

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pamela A. Johns and Daniel Lang	:	
	:	
v.	:	C-2017-2605604
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Conrad A. Johnson
Administrative Law Judge

This decision dismisses the formal complaint filed by Complainants for their failure to establish their burden of proving any violation of the Public Utility Code or a Commission regulation or order by Respondent, or that they are eligible for a third Commission-ordered payment arrangement.

HISTORY OF THE PROCEEDINGS

Complainants' Complaint

On May 18, 2017, Complainants Pamela Johns and Daniel Lang¹ filed a Complaint seeking review of the Commission's Bureau of Consumer Services' (BCS) February 2, 2017 decision granting Complainants' informal complaint against Respondent West Penn Power Company (Respondent or West Penn) at BCS No. 3500954. The BCS decision granted Complainants a Level 4 payment arrangement, requiring Complainants to pay a budget

¹ Initially, Pamela Johns was the only named Complainant. During the hearing the Complaint was amended to add Daniel Lang, Complainant's husband, as a Complainant, as there was no objection to the amendment. Tr. 8. See the Commission's regulations at 52 Pa.Code § 5.91, which provides for the amendment of a pleading.

amount of \$351.00 plus \$1,292.00 monthly on their arrearages in the amount of \$7,750.64, starting in March 2017. The Complaint alleges West Penn is threatening to shut off Complainants' service or already has shut off service, and Complainants would like a payment arrangement.² Complaint ¶4.

As relief, Complainants averred their utility bill was very high because of the need for medical equipment, and three medical certificates had been issued previously. According to Complainants, they are "now faced with selling their home to pay for existing and future health and financial responsibilities." Thus, Complainants requested "a small monthly payment arrangement until [their] house is sold." *Id.* ¶5.

Respondent's Answer

Respondent filed an Answer on June 12, 2017, and admitted it had threatened to shut off Complainants' electric for their failure to pay their bills. Answer ¶4. West Penn denied Complainants were eligible for a further payment arrangement, considering their lack of payments and previous history of defaulting on Company and Commission payment arrangements. *Id.* As relief, West Penn requested that the Complaint be dismissed. In the alternative, Respondent submitted that the case was appropriate for mediation. *Id.* ¶11.

Mediation

This case was referred to the Commission's Mediation Unit by Interim Order entered on June 15, 2017. Mediation proved unsuccessful, and the Mediator's Report was filed with the Commission's Secretary's Bureau on September 29, 2017.

² While Complainants did not seek timely review within 30 days of the BCS decision under 52 Pa.Code § 56.172(c), the failure to do so did not foreclose Complainants from filing a formal complaint at a later time as provided for under 52 Pa.Code § 56.172(e).

The Hearing

By Notice dated September 26, 2017, the Commission scheduled this matter for an initial call-in telephonic hearing on November 16, 2017, at 10:00 a.m. and assigned the case to me. On September 29, 2017, I issued a Prehearing Order, addressing, *inter alia*, requests for a continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

At approximately 4:00 p.m. on Wednesday, November 15, 2017, Attorney Dennis Rafferty telephoned my office, spoke with my legal assistant and requested a continuance of the hearing. Transcript (Tr.) 12. Attorney Rafferty stated the reason for the continuance request was that he had not had any opportunity to speak with his clients. *Id.* I directed my legal assistant to inform Attorney Rafferty that the request for a continuance was denied and to please call into the hearing the next day. *Id.*

The telephone hearing convened as scheduled on November 16, 2017. Complainants Pamela Johns and Daniel Lang appeared and represented themselves. Attorney Rafferty did not call into the telephonic hearing. As discussed below, Mr. Lang's request for a hearing continuance to obtain legal counsel was denied. Tr. 15. Mr. Lang briefly testified and submitted to cross-examination. Ms. Johns did not provide any testimony. Complainants did not offer any exhibits, and they left the hearing before conducting any cross-examination of Respondent's witness. Tr. 18.

Respondent West Penn was represented by John L. Munsch, Esquire. Attorney Munsch represented that he had spoken to Attorney Rafferty the morning of the hearing, but Attorney Rafferty had not asked for a continuance. Tr. 11. Had Attorney Rafferty requested a continuance of the hearing, Attorney Munsch stated he would not have agreed to a continuance because of the payment history on the case. *Id.* Tammy J. Taylor, a senior customer service compliance specialist, testified on behalf of West Penn and sponsored Exhibits 1 through 4, all of which were admitted into the record.

The November 16, 2017 hearing generated thirty-nine pages of transcribed testimony. The record was closed by Interim Order dated December 18, 2017. This case is procedurally ready for ruling.

