

April 6, 2015

Via Electronic Filing

Rosemary Chiavetta, Esquire
Secretary
PA Public Utility Commission
Commonwealth Keystone Building, 2 North
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Docket No. C-2014-2454119
Rose Marie Donafrio v. Pennsylvania Power Company
Penn Power's Motion in Limine to Exclude Evidence**

Dear Secretary Chiavetta:

Attached for filing is Pennsylvania Power Company's (Penn Power) Motion in Limine to Exclude Evidence of Rose Marie Donafrio (Complainant) in the above captioned proceeding.

Penn Power seeks to argue this Motion at the beginning of tomorrow's scheduled hearing. The Complainant has been advised that Penn Power would be making this Motion

A copy of the enclosed Motion has been provided to the Complainant in the manner indicated on the attached Certificate of Service.

If there are any questions, please contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM
Enclosure

cc: The Honorable David Salapa, PA Public Utility Commission [w/enc.]
John L. Munsch, Esquire, FirstEnergy Service Company [w/enc.]
Rose Marie Donafrio [w/enc.]

**Re: Docket No. C-2014-2454119
Rose Marie Donafrio v. Pennsylvania Power Company
Penn Power's Motion in Limine to Exclude Evidence**

CERTIFICATE OF SERVICE

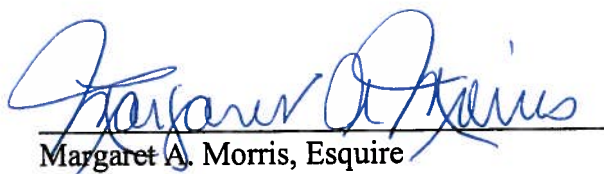
I hereby certify that a true and correct copy of the foregoing document has been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

Via First Class U.S. Mail

Rose Marie Donafrio
238 Victoria Heights
Pulaski, PA 16143

Rose Marie Donafrio
c/o Amanda Carbone
13 Lee Avenue
New Castle, PA 16101

Dated: April 6, 2015


Margaret A. Morris, Esquire

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ROSE MARIE DONAFRIO

v.

PENNSYLVANIA POWER COMPANY

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Docket No. C-2014-2454119

MOTION IN LIMINE TO EXCLUDE EVIDENCE

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, Pennsylvania Power Company (Penn Power or Company), by and through its counsel, Reger Rizzo & Darnall LLP, hereby files this Motion in Limine to Exclude Evidence (Motion) with the Pennsylvania Public Utility Commission (Commission) pursuant to 52 Pa. Code § 5.103 and requests that Rose Marie Donafrio (Complainant) be precluded from presenting testimony and/or other evidence relating to responsibility for charges for service at a prior service location, as that issue *inter alia* has been fully considered and resolved by the Commission in a prior Complaint filed by Ms. Donafrio at Docket No. C-2013-2390710. To allow such evidence would constitute an impermissible collateral attack on a validly entered Commission Order; would violate Section 316 of the Public Utility Code (66 Pa. C.S.A. § 316); and would result in the waste of resources of both the Commission and the parties. This Motion is not intended to prevent consideration of the other issues raised in the instant Complaint, specifically the request for a second Commission payment arrangement (PAR) and the assertion that the termination of Complainant’s service in October 2014 occurred without proper notice. In support of this Motion, Penn Power states as follows:

I. BACKGROUND

1. On or about October 31, 2014, the Complainant filed the instant Formal Complaint with the Commission at Docket No. C-2014-2454119. In this Complaint, Ms. Donafrio requested “a reasonable” payment arrangement, and indicated that she was having a reliability, safety or quality problem with her utility service, stating that “they turn power off without proper notification. . .” and that “. . . the Company is just not able to hear the little people.” She also stated “half this bill is not from my address.” That denial of responsibility for “half this bill” is the allegation that is the subject of this Motion. Formal Complaint, ¶¶ 4 and 5. The Complaint is an untimely appeal of a decision on informal complaint rendered by the Commission’s Bureau of Consumer Services (BCS) on October 11, 2014, at BCS Decision No. 3137323, which denied Complainant’s request for a second Commission PAR.

2. On December 10, 2014, the Company timely filed its Answer and New Matter to the instant Complaint, asserting that Complainant has been payment-troubled for years; that her balance includes charges associated with another property where service had also been in her name (the Overlook property)¹ and that the outstanding charges (\$7,955.69) from the Overlook property were transferred to the Service Location account on May 13, 2013; that Complainant defaulted on the Commission payment arrangement directed by BCS on July 17, 2009, at BCS Decision No. 2565451, which directed a Level 1 PAR of budget plus \$85.00; and that the Complainant’s request for a subsequent/second Commission PAR was denied by BCS at BCS Decision No. 3137323 on October 11, 2013, because there was no change in income or significant change in circumstances. By way of further response, the Company averred that

¹ 306 Overlook Drive, Hillsville, PA, under Account No. 110076514295.

service was terminated for non-payment on August 13, 2014; service was also terminated two additional times following discovery of meter tampering and unauthorized service.

