

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|------------------------|---|----------------|
| Gwendolyn Mercer | : | |
| | : | |
| v. | : | C-2018-3004601 |
| | : | |
| Philadelphia Gas Works | : | |

INITIAL DECISION

Before
Gail M. Chiodo
Special Agent

INTRODUCTION

This decision denies the complaint because the complainant has failed to establish by a preponderance of the evidence that she is eligible for a second Commission-issued payment arrangement or an extension of her prior one.

HISTORY OF THE PROCEEDING

On August 24, 2018, Gwendolyn Mercer (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (PGW or Respondent) in which she requested a payment arrangement that she could afford.

On October 3, 2018, Respondent filed an Answer in which it generally denied all material allegations of the complaint and requested that Ms. Mercer's complaint be dismissed.

On October 16, 2018, the Commission issued a hearing notice setting an initial telephonic hearing for November 29, 2018 at 10:00 a.m. The case was assigned to me pursuant

to 52 Pa. Code § 56.174.¹ On October 24, 2018, a prehearing order was issued which advised the parties of the applicable hearing procedures.

The hearing convened as scheduled on November 29, 2018. Ms. Mercer appeared *pro se*, testified on her own behalf, and offered the following two exhibits which were admitted into the record:

Exhibit C-1 – Letters from PGW to Complainant regarding her account
Exhibit C-2—Complainant’s pay stubs for six weeks

Ms. Graciela Christlieb, Esquire, appeared on behalf of Respondent and presented the testimony of one witness, Tiffany Jones, Senior Customer Review Officer for PGW. Ms. Jones sponsored the following four (4) exhibits, which were admitted into the record:

PGW Exhibit 1 – Statement of Account
PGW Exhibit 2 – Payment Arrangement History
PGW Exhibit 3 – BCS Complaint and Decision No. 3597820
PGW Exhibit 4 – BCS Complaint and Decision No. 2464103

The record² closed following the conclusion of the hearing.

FINDINGS OF FACT

1. Complainant is Gwendolyn Mercer, who resides at 1345 71st Avenue, Philadelphia, Pennsylvania (service address).

2. Respondent is Philadelphia Gas Works, which provides service to Complainant at the service address.

¹ 52 Pa. Code § 56.174 (providing for review by a special agent of decisions of the Bureau of Consumer Services (BCS) and any other case in which the issue is solely the ability to pay). The instant complaint is an untimely appeal from a BCS decision dated July 11, 2018 which dismissed the informal complaint.

² Pursuant to 52 Pa. Code § 56.174(3), the hearing was tape recorded. No court reporter was present.

3. On July 20, 2007, residential service was established at the service address; Complainant is the ratepayer of record.

4. On February 1, 2008, Respondent issued Complainant a payment arrangement; Complainant defaulted on this payment arrangement. (PGW Exhibit 2).

5. On July 28, 2008, Respondent issued Complainant a payment arrangement; Complainant defaulted on this payment arrangement. (PGW Exhibit 2).

6. On October 27, 2008, Complainant filed an informal complaint with the Commission's Bureau of Consumer Services (BCS) at BCS Case No. 2464103, seeking a payment arrangement. (PGW Exhibit 4).

7. By decision dated December 15, 2008, at BCS Case No. 2464103, BCS granted Complainant a level 1³ payment arrangement, which directed Ms. Mercer to pay her monthly budget bill of \$312 plus an additional \$15 towards her arrearage, for a total of \$327, beginning with the due date of her January 2009 bill. (PGW Exhibit 4).

8. At BCS Case No. 2464103, Ms. Mercer reported a gross monthly household income of \$2,540 and a household size of four individuals, which included three adults and one minor. (PGW Exhibit 4).

9. Complainant defaulted on the December 15, 2008 BCS payment arrangement and the outstanding balance has never been satisfied. (PGW Exhibit 2).

10. On July 28, 2009 and October 23, 2009, Respondent issued Complainant payment arrangements; Complainant defaulted on both payment arrangements. (PGW Exhibit 2).

³ A level one customer is defined as a household with a gross monthly income level not exceeding 150% of the Federal poverty level and is provided with a repayment period of not more than sixty months. 66 Pa.C.S. § 1405(b)(1).

11. On February 26, 2010, March 8, 2010, August 6, 2010, and December 30, 2010, Respondent issued Complainant payment arrangements; Complainant defaulted on all four payment arrangements. (PGW Exhibit 2).

12. On September 13, 2012 and November 29, 2012, Respondent issued Complainant payment arrangements; Complainant defaulted on both payment arrangements. (PGW Exhibit 2).