FINDINGS OF FACT

1. Complainants are Pamela A. Johns and Daniel Lang, and they reside at 1564 Darlington Road, Ligonier, Pennsylvania PA 15658 (service address). Tr. 4.
2. Respondent is West Penn Power Company. Answer ¶2.
3. Electric service to Complainants' residence was established by West Penn on December 8, 2006. Tr. 20.
4. Complainants are not disputing their electric usage nor the amount of their account balance. Tr. 15, 35.
5. Between June 22, 2015 and January 6, 2017, Complainants made two payments on their account: \$100.00 on September 3, 2015, and \$187.79 on October 28, 2015. Exhibit 1.
6. On January 7, 2016, Complainants made two payments on their account in the amount of \$1,500.00 each, for a total of \$3,000.00. Exhibit 1.
7. The morning of the hearing, November 16, 2017, Complainants made a payment on their account in the amount of \$750.85. Tr. 23.
8. Complainants have an outstanding electric account balance in the amount of \$9,157.47. Tr. 23; Exhibit 1.

9. The service address is a three-member household: Mr. Lang, Ms. Johns and their daughter, ages 65, 64 and 21, respectively. Tr. 16, 37.

10. Complainants' household income includes Ms. Johns' monthly employment earnings of \$5,000.00 and Mr. Lang's \$450.00-monthly pension for a total of \$5,450.00 monthly. Tr. 32.

11. Based upon their household size and monthly income, Complainants have received payment arrangements on their account with outcomes as follows:

Type of Payment Arrangement	Date	Arrangement Amount	Household Income	Arrangement Monthly Terms	Outcome
BCS No. 35000954	2/2/17	\$7,539.35	\$5,153.08	Budget + \$1,292.00 Beginning 3/17	Default
F-2015-2485291 Settlement Arrangement	1/8/16	\$2,972.35	\$6,679.78	Budget + \$495.42 Beginning 2/8/16	Default
BCS No. 3326562	4/13/15	\$3,782.03	\$6,679.78	Budget + \$448.00 Beginning 5/26/15	Default
Company Payment Arrangement	2/7/14	\$1,602.81	\$5,600.00	Budget + \$133.00 Beginning 3/17/14	Default
Company Payment Arrangement	5/16/13	\$1,093.27	\$5,600.00	Budget + \$182.00 Beginning 6/10/13	Default

Tr. 26-29; Exhibits 1, 3.

12. On April 13, 2015, BCS granted Complainants a payment arrangement based upon a household income of \$6,679.78. *Id.*

13. On February 2, 2017, BCS granted Complainants a second payment arrangement at Level 4 based on a three-member household and reduced monthly household income of \$5,153.08. Tr. 31-32; Exhibit 4.

14. Complainants have not experienced a significant change in their household size or income since BCS granted them a payment arrangement on February 2, 2017. Tr. 31-32; Exhibits 3, 4.

15. Complainants' electric service remains active. Tr. 24.

DISCUSSION

A. Legal Standards

1. Complainants and Burden of Proof

Section 701 of the Public Utility Code (Code), 66 Pa.C.S. § 701, provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.

In this proceeding Complainants, as the parties seeking affirmative relief from the Commission, bear the burden of proof pursuant to Section 332(a) of the Code. 66 Pa.C.S. § 332(a). To satisfy this burden, Complainants must demonstrate that Respondent is responsible for the problem alleged in their Complaint through a violation of the Code or a regulation or outstanding order of the Commission. 66 Pa.C.S. § 701. This must be established by a preponderance of the evidence. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990). Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602, *alloc. den.*, 602 A.2d 863 (1992). In addition, the Commission's findings of fact must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. *Norfolk and Western Railway v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by Complainants of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, to rebut the evidence of Complainants, shifts to Respondent. If the evidence presented by Respondent is of co-equal weight, Complainants have not satisfied their burden of proof. Complainants now have to provide some additional evidence to rebut that of Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlt. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983). While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlt. 2001).

2. Service Termination Notice

Chapter 14 of the Code, the Responsible Utility Customer Protection Act, 66 Pa.C.S. § 1401, et seq., effective December 22, 2014, governs certain residential utility service standards. Section 1406 of the Code, 66 Pa.C.S. § 1406, permits a utility company to notify a customer about an impending service termination under certain conditions and outlines the procedure the company must follow to terminate service. Section 1406, in relevant part, states:

§ 1406. Termination of Utility Service

(a) Authorized termination. — A public utility may notify a customer and terminate service provided to a customer after notice as provided in subsection (b) for any of the following actions by the customer.

(1) Nonpayment of an undisputed delinquent account.

