PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held September 12, 2013

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
Wayne E. Gardner
James H. Cawley
Pamela A. Witmer

Susan Hewitt F-2011-2273271

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Susan Hewitt (Complainant), on January 11, 2013, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Christopher P. Pell issued on December 27, 2012. Replies to Exceptions were filed by PECO Energy Company (PECO) on January 14, 2013. For the reasons stated below, we shall deny the Exceptions of the Complainant and dismiss the Complaint.

History of the Proceeding

On November 12, 2011, the Complainant filed a Formal Complaint (Complaint) against PECO, alleging that there were incorrect charges on her electric bill, that there was a reliability, safety, or quality problem with her utility service, that she received a notice that her utility service was being terminated, and that she would like a payment agreement. Additionally, the Complainant averred that the facts of her Complaint were very complicated and that she did not believe that she would be able to have a fair hearing in Pennsylvania. As relief, the Complainant stated the following:

> I would like All the "agents" and/or "representatives" to share costs or have them pay it and have the mortgage company pay too. And I should not have to pay for electric I did not order myself. My dad + I should only have to share his bill.

Complaint at 5. This case is a timely appeal of an informal Bureau of Consumer Services (BCS) decision at BCS Case No. 002865391.

On December 6, 2011, PECO filed an Answer and New Matter to the Complaint. In its Answer, PECO denied the material allegations of the Complaint and averred that the Complainant had a history of account delinquency and failure to maintain the terms of payment agreements. PECO also denied that it billed the Complainant incorrectly for service. Answer at 2-3. PECO admitted that on two separate occasions, it terminated the Complainant's service following a ten-day written notice and a seventy-two-hour notice of pending termination. *Id.* at 4.

In its New Matter, PECO argued that, in accordance with 66 Pa. C.S. § 1405(c), the Complainant, who participated in PECO's Customer Assistance Program (CAP) from May 17, 2007 through April 27, 2010, was not eligible for a Commission-issued payment agreement.

On January 13, 2012, the Complainant filed an untimely response to PECO's New Matter.

On April 20, 2012, a hearing was held. The Complainant appeared *pro se*. Counsel appeared on PECO's behalf with a witness and was prepared to proceed. However, at the outset of this hearing, the Complainant requested that the hearing be rescheduled so that she could be afforded the opportunity to hire an attorney to represent her.

On May 7, 2012, the ALJ issued an Order Granting Motion for Continuance, granting the Complainant's request for postponement of the hearing and directing that the hearing be rescheduled.

On July 17, 2012, the rescheduled hearing was held. Although the April 20, 2012 hearing was postponed to provide the Complainant the opportunity to hire an attorney, she appeared *pro se*, testified on her own behalf, and offered two exhibits, neither of which were admitted into the record.[1] PECO was represented by Counsel, presented the testimony of one witness, and offered ten exhibits, all of which were admitted into the record.

The record in this case consists of twenty-six pages of transcripts from the April 20, 2012 hearing; fifty-three pages from the July 17, 2012 hearing; and ten exhibits. The record closed on September 4, 2012.

[1] Counsel for PECO objected to the admission of the Complainant's exhibits on relevancy grounds. The ALJ sustained this objection.

Discussion

Legal Standards

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code). 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. 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. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by a complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the complainant shifts to the respondent. If the evidence presented by the respondent is of co-equal value or "weight," the burden of proof has not been satisfied. The complainant now has to provide some additional evidence to rebut that of the respondent. *Burleson v. Pa. PUC,* 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd,* 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence 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. PUC,* 768 A.2d 1217 (Pa. Cmwlth. 2001).

Any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); see also, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

We note at the outset that the Exceptions of the Complainant are not in strict compliance with Section 5.533(b) of our Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.533(b), which provides that:

> (b) An exception shall be stated in specific, numbered paragraphs, identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. Supporting reasons for the exception shall follow a specific exception.

We recognize, however, that the Complainant is appearing *pro se* in this proceeding. Traditionally, we have been hesitant to rule unfavorably against *pro se* litigants based on technical grounds. See, *e.g.*, *Destefano v. Peoples Natural Gas Company*, 56 Pa. P.U.C. 489 (1982). We typically apply the liberal construction provisions of our Regulations, 52 Pa. Code § 1.2(a), to *pro* se litigants to ensure just, speedy, and inexpensive determinations of proceedings before the Commission. See, *e.g., Ditsious v. Pennsylvania Electric Co.,* Docket No. F-2011-2274306 (Order entered March 14, 2013). In our view, it is in the public interest that all litigants, particularly *pro se* litigants, be afforded a meaningful opportunity to be heard. Therefore, we will consider the merits of the Complainant's Exceptions.