13. On May 10, 2013, Complainant entered into Respondent's Customer Responsibility Program (CRP). (PGW Exhibit 2).

14. On June 28, 2016, Complainant was removed from CRP for nonpayment and a previously deferred balance of \$3,190.34 was added back to her account. (PGW Exhibits 1, 2).

15. On December 21, 2016 and November 20, 2017, Respondent issued Complainant payment arrangements; Complainant defaulted on both payment arrangements. (PGW Exhibit 2).

16. On April 4, 2018, Complainant filed an informal complaint with BCS at BCS Case No. 3597820 seeking a payment arrangement. (PGW Exhibit 3).

17. By decision dated July 11, 2018, at BCS Case No. 3597820, BCS denied Complainant's informal complaint. (PGW Exhibit 3).

18. On August 24, 2018, Complainant filed the instant formal complaint.

19. Ms. Mercer's current household size is three adults, including herself, her spouse, and her adult son.

20. Ms. Mercer's current gross monthly household income is \$2,604.11, which she receives in wages from her employment; neither of the other two adults receive any income. (Exhibit C-1).

21. Ms. Mercer's outstanding balance as of the date of the initial hearing is \$8,313.96 of which \$861.08 is comprised of CRP arrears. (PGW Exhibit 1).

DISCUSSION

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). "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*, 364 Pa. 54, 70 A.2d 854 (1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990). In addition, the Commission's decision 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 Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa.Cmwlth. 1980).

In her complaint, Ms. Mercer seeks a second Commission-issued payment arrangement. Therefore, as the party seeking relief, Ms. Mercer bears the burden of proof. Ms. Mercer is seeking a payment arrangement on her outstanding balance of \$8,313.96 of which \$861.08 is comprised of CRP arrears. Complainant does not dispute that she defaulted on twelve Company-issued payment arrangements and the Commission-issued payment arrangement at BCS Case No. 2464103.

Customer Assistance Program Arrears

The Responsible Utility Customer Protection Act, 66 Pa.C.S. §§ 1401-1418 (Act), applies to complainants alleging inability to pay and requesting a Commission-issued payment

arrangement. See, 66 Pa.C.S. § 1405(a), which provides that, “[t]he commission is authorized to investigate complaints regarding payment disputes between a public utility, applicants and customers.”

However, the Act provides that the Commission cannot grant a payment arrangement on any customer assistance program (CAP) arrears. See, 66 Pa.C.S. § 1405(c) 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.” Therefore, Ms. Mercer cannot be granted a Commission-ordered payment arrangement on the CRP charges in the amount of \$861.08.

Second Payment Arrangement on Non-CAP Arrears

Where, as in the instant matter, there is a mixed arrearage of CAP and non-CAP arrears, the Commission has held that it retains the authority to issue a payment arrangement for the non-CAP portion of a mixed arrearage. *Hewitt v. PECO Energy Co.*, Docket No. F-2011-2273271 (Order entered September 12, 2013) (*Hewitt*). The Commission also emphasized in *Hewitt* that the issuance of a payment arrangement was a matter within the Commission's discretion. In *Hewitt*, the Commission determined that the complainant, a former CAP customer, was not entitled to a payment arrangement for her non-CAP arrearages because of her poor payment history and her inability to keep prior payment agreements.

Turning to Ms. Mercer's non-CAP arrears of \$7,452.88⁴, as noted above, Ms. Mercer seeks a second Commission-issued payment arrangement. The Act provides strict guidelines that the Commission must follow, including the provision that generally permits the Commission to grant only one payment arrangement with limited exceptions. Specifically, this provision of the Act provides, in relevant part:

(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 arrangement if a customer has defaulted*

⁴ \$8,313.96 – \$861.08 = \$7,452.88.

on a previous payment arrangement established by a commission order or decision

66 Pa.C.S. § 1405(d) (emphasis added).

Complainant failed to comply with the terms of the BCS decision at Case No. 2464103 which directed a payment arrangement on her account with Respondent. (PGW Exhibits 1, 2). Since Ms. Mercer did not appeal the BCS decision and failed to make the payments ordered by the BCS decision, she has defaulted on the payment arrangement. As the Commission recently explained, when a BCS decision is not timely appealed, “then the BCS payment arrangement becomes final and the complainant must prove a change in income to be awarded a different payment arrangement before the BCS PAR is paid off.” *Horinka v. Pa. Power Company*, Docket No. C-2017-2582842, p. 3 (Opinion and Order entered August 4, 2017).

Therefore, pursuant to 66 Pa.C.S. § 1405(d), Ms. Mercer is eligible for another Commission-issued PAR only if she has suffered a change in income.