In conjunction with Section 1406 of the Code, Section 56.321 of the Commission's regulations also permits a public utility to terminate service for nonpayment of an undisputed delinquent account or failure to comply with the material terms of a payment arrangement. 52 Pa.Code § 56.321. The notice provisions that a utility must follow for an impending services termination are set forth at 52 Pa.Code § 56.331.

3. Payment Arrangements

Section 1405 of the Code authorizes the Commission to grant customers and applicants payment arrangements. 66 Pa.C.S. § 1405. Specifically, Section 1405 of the statute provides in pertinent part as follows:

§ 1405. Payment arrangements

(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 arrangements between a public utility, customers and applicants within the limits established by this chapter.

....

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

....

(f) Failure to comply with payment arrangement.— Failure of a customer to comply with the terms of a payment arrangement 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.

B. Denial of Complainants' Continuance Request

Upon commencement of the hearing, Mr. Lang requested a continuance for Attorney Rafferty to represent him. Tr. 12-15. Mr. Lang testified that Attorney Rafferty had been his legal counsel for several years, and he had contacted Attorney Rafferty two weeks prior to the hearing concerning legal representation. *Id.* He was unaware until three days before the hearing that Attorney Rafferty would be unavailable for the hearing. *Id.* Although there were

other attorneys in Attorney Rafferty's firm who might have represented Complainants, Mr. Lang wanted Attorney Rafferty present primarily to negotiate a settlement of the case. *Id.* After duly considering (1) that Complainants had ample opportunity to obtain legal representation, (2) alternate legal counsel was available (3) the reason for and lateness of the continuance request, and (4) the issues involved were not complex, I exercised my discretion and denied Complainants' request for a continuance of the hearing. *See, Steadwell v. Unemployment Compensation Board of Review*, 463 A.2d 1298 (Pa.Cmwlth. 1983), which holds that the granting of a continuance is within the discretion of the presiding officer.

C. Positions of the Parties

1. Complainants' Position

Mr. Lang briefly submitted, "Our case is about outstanding arrears for utilities at our home, and we are asking the utility to wait until we either refinance this property or we are able to sell the property to make payments to the utility. That's all I can tell you, your Honor." Tr. 15. After a brief cross-examination about his household size and income, Mr. Lang claimed he was too ill to proceed and was going to go to the emergency room. He further stated his wife was under a doctor's care and unable to proceed with the hearing. Tr. 8-16. I informed Mr. Lang, if he left the hearing, I would have to base the decision on his testimony thus far. I also instructed him to please send me a statement verifying that he went to the doctor and was not able to continue to participate in the hearing. As of the date of this decision, I have not received any verification from Mr. Lang relating to him seeking medical treatment the morning of the hearing.

2. Respondent's Position

West Penn's customer service compliance specialist, Ms. Taylor, stated she was in contact with Complainants on November 3, 2017, and their utility concerns were discussed. Tr. 35. Complainants did not dispute their utility usage or account balance, and Mr. Lang conceded West Penn "had tried to work with them all along." *Id.* Ms. Taylor maintained

Complainants basically wanted the company to hold off on the account balance until they were able to sell their home. *Id.*

West Penn submitted that during the two years prior to the hearing, Complainants had only made two payments of \$1,500.00 each on January 7, 2016, for a total of \$3,000.00. Tr. 24; Exhibit 1. These initial payments were part of the settlement terms of their formal complaint at Docket No. F-2015-2485291. *Id.* However, Complainants did not make any additional payments on the settlement until the morning of the hearing when they paid \$750.85. The latest payment reduced the account balance to \$9,157.47, Ms. Taylor contended. Tr. 23. Ms. Taylor claimed that the \$750.85 payment was in response to a November 13, 2017, termination notice sent to the Complainants because of lack of payments on the undisputed balance. Tr. 33-34.

Ms. Taylor further asserted that Complainants previously requested the company to forebear on the account balance until they sold a rental property. Tr. 35-36. However, when the property was sold, the company did not receive any payment on the account balance. *Id.* Ms. Taylor stated that Mr. Lang informed her that upon sale of the rental property the closing expenses were greater than anticipated. *Id.* Consequently, there were no monies left over to pay on Complainants' account balance. *Id.*

According to Ms. Taylor, Complainants utilized one medical certificate to forestall service termination as well as informal and formal complaints. Tr. 33. Complainants were never eligible for West Penn's customer assistance program because for a three-member household their monthly income exceeded company guidelines. Tr. 31-32.

Considering Complainants' high account balance and multiple defaults on payments arrangements, West Penn is not willing to extend another payment arrangement to Complainants. Tr. 36.