ALJ's Initial Decision

ALJ Pell made twenty Findings of Fact and reached six Conclusions of Law. I.D. at 4-6, 9. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

In his Initial Decision, the ALJ found that, while the Complainant challenged the accuracy of her large outstanding account balance, totaling $15,224.00 as of the date of the hearing, she simply stated her belief that these charges were incorrect. The Complainant testified that she periodically was locked out of her house, and that PECO allowed people to open up accounts in her name and steal from her. Tr. at 13-16. However, she did not offer any evidence to demonstrate that this account balance was incorrect. The ALJ noted that a customer cannot establish a case merely by stating his or her personal beliefs. Assertions, personal opinions, or perceptions do not constitute evidence. *Pennsylvania Bureau of Corrections v. City of Pittsburgh,* 516 Pa. 75, 532 A.2d 12 (1987). As such, the ALJ found that the Complainant did not meet her burden of proving that the charges for her outstanding balance, which accumulated through non-payment for PECO's services at two separate properties under accounts in her name, were incorrect. I.D. at 7.

In addressing the Complainant's allegation that there was a reliability, safety, or quality problem with her utility service, the ALJ again found the Complainant did not meet her burden of proof. The ALJ ruled that the Complainant failed to offer anything to support her allegation beyond assertions that PECO was at fault for allowing people to force her to establish service at [redacted]. Further, at the July 17, 2012 hearing, PECO presented a recording of a telephone call the Complainant made to PECO on June 23, 2009, to establish service at this address. PECO Exh. 10. The ALJ opined that nothing in this recording indicated that someone forced the

Complainant to initiate service at [redacted], or indicated that PECO acted improperly on her request for service. Additionally, during this telephone call, the Complainant acknowledged that she had service at [redacted], but declined to close out the account for service at that address. I.D. at 7-8.

In response to the Complainant's averments that PECO issued a notice advising her that her electric and gas utility service would be terminated and that PECO had terminated her service on several occasions, the ALJ noted that the Complainant did not offer any testimony at the hearing related to her termination notices. Therefore, the ALJ found that the Complainant failed to meet her burden of proving that PECO improperly issued termination notices to her or that PECO's termination of her service for non-payment was improper. I.D. at 8.

In addressing the Complainant's request for a payment agreement, the ALJ referenced Section 1405(c) of the Code, which states that "[c]ustomer assistance program rates shall be timely paid and shall not be the subject of payment agreements negotiated or approved by the [C]ommission." 66 Pa. C.S. § 1405 (c); I.D. at 8. The ALJ noted that the Complainant's $15,224.00 past-due balance with PECO includes CAP arrears. Based on this fact, the ALJ found that the Complainant was not eligible for a Commission-issued payment agreement. I.D. at 8.

Exceptions/Reply Exceptions

In her Exceptions, the Complainant argues, without any support, *inter alia*, that the ALJ was misinformed by PECO on several findings of fact; that all evidence that she submitted to satisfy the burden of proof was omitted from the record; that PECO shut off her service during the complaint process, despite the ALJ asking PECO to refrain from doing so; and that the Commission should readdress her Complaint. Exc. at 1-2.

In its Replies to Exceptions, PECO submits that, instead of challenging any error of law or abuse of discretion as required by 52 Pa. Code § 5.533(b), the Complainant merely states that she disagrees with the ALJ's Initial Decision because she believes she submitted adequate proof to support her position. PECO contends that the Complainant makes several statements that have nothing to do with the Complaint she brought against PECO. R.Exc. at 3. PECO also avers that the ALJ correctly concluded that the Complainant did not meet her burden of proof pursuant to 66 Pa. C.S. § 332(a), and requests that the Commission deny the Complainant's Exceptions and uphold the ALJ's Initial Decision. R.Exc. at 4-5.

Disposition

Upon our review and consideration of the record and the Complainant's Exceptions, we are of the opinion that the Complainant has failed to meet her burden of proving that there were incorrect charges on her bills, that there was a reliability, safety, or quality problem with her utility service, that PECO improperly terminated her service, or that she is entitled to a payment agreement. As indicated, *supra*, the Complainant's outstanding account balance at the time of the hearing was $15,224.00. PECO Exh. 4. This represents an accumulated amount that the Complainant failed to pay PECO for service in her name at two addresses. The record also indicates that this outstanding balance includes CAP arrears. PECO Exh. 6. Additionally, PECO offered convincing evidence at the hearing to show that there were no issues with the Complainant's service and reliability. PECO Exh. 9.

