

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Claude Barber and Kathleen Barber	:	
	:	
v.	:	C-2017-2630955
	:	
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 Commission-ordered payment arrangement.

HISTORY OF THE PROCEEDING

Complainants' Complaint

On October 17, 2017, Complainants Claude Barber and Kathleen Barber¹ filed a Complaint seeking review of the Commission's Bureau of Consumer Services' (BCS) August 25, 2017, decision denying Complainants' informal complaint against Respondent West Penn Power Company (Respondent or West Penn) at BCS No. 3552397. The BCS decision determined that Complainants were not eligible for a Commission-ordered payment

¹ Initially, Claude Barber was the only named Complainant on the Complaint, which was signed by Kathleen Barber. During the hearing the Complaint was amended to add Kathleen Barber, Complainant's wife, as a Complainant, as there was no objection to the amendment. Tr. 5-6. See the Commission's regulations at 52 Pa.Code § 5.91, which provides for the amendment of a pleading.

arrangement. The Complaint alleges Complainants would like a payment arrangement that they can afford.² Complaint ¶¶4-5.

Respondent's Answer

Respondent filed an Answer on November 16, 2017, admitting that Complainants would like a payment arrangement, but disagreeing that Complainants should receive a further payment arrangement considering their history of defaulting on an existing payment arrangement. West Penn alleges that Mr. Barber was enrolled in its Pennsylvania Customer Assistance Program (PCAP) on November 21, 2015, with a balance of \$256.59 deferred for potential forgiveness and terms requiring payment of current charges minus a monthly \$80.00 PCAP credit. According to West Penn, Mr. Barber was removed from its PCAP on June 21, 2016, for failure to recertify. West Penn asserts a company payment arrangement was established for Mr. Barber on March 2, 2017, on a \$4,063.89 account balance, which provided for payment of the budget bills plus \$338 monthly starting on April 19, 2017. West Penn contends Mr. Barber owes \$4,048.64 to catch up on his March 2, 2017, company payment arrangement. As relief, West Penn requested that the Complaint be dismissed.

Evidentiary Hearing and Record Closing

By Notice dated December 8, 2017, the Commission scheduled this matter for an initial call-in telephonic hearing on February 6, 2018, at 10:00 a.m. and assigned the case to me. On December 12, 2017, I issued a Prehearing Order, addressing, *inter alia*, requests for a continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

The telephone hearing convened as scheduled on February 6, 2018. Hearing participants included Complainant Kathleen Barber, Respondent's witness, Tammy J. Taylor,

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).

and its counsel, John L. Munsch, Esquire. Complainant Claude Barber did not appear for the hearing. Mrs. Barber represented herself and offered testimony, but she did not sponsor any exhibits. Ms. Taylor testified on behalf of Respondent and sponsored Exhibits 1 through 4, all of which were admitted into the record.

The February 6, 2018 hearing generated thirty-nine pages of transcribed testimony. The record was closed by Interim Order dated March 30, 2018. This case is procedurally ready for ruling.

FINDINGS OF FACT

1. Complainants Claude Barber and Kathleen Barber reside at 328 Haines Street, Kane, Pennsylvania (service address). Transcript (Tr.) 4-5.
2. Respondent West Penn Power Company is a jurisdictional public utility providing electric service to Pennsylvania customers.
3. Respondent established electric service for Complainants on July 29, 2015. Tr. 16.
4. The electric service account is in the name of Mr. Barber, and Mrs. Barber is an authorized contact on the account. Tr. 16-17.
5. On November 21, 2015, West Penn Power enrolled Mr. Barber in the company's Pennsylvania Customer Assistance Program (PCAP) with a balance of \$256.59 deferred for potential forgiveness. Tr. 24-25; Exhibit 4.
6. Under PCAP, Mr. Barber was required to pay current bills, minus an \$80.00 credit monthly beginning on January 11, 2016. Tr. 25; Exhibit 4.