3. The Complainant previously filed a formal Complaint with the Commission in 2013. In this Complaint, filed on October 31, 2013, and docketed at No. C-2013-2390710 (2013 Complaint) she requested a subsequent/second Commission PAR for the outstanding balance that consisted of arrears for both the Service Location account and the Overlook property account. At the outset of the evidentiary hearing on February 27, 2014, the Complainant specifically agreed that she was not disputing the accuracy of her bill that included the transferred charges from the Overlook property.

4. By Initial Decision dated June 18, 2014, Administrative Law Judge Mark Hoyer ruled, after a hearing at which both parties participated, that the Complainant was not entitled to a subsequent/second Commission PAR based on the provisions of 66 Pa.C.S.A. §§ 1405(c), 1405(d) and 1405(e). Further, Judge Hoyer found that on May 13, 2013, the Company had lawfully transferred the final bill amount from the Overlook property to the Service Location, in the amount of \$7,995.69, and that Complainant did not dispute the transferred balance. See, Initial Decision, Conclusion of Law #2, Finding of Fact #6. The Complainant did not file exceptions to the Initial Decision, which became final by operation of law pursuant to Final Order entered by the Commission on July 29, 2014. A copy of the 2013 Initial Decision and Final Order are provided as Attachment 1.

5. In the present Complaint, which is practically a verbatim reiteration of the 2013 Complaint, the Complainant expressly attempts to evade responsibility for the undisputed charges incurred for service incurred at the Overlook property. The charges may not have been incurred at her current Service Location, but were incurred at a property for which she had service in her name and were accepted by her in the 2013 Complaint proceeding.

II. ARGUMENT

6. The Commission's Rules of Administrative Practice and Procedure permit the filing of motions for relief. Such motions must set forth the ruling or relief sought, and state the grounds therefor and the statutory or other authority upon which it relies. 52 Pa. Code § 5.103(a).

7. Commission preliminary motion practice is similar to Pennsylvania civil practice respecting preliminary objections. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

8. Well-established rules of law do not permit the re-litigation of those issues which have already been the subject of full and fair litigation. This Commission has long recognized application of the principles of *res judicata* (issue preclusion) and collateral estoppel (claim preclusion) in order to promote judicial economy by providing certainty and finality to the judicial process if affected parties have already had an opportunity to appear and be heard and the ultimate and controlling issues have been decided on the merits. See, e.g., *Shan v. Verizon Pennsylvania LLC*, Docket No. C-2013-2371560, Commission Opinion and Order entered

December 18, 2014; *Tarr v. Equitable Gas Company, LLC*, Docket No. C-2009-2138511, Commission Final Order entered December 9, 2011.

9. The importance of the finality of issue resolution is recognized in the Pennsylvania Public Utility Code (Code), which at Section 316, 66 Pa. C.S.A. § 316, states in relevant part that: “[e]ffect of commission action. Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.”

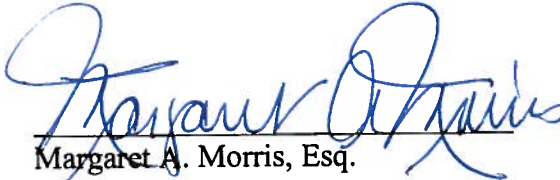
10. The Initial Decision in the 2013 Complaint became final by operation of law pursuant to Final Order entered July 29, 2014. The Commission’s Final Order on the 2013 Complaint, including the issue of responsibility for charges incurred at the Overlook property, was not set aside, annulled or modified on judicial review and therefore remains conclusive on both the Complainant and Respondent.

11. To allow testimony or other evidence on this issue would constitute an impermissible collateral attack on the Commission’s Final Order on 2013 Complaint, would violate Section 316 of the Code, and would be a waste of the resources of the Commission and the parties.

WHEREFORE, Pennsylvania Power Company respectfully requests that the Commission: (1) grant this Motion in Limine to Exclude Evidence; (2) preclude Complainant

Rose Marie Donafrio from presenting testimony and/or other evidence relating to responsibility for charges incurred for service at the Overlook property; and (3) grant any other relief deemed appropriate.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Margaret A. Morris", is written over a horizontal line.