In light of the above, we concur with the ALJ's decision to dismiss the Complaint. As the ALJ correctly noted in his Initial Decision, the Complainant's personal opinions cannot form the basis of a finding in her favor. Accordingly, we shall dismiss this Complaint for the failure of the Complainant to satisfy her burden of proof.

In addition to adopting the ALJ's decision to dismiss the Complaint, we will take this opportunity to clarify one aspect of the Initial Decision. The ALJ correctly observed that Section 1405(c) of the Code prohibits the Commission from establishing a payment agreement for "customer assistance program rates." To date, the scope of this limitation on the Commission's power has not been addressed in detail by the Commission, and consequently the decisions issued by the Commission's administrative law judges have not been entirely consistent.[2] Prior Commission decisions have held that no payment agreement may be established for a current CAP customer. *Blocker v. Duquesne Light Co.*, Docket No. Z-01645063 (Order entered May 20, 2005) (*Blocker*). More recently, the Commission has held that Section 1405(c) prohibits the Commission from issuing a payment agreement for the CAP portion of a mixed arrearage owed by a former CAP customer. *Cooper v. PECO Energy Co.*, Docket No. F-2011-2254904 (Order entered August 2, 2012) (*Cooper*). In *Cooper*, the Commission also held that the Complainant was entitled to a payment agreement on the non-CAP portion of her mixed arrearage if she first paid off her CAP arrearage of $2,615.36. In today's Opinion and Order, we will take the opportunity to discuss our holdings in *Cooper* in more detail.

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[2] *See. e.g., Jackson v. Metropolitan Edison Co.*, Docket No. F-2012-2283966) (Initial Decision issued May 11, 2012; Final Order entered August 31, 2012) (current CAP customer eligible for payment agreement for non-CAP portion of arrearage not subject to deferral and CAP rates); *Spotti v. Equitable Gas Co.*, Docket No. C-2011-2255047 (Initial Decision issued May 24, 2012; Commission Order entered July 19, 2012) (former CAP customer not eligible for payment agreement for CAP arrearage); *White v. PECO Energy Co.*, Docket No. C-2010-2206165 (Initial Decision issued March 8, 2012; Final Order entered April 11, 2012) (former CAP customer with mixed arrearage not eligible for payment agreement); *Stevenson v. Duquesne Light Co.*, Docket No. C-2010-2175977 (Initial Decision issued November 18, 2011; Final Order entered December 20, 2011) (former CAP customer eligible for payment agreement for post-CAP portion of arrearage); *Jackson v. PECO Energy Co.*, Docket No. C-2010-2189011 (Initial Decision issued March 1, 2011; Commission Order entered April 29, 2011) (former CAP customer with mixed arrearage not eligible for payment agreement); *McCuff v. PECO Energy Co.*, Docket No. C-2008-2079359 (Initial Decision issued April 6, 2009; Final Order entered May 13, 2009) (current CAP customers are not eligible for payment agreements; issue of mixed arrearage not addressed); *Gillis v. PECO Energy Co.*, Docket No. C-2008-2030074 (Initial Decision issued July 2, 2008; Final Order entered February 20, 2009) (current CAP customers are not eligible for payment agreements; issue of mixed arrearage not addressed).

Although the term "customer assistance program rates" is not defined by Chapter 14 of the Code, 66 Pa. C.S. §§ 1401 *et seq.*, it seems reasonable to interpret this term as including CAP rates charged to customers currently enrolled in CAP programs, including rates for current service and rates for deferred pre-CAP arrearages. It also seems reasonable to interpret this term as including arrearages that accumulated while a customer formerly was enrolled in a CAP program, since these arrearages accumulated from the non-payment of "customer assistance program rates." This is consistent with our holdings in *Cooper* and *Blocker*, *supra*.