7. In 2016, Complainants filed medical certifications on March 25, May 16 and June 22, thereby avoiding service termination. Tr. 32; Exhibit 3.

8. On June 21, 2016, Mr. Barber was removed from PCAP for failure to recertify. Tr. 25.

9. On March 2, 2017, West Penn Power established a company payment arrangement for Mr. Barber, requiring him to pay his budget bill plus \$338.00 monthly beginning on April 19, 2017. Tr. 24; Exhibit 4.

10. The March 2, 2017, company payment arrangement defaulted due to lack of payment. Tr. 24.

11. During the last two years, Complainants made only one valid payment on the service account in the amount of \$587.00 on April 21, 2017. Tr. 20, 28-29; Exhibit 1.

12. As of the hearing date, the account balance was \$5,929.21, which includes \$1,374.80 in PCAP arrears. Tr. 18, 25, 31.

13. Complainants are the only ones living at the service address and they have a net monthly income in the approximate amount of \$800.00.³ Tr. 13-14.

14. Complainants have not received a Commission-ordered payment arrangement. Tr. 31.

15. Complainant Claude Barber was aware of the hearing date and time, but he failed to appear for the hearing. Tr. 3-4.

16. At the time of the hearing, electric service at the service address was active. Tr. 20.

³ The record is silent as to Complainants' gross monthly income.

DISCUSSION

Legal Standards

Due Process

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlth. 1984). This due process requirement is satisfied, however, when the administrative agency provides the parties notice and the opportunity to be heard.

Burden of Proof

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 Public Utility Code (Code). 66 Pa.C.S. § 332(a). To satisfy this burden, the Complainants must demonstrate that the 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*, 134 Pa.Cmwlth. 218, 578 A.2d 600, 602 (1990), *alloc. den.*, 529 Pa. 654, 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 must provide some additional evidence to rebut that of Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 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.Cmwlth. 2001).

Payment Arrangements

Chapter 14 of the Code, the Responsible Utility Customer Protection Act, 66 Pa.C.S. § 1401 *et seq.*, effective December 22, 2014, authorizes the Commission to grant customers and applicants payment arrangements. 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.

....

(c) Customer assistance programs – Customer assistance program rates shall be timely paid and shall not be the subject of payment arrangements negotiated or approved by the commission.

....

(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.

Analysis

Complainant Claude Barber's Lack of Prosecution of the Complaint

The Commission sent notice of the telephonic hearing in this case to Complainant Claude Barber on December 8, 2017, by regular first-class mail to the address stated on the Complaint. The notice was received by Complainants because Complainant Kathleen Barber, who resides at the service address and is an authorized contact on the service account, appeared for the hearing. Mrs. Barber indicated she was handling the matter because she prepared all the paperwork and her husband works. Tr. 3-4. During the hearing Mrs. Barber could represent herself, but as a non-attorney she could not represent her husband, Mr. Barber. An individual may represent himself or herself before the Commission. *See* 52 Pa.Code § 1.21. However, all other persons must be represented by an attorney. *Id.* § 1.22.

Here, I must find that Mr. Barber had notice of the hearing and elected not to appear to prosecute his Complaint. Under these circumstances, his due process rights have been fully protected. *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993); 52 Pa.Code § 5.245(a). However, Mr. Barber's failure to appear for the hearing results in the failure of his burden of proof under Section 332(a) of the Code. Under these circumstances, the Complaint may be dismissed with prejudice as to Mr. Barber. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995); *El-Ayazra v. West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa.Code § 5.245. Therefore, in the ordering paragraphs below the Complaint will be dismissed as to Mr. Barber for lack of prosecution.

