's was not in fact entitled to participate in the On-Track Program. (N.T. 43-44). Once the \$1233 delinquency was written off, her payments (\$1006.00) exceeded her charges (\$890.86) for electrical services between October 28, 2011 and April 2012 (when On-track payments began). (Id.). Accordingly, Kuhns was not eligible for On-Track. Further, PPL Electric's customer service representative, Mae Dorris, testified that Kuhn's would not have been eligible for On-Track as there was no attempted payment arrangement and, based upon inclusion of child support, her income level was too high (Id. at 44-45). While PPL Electric could argue that its prepetition bills have not been discharged, it has taken the position that such bills have been written off and deemed uncollectable and treated Kuhn's like any other customer in bankruptcy. Interestingly even if it determined that PPL Electric's pre-petition debt is not or will not be discharged under the circumstances, and finds that Kuhn's would otherwise have been eligible for the On-Track Program, the amount of the discharged claim for electrical services (\$1233.00) is almost exactly the same as the amount Kuhn's is requesting as a credit (\$1231.96). The amounts are essentially a wash. Kuhn's can not be entitled to both a \$1233 write off and a credit of \$1231.96, especially since the actions or inactions of Kuhn's in failing to provide PPL Electric with appropriate notice of her bankruptcy created this situation. Either PPL Electric is entitled to pursue the \$1233 bills (which it has elected to write off and not pursue) or PPL

Electric is not able to pursue its \$1233 pre-bankruptcy claim and Kuhn's is not entitled to her credit of \$1231.96.

Based upon the foregoing, PPL Electric asserts is the most appropriate outcome under the circumstances is that Kuhn's claim for a credit be denied and dismissed, particularly since her actions, or more appropriately her inactions, created this situation.

V. ORDERING PARAGRAPHS:

1. Complainant's Complaint against PPL Electric Utilities is denied.

Respectfully submitted,

GROSS MCGINLEY, LLP



BY: _____

KIMBERLY G. KRUPKA, ESQUIRE
*Attorney for Respondent, PPL Electric
Utilities Corporation*

Dated: October 18, 2013
In Allentown, Pennsylvania

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CERTIFICATE OF SERVICE

This is to certify that the **BRIEF OF PPL ELECTRIC UTILITIES CORPORATION** on behalf of PPL ELECTRIC UTILITIES CORPORATION was mailed to counsel/complainant of record MISTY KUHNS, on behalf of Respondent by first class United States mail, postage on this the 18th day of October, 2013.

MISTY KUHNS
2023 EAST GRAND AVENUE
TOWER CITY, PA 17980

GROSS MCGINLEY, LLP



By: _____

KIMBERLY G. KRUPKA, ESQUIRE

I.D. # 83071

Attorney for Respondent

PPL Electric Utilities Corporation

33 South 7th Street, P.O. Box 4060

Allentown, PA 18105

Phone (610) 820-5450; Fax (610) 820-6006