The Act defines a “change in income” as follows:

“Change in income.” A *decrease* in household income of 20% or more if the customer's household income level exceeds 200% of the Federal poverty level or a *decrease* in household income of 10% or more if the customer's household income level is 200% or less of the Federal poverty level.

66 Pa.C.S. § 1403 (emphasis added).

Additionally, “household income” is defined as, “[t]he combined gross income of all adults in a residential household who benefit from the public utility service.” 66 Pa.C.S. § 1403.

Ms. Mercer testified about her household size and income. Ms. Mercer’s current household size consists of three adults and her current gross monthly household income is

\$2,604.11.⁵ Therefore, Ms. Mercer’s income is less than 200% of the Federal poverty level.⁶ Thus, pursuant to 66 Pa.C.S. § 1403, Ms. Mercer is eligible for a second Commission-issued payment arrangement if she has experienced a decrease in household income of 10% or more. Ms. Mercer’s gross household monthly income at the time of the BCS decision dated December 15, 2008 at Case No. 2464103 was \$2,540; therefore, Ms. Mercer has experienced an increase in income given her current gross monthly income of \$2,604.11. Consequently, since Ms. Mercer experienced an increase, not a decrease, in income, she is not eligible for a second Commission-issued payment arrangement.

While the Complainant is not eligible for a second Commission-issued payment arrangement, a provision of the Act provides that the Commission may reinstate and extend a previously ordered payment arrangement in limited circumstances where the customer has defaulted on that payment arrangement. Specially, section 1405(e) provides:

(e) Extension of payment arrangements.--If the customer defaults on a payment arrangement . . . as a result of a *significant change in circumstance*, the commission may reinstate the payment arrangement and extend the remaining term for an initial period of six months

66 Pa.C.S. § 1405(e) (emphasis added).

Further, “significant change in circumstance” is defined as a customer with an income less than 300% of the Federal poverty level, which Complainant is, who experienced one of the following: (1) an onset of a chronic or acute illness resulting in a significant loss in the customer's household income; (2) a catastrophic damage to the customer's residence resulting in a significant net cost to the customer's household; (3) a loss of the customer's residence, or (4) an increase in the customer's number of dependents in the household. 66 Pa.C.S. § 1403.

⁵ Ms. Mercer provided documentation from her employer that she receives a gross weekly income of \$600.95. Thus, her gross monthly income is \$2,604.11. ($\$600.95 \times 52 \text{ weeks} = \$31,249.40 \text{ per year} \div 12 \text{ months} = \$2,604.11 \text{ per month}$). (See, Exhibit C-2).

⁶ See *Federal Register*, Vol. 83, No. 12, pp. 2642-2644 (January 18, 2018). Also available at <http://aspe.hhs.gov/poverty> (providing that a gross monthly income of less than \$3,463.34 for a household of three is less than 200% of the Federal poverty level). Under the 2019 guidelines, Complainant’s income is also less than 200% of the Federal poverty level. See, n. 7 above.

None of these are applicable. There was no evidence that Complainant defaulted on her BCS-PAR as the result of the onset of a chronic or acute illness, catastrophic damage to her residence, or loss of residence. Further, there was a decrease in Complainant's number of dependents in her household from four to three individuals.

By law, a public utility is entitled to receive payment for the service it provides and the Complainant must pay the Respondent for the service she consumes. *Scaccia v. West Penn Power Co.*, 55 Pa. PUC 637 (1982); *Kea v. Peoples Natural Gas Co.*, 60 Pa. PUC 215 (1985); *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982). The Respondent has the right to bill and receive payment for the utility service actually supplied. *Neal v. Philadelphia Gas Works*, Docket No. Z-00971874 (Final Order entered January 4, 2002). Otherwise, unpaid bills are included in the utility's uncollectible expenses, which all of its remaining customers must pay. *Bolt v. Duquesne Light Co.*, Docket No. Z-8721758 (Opinion and Order entered April 8, 1988). A payment arrangement, which prevents service termination if the Complainant complies with it, is a privilege, not a right. *Mandell v. Duquesne Light Co.*, Docket No. C-20030234 (Opinion and Order entered March 17, 2004).

Complainant failed to honor the terms of the payment arrangement directed by BCS Case No. 2464103 and thus has defaulted on it. Therefore, the Commission may not reinstate the payment arrangement ordered in BCS Case No. 2464103.

Consequently, I conclude that the Complainant has failed to establish by a preponderance of the evidence that she is eligible for a second Commission-issued payment arrangement or an extension of the prior one. Therefore, I am constrained to conclude that the Commission lacks authority to order a second payment arrangement or an extension of the prior one in these circumstances.⁷

⁷ I note that at the time of the hearing, PGW's witness explained that Complainant was not eligible for several programs available to aid low-income customers because under the