Complainant Kathleen Barber's Payment Arrangement Request

Mrs. Barber is seeking an affordable Commission-order payment arrangement. Tr. 35. Mrs. Barber has not previously received a payment arrangement from the Commission (Tr. 31), but she has made only one payment on the service account in the last 24-months. Tr. 20, 28-29; Exhibit 1. As she has defaulted on PCAP and a company payment arrangement, West Penn is not in favor of extending another payment arrangement to Complainant. Tr. 24, 28-29.

Resolution of Mrs. Barber's request for a payment arrangement must be in conformity with the Commission's decision in *Susan Hewitt v. PECO Energy Company*, Docket No. F-2011-2273271, (Opinion and Order entered September 12, 2013) (*Hewitt*). In *Hewitt*, the Commission stated it did have authority to order a payment arrangement in mixed arrearage cases which include CAP (Customer Assistance Program) and non-CAP charges. Here, Mrs. Barber's arrearages include PCAP charges in the amount of \$1,374.80 and non-CAP charges in the amount of \$4,554.41. In *Hewitt*, the Commission noted that it did not have the authority to grant a payment arrangement on CAP charges under Section 1405(c) of the Code, which states, "Customer assistance program rates shall be timely paid and shall not be the subject of payment arrangements negotiated or approved by the commission." 66 Pa.C.S. § 1405(c). Therefore, Mrs. Barber cannot be granted a Commission-ordered payment arrangement on her PCAP charges in the amount of \$1,374.80.

Furthermore, in *Hewitt*, the Commission declined to exercise its authority to grant the complainant a payment arrangement on the non-CAP arrearages based on the customer's poor payment history and her inability to keep company-issued payment arrangements. *Hewitt* at 10-12.

Similarly, in the present case, Mrs. Barber has a poor payment history, defaulted on PCAP and a company payment arrangement and made only one payment on the service account in two years. Tr. 20, 28-29; Exhibit 1. Significantly, Mrs. Barber has managed to elude disconnection of electric service by filing informal and formal complaints and through broken

payment arrangements, in addition to filing three medical certifications. Tr. 31-32. Such maneuvering circumvents the Commission's processes and should not be countenanced.

Ruling

However Mrs. Barber manages her household budget, she will have to pay for the arrearages that she owes West Penn. 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 its remaining customers must pay. *Bolt v. Duquesne Light Company*, Docket No. Z-8712758 (Order entered April 8, 1988).

Therefore, Mrs. Barber has failed to establish that West Penn is responsible for the problem alleged in her Complaint through a violation of the Code or a regulation or outstanding order of the Commission.

After duly considering the above findings and in applying the applicable legal standards to Mrs. Barber's poor payment history combined with her outstanding PCAP charges, I am compelled to deny her request for a Commission-ordered payment arrangement.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this dispute. 66 Pa.C.S. § 701.

2. Complainants carry 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 service. 66 Pa.C.S. § 332(a).

3. When a complainant fails to appear and proffer evidence in support of his complaint, complainant has failed to meet his burden of proof. Under these

circumstances, the complaint may be dismissed with prejudice. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995); *El-Ayazra v. West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016).

4. The Responsible Utility Customer Protection Act, 66 Pa.C.S. § 1401 *et seq.*, applies to this proceeding.

5. Customer assistance program rates shall be timely paid and shall not be the subject of payment agreements negotiated or approved by the Commission. 66 Pa.C.S. § 1405(c).

6. The Commission has a responsibility to exercise its authority very judiciously when granting customers payment arrangements and should exercise its discretion only on behalf of customers who have demonstrated some evidence of good faith efforts to pay their utility bills. *Susan Hewitt v. PECO Energy Company*, Docket No. F-2011-2273271, (Opinion and Order entered September 12, 2013).

7. Complainants failed to carry their burden of proving that Respondent violated a Commission order, statute or regulation. 66 Pa.C.S. §§ 332, 701.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Claude Barber and Kathleen Barber against West Penn Power Company at Docket No. C-2017-2630955 is dismissed for failure of Complainant Claude Barber to appear for the hearing and prosecute the Complaint and for failure of