It is less clear whether the Commission is prohibited by Section 1405(c) from establishing a payment agreement for other amounts like the pre-CAP (non-CAP) portion of a mixed arrearage of a current CAP customer that is not subject to deferral and CAP credits under the utility's CAP program,[3] or the post-CAP (non-CAP) portion of a mixed arrearage of a former CAP customer. In situations such as these, a mixed arrearage may include (1) amounts billed under CAP rates; (2) amounts initially billed under standard rates but subject to deferral and credits under a CAP program; and/or (3) amounts billed under standard rates that are not, and have never been, subject to deferral or credits under a CAP program. Section 1405(c) does not explicitly limit the Commission's authority to establish a payment agreement for the latter amounts. These non-CAP amounts are not, and have never been, billed under "customer assistance program rates." We therefore conclude, consistent with *Cooper*, that we retain the authority to issue a payment agreement for non-CAP portion of a mixed arrearage.

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[3] For example, when a customer is suspended from a CAP and becomes eligible for re-enrollment at a later time, typically only the original deferred arrearage from the initial enrollment is eligible for re-deferment. The customer's unpaid CAP bills from the first CAP enrollment, and unpaid non-CAP bills that accumulated when the customer was suspended from CAP, typically are not eligible for deferment. *See, e.g., Jackson v. Metropolitan Edison Co.*, Docket No. F-2012-2283966) (Initial Decision issued May 11, 2012; Final Order entered August 31, 2012).

The question then becomes whether the Commission should exercise its legal authority and issue a payment agreement in this case for the non-CAP portion of a mixed arrearage. The issuance of a payment agreement is a matter within the Commission's discretion. As a practical matter, bifurcating an arrearage, and establishing a payment arrangement only for the non-CAP portion, is not feasible in most cases. In effect, such a truncated arrangement would require the utility to place the CAP portion of the arrearage on hold, presumably indefinitely. As long as the customer adhered to the payment agreement for the non-CAP portion of the arrearage, the utility presumably would be prohibited from terminating service for non-payment of the CAP arrearage. In many instances, it is likely that the utility ultimately would be required to simply write off the CAP arrearage. This obviously would not be in the public interest, and would allow customers to utilize payment agreements for non-CAP arrearages as a tool to avoid payment of CAP bills, which already are discounted from standard rates.[4]

In the instant case the Complainant is a former CAP customer whose arrearage is "mixed," and includes both CAP and non-CAP arrearages.[5] As explained above, Section 1405(c) does not explicitly address the Commission's authority to bifurcate a "mixed" arrearage and establish a payment agreement for the non-CAP portion. Although the Commission may have the authority to establish a payment

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[4] Even if bifurcating an arrearage is feasible, it may not be practical. Typically, CAP assistance is the best, most affordable payment plan for an eligible, low-income customer. If a customer cannot afford and does not pay a CAP bill, which is service provided at a discount, the customer most likely cannot afford and will not pay his or her current/budget bill plus an additional payment on an accrued balance, which is the typical structure of a payment agreement. Given the limitations in the Code in Section 1405(d) on the number of payment agreements that the Commission may issue for a customer, issuing a payment agreement where the customer will likely default is not in the customer's best interest.

[5] The precise amounts of the CAP and non-CAP portions of the Complainant's arrearage are not in the record. The Complainant was enrolled in PECO's CAP for approximately three years, between May 15, 2007, and April 27, 2010. PECO Exh. 6. The day before the Complainant was removed from PECO's CAP program, her account balance was $8,965.71. PECO Exh. 2. This amount includes an unspecified amount of charges incurred prior to her enrollment in CAP in 2007.

agreement for the non-CAP portion of a former CAP customer's "mixed" arrearage, we decline to do so in this case, given the Complainant's poor payment history and her inability to keep prior payment agreements with PECO.

Accordingly, we shall deny the Complainant's Exceptions and adopt the ALJ's Initial Decision, which dismisses the Complaint for failure by the Complainant to carry her burden of proof.

Conclusion

Based on the forgoing discussion, we shall deny the Complainant's Exceptions and adopt the ALJ's Initial Decision that dismisses the Complaint, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

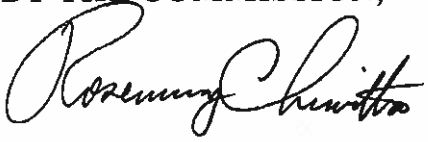
1. That the Exceptions of Susan Hewitt, filed on January 11, 2013, to the Initial Decision of Administrative Law Judge Christopher P. Pell are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Christopher P. Pell, issued on December 27, 2012, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Susan Hewitt against PECO Energy Company at Docket No. F-2012-2273271 is dismissed, consistent with this Opinion and Order.

4. That the proceeding docketed at F-2012-2273271 be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: September 12, 2013

ORDER ENTERED: September 12, 2013