D. Issue Analysis and Ruling

1. Threat of Service Termination Issue

Section 1406(a)(1) of the Code and Section 56.321 of the Commission's regulations permit a utility to terminate service for non-payment of an undisputed bill. Section 56.331 sets forth the general notice provisions for termination of service. In the instant proceeding, Respondent admits that Complainants were given notice of an impending service termination for an unpaid account balance exceeding \$9,000.00. Answer ¶ 4; Exhibit 1. Complainants do not dispute the account balance or their service usage. Tr. 35. Under the Code and the Commission's regulations, Respondent was authorized to issue a service termination notice. There is no evidence establishing that West Penn violated any of the Commission's regulations or the Code in threatening to terminate Complainants' service. Therefore, Complainant's threat of service termination issue must be dismissed.

2. Payment Arrangement Issue

The evidence establishes that the Commission's Bureau of Consumer Services (BCS) granted Complainants payment arrangements on April 13, 2015, and February 2, 2017. Exhibit 3. Complainants defaulted on both payment arrangements granted by the Commission. The February 2, 2017, BCS decision granted Complainants a Level 4 payment arrangement based on a three-member household and monthly household income of \$5,153.08. Tr. 31-32; Exhibit 4. Complainants' household size has not changed since February 2, 2017, and their household income has increased slightly from \$5,153.08 to \$5,450.00. Tr. 16, 32, 37.

Here I must note Complainants waited until May 18, 2017, more than 90 days, to seek review of BCS's February 2, 2017 decision, rather than file for timely review within 30 days as prescribed by the Commission's regulations at 52 Pa.Code § 56.172(c). Also, Complainants did not make any payments on their account between January 8, 2016 and November 15, 2017. See Exhibit 1. Section 1405(f) of the regulations, cited above, obligates customers to pay undisputed portions of their bill during the pendency of the complaint. In the

present case, Complainants are not disputing their account balance, but they have not paid on their account for almost two years prior to the hearing. Under these circumstances, BCS's February 2, 2017 decision must be deemed a final Commission-ordered payment arrangement, which is subject to the provisions of Section 1405(d) further discussed below. To rule otherwise would permit Complainants to circumvent the Commission's regulations and to delay payments on their account while simultaneously requesting a subsequent payment arrangement. Such a scenario is not the intent of Chapter 14 of the Code.

“Absent a change in income, the commission shall not establish or order a public utility to establish a second or subsequent payment arrangement if a customer has defaulted on a previous payment arrangement.” See 66 P.S.C. § 1405(d), cited above. Complainants have not experienced a significant change in income since their last Commission-ordered payment arrangement. While the Commission is not unsympathetic to Complainants' financial dilemma, Section 1405(d) restricts the Commission from granting Complainants another payment arrangement, absent a substantial change in income.

Importantly, by law, a public utility is entitled to receive payment for the service it provides. *Scaccia v. West Penn Power Company*, 55 Pa. PUC 637 (1982). Otherwise, unpaid bills are included in the utility's uncollectible expenses, which all remaining customers must pay. *Bolt v. Duquesne Light Company*, Docket No. Z-8712758 (Order entered April 8, 1988).

E. Disposition

Considering the above findings of fact, applicable legal principles and issue analysis, a conclusion is required that Complainants did not establish their burden of proving that (1) Respondent violated a Commission statute, regulation or order, or (2) that they are eligible for another Commission-ordered payment arrangement. Therefore, the Complaint must be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa.C.S. § 701.
2. Complainants as the proponent of a rule or order have the burden of proof. 66 Pa.C.S. § 332(a).
3. Complainants have the burden of proving Respondent has in some manner violated the provisions of the Public Utility Code or the regulations of the Commission in providing them with electric service. Section 332 (a) of the Public Utility Code, 66 Pa.C.S. § 332 (a).
4. The Public Utility Code permits a utility company to terminate service for non-payment and outlines the procedure the company must follow to terminate service. 66 Pa.C.S. § 1406.
5. A Commission-ordered payment arrangement was established for Complainants on February 2, 2017. 66 Pa.C.S. § 1405(a).
6. Absent a change in income, the commission shall not establish or order a public utility to establish a second or subsequent payment arrangement if a customer has defaulted on a previous payment arrangement. 66 Pa.C.S. § 1405(d).
7. Complainants have not met their burden of proof as required under Section 332(a) of the Code. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That Complainants Pamela Johns' and Daniel Lang's request for a subsequent Commission-ordered payment arrangement is denied.
2. That the Complaint filed by Complainants Pamela Johns and Daniel Lang against West Penn Power Company at Docket No. C-2017-2605604 is dismissed.
3. That the Secretary shall mark the Docket No. C-2017-2605604 closed.

Date: January 31, 2018

_____/s/
Conrad A. Johnson
Administrative Law Judge