Margaret A. Morris, Esq.
Attorney ID No. 75048
Reger Rizzo & Darnall LLP
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2929 Arch Street
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(215) 495-6600 fax

Date: April 6, 2015

mmorris@regerlaw.com

Counsel for Pennsylvania Power Company

Docket No. C-2014-2454119
Rose Marie Donafrio v. Pennsylvania Power Company

Attachment 1

**Initial Decision and Final Order
Docket No. C-2013-2390710**

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rose Marie Donafrio

v.

Pennsylvania Power Company

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C-2013-2390710

INITIAL DECISION

Before
Mark A. Hoyer
Administrative Law Judge

This initial decision denies the request of Rose Marie Donafrio (“Complainant”) for a Commission-ordered payment agreement pursuant to 66 Pa.C.S. § 1405.

HISTORY OF THE PROCEEDING

On October 31, 2013, Ms. Donafrio filed a formal complaint with the Public Utility Commission (“Commission”) against Pennsylvania Power Company (“Penn Power” or “Respondent”) at Docket No. C-2013-2390710. Ms. Donafrio alleged that Penn Power is threatening to shut off her electric utility service. She seeks a payment agreement from the Commission. On November 18, 2013, Penn Power filed its answer to the complaint. Penn Power averred, *inter alia*, that Ms. Donafrio is not entitled to a Commission-ordered payment agreement and requested that the relief sought by the complaint be denied and the complaint dismissed.

A standard Prehearing Order was issued on December 3, 2013. The initial telephonic hearing was continued by the presiding Administrative Law Judge. A Hearing Cancellation/Reschedule Notice was mailed to the parties on February 5, 2014. A telephonic

hearing was held on the rescheduled date, Thursday, February 27, 2014. Ms. Donafrio represented herself and testified on her own behalf. Margaret A. Morris, Esquire, represented Penn Power, which sponsored six exhibits for admission into the record. The hearing generated 87 pages of notes of testimony. Neither party filed a brief. The record closed on March 28, 2014.

FINDINGS OF FACT

1. Complainant, Rose Marie Donafrio, resides at 238 Victoria Heights Lane, Pulaski, PA 16143 (Tr. 12).
2. Complainant is the ratepayer for electric service provided by Penn Power to 238 Victoria Heights Lane, Pulaski, PA 16143 (Tr. 12).
3. Complainant previously resided at 306 Overlook Drive, Hillsville, PA 16132 and was the ratepayer for electric service at that address. When Complainant moved to 238 Victoria Heights Lane she had electric utility service at both 238 Victoria Heights Lane and 306 Overlook Drive (Tr. 47-48; Ex. 2 and Ex. 3).
4. Complainant's account balance for electric utility service provided by Penn Power on December 10, 2013 was \$10,565.22 (Tr. 52; Ex. 2).
5. Complainant's last payment for electric service provided to 238 Victoria Heights Lane was made on May 16, 2013 in the amount of \$45.00 (Tr. 54; Ex. 2).
6. On May 13, 2013, the final bill amount for service provided to 306 Overlook Drive was transferred by Penn Power to Complainant's account for service at 238 Victoria Heights Lane. The total amount transferred was \$7,995.69. Complainant did not dispute the transferred balance (Tr. 51-54, 58; Ex. 2).

7. Complainant made only three payments on her account since January 2012 (Tr. 58-59; Ex. 2).

8. Complainant has entered into four payment arrangements with Penn Power for service provide to 238 Victoria Heights Lane and defaulted on all four agreements. She has entered into six total payment agreements for both 238 Victoria Heights Lane and 306 Overlook Drive and defaulted on every one of them. She received a payment agreement from the Commission's Bureau of Consumer Services ("BCS") for service provided to 306 Overlook Drive at BCS Case No. 2565451 and she did not comply with that agreement (Tr. 62-65, 68; Ex. 5).

9. Penn Power has initiated proceedings to terminate electric service to Complainant (Tr. 61-62; Ex. 4).

10. Complainant resides with her adult daughter at 238 Victoria Heights Lane (Tr. 18).

11. Complainant's household income for two adults at 238 Victoria Heights Lane is \$599 per month (Tr. 19).

12. Complainant participated in the Customer Assistance Program offered by Penn Power ("PCAP") at both 306 Overlook Drive and at 238 Victoria Heights Lane. She is no longer enrolled in the PCAP. A portion of the arrearages owed on her account are CAP arrearages. (Tr. 33-38).

DISCUSSION

The issue presented by this complaint is whether Complainant is entitled to a Commission-ordered payment agreement pursuant to Section 1405 of the Public Utility Code, 66 Pa.C.S. § 1405. At the outset of the initial hearing, Complainant agreed that she is not

disputing the accuracy of her bill for electric utility service or the quality of service provided by Penn Power. Tr. 8.

Section 1405 of the Code provides as follows:

§1405. Payment Agreements.

(a) General Rule. The commission is authorized to investigate complaints regarding payment disputes between a public utility, applicants and customers. The commission is authorized to establish payment agreements between a public utility, customers and applicants within the limits established by this chapter.

(b) Length of Payment Agreements. The length of time for a customer to resolve an unpaid balance on an account that is subject to a payment agreement that is investigated by the commission and is entered into by a public utility and a customer shall not extend beyond:

(1) Five years for customers with a gross monthly household income level not exceeding 150% of the Federal poverty level.

(2) Two years for customers with a gross monthly household income level exceeding 150% and not more than 250% of the Federal poverty level.

(3) One year for customers with a gross monthly household income level exceeding 250% of the Federal poverty level and not more than 300% of the Federal poverty level.

(4) Six months for customers with a gross monthly household income level exceeding 300% of the Federal poverty level.

(c) Customer Assistance Programs. Customer assistance program rates shall be timely paid and shall not be the subject of payment agreements negotiated or approved by the commission.

(d) Number of Payment Agreements. Absent a change in income, the commission shall not establish or order a public utility to establish a second or subsequent payment agreement if a customer has defaulted on a previous payment agreement. A public utility may, at its discretion, enter into a second or subsequent payment agreement with a customer.

(e) Extension of Payment Agreements. If the customer defaults on a payment agreement established under subsections (a) and (b) as a result of a significant change in circumstance, the commission may reinstate the payment agreement and extend the remaining term for an initial period of six months. The initial extension period may be extended for an additional six months for good cause shown.

(f) Failure to Comply with Payment Agreement. Failure of a customer to comply with the terms of a payment agreement shall be grounds for a public utility to terminate the customer's service. Pending the outcome of a complaint filed with the commission, a customer shall be obligated to pay that portion of the bill which is not in dispute and subsequent bills which are not in dispute.

CAP arrearages cannot be the subject of payment agreements negotiated or approved by the Commission. 66 Pa.C.S. § 1405(c). Consequently, Complainant cannot obtain a Commission-ordered payment agreement for the CAP arrearages she owes.

Complainant has failed to provide evidence of a change in income since the time of her first Commission-issued payment agreement at BCS Case No. 2565451. 66 Pa.C.S. § 1405(d). Complainant has also failed to provide evidence that she defaulted on that first Commission-issued payment agreement as a result of a significant change in circumstance. 66 Pa.C.S. § 1405(e). The Complainant has entered into six payment agreements and has defaulted on all of them. She has made only three payments on her account since January 2012. Her last payment was made on May 16, 2013. The Complainant is clearly not entitled to a Commission-ordered payment agreement pursuant to Section 1405(d) above.

As the party seeking affirmative relief from this Commission, Complainant bears the burden of proof. 66 Pa.C.S. § 332(a). 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); and Feinstein v. Philadelphia Suburban Water Company, 50 Pa. PUC 300 (1976). "Preponderance of the evidence" means one party must present evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party. *Id.*

Complainant has failed to provide evidence of a significant change in circumstances or income that would meet the requirements necessary to receive a Commission-ordered payment agreement in this complaint proceeding. Accordingly, the request for a payment agreement is denied.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding to the extent discussed in the foregoing section of this decision.
2. Complainant has failed to meet her burden of proving that she is entitled to a payment agreement from the Commission. 66 Pa.C.S. §§ 332(a), 1405.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of Rose Marie Donafrio against Pennsylvania Power Company at Docket No. C-2013-2390710 is hereby denied.
2. That the Docket in this proceeding, Docket No. C-2013-2390710, be marked closed.

Date: June 18, 2014

_____/s/
Mark A. Hoyer
Administrative Law Judge

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Rose Marie Donafrio

v.

Pennsylvania Power Company

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C-2013-2390710

FINAL ORDER

In accordance with the provisions of Section 332(h) of the Public Utility Code, 66 Pa. C.S. §332(h), the decision of Administrative Law Judge Mark A. Hoyer dated June 18, 2014, has become final without further Commission action;

THEREFORE,

IT IS ORDERED:

1. That the complaint of Rose Marie Donafrio against Pennsylvania Power Company at Docket No. C-2013-2390710 is hereby denied.
2. That the Docket in this proceeding, Docket No. C-2013-2390710, be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ENTERED: July 29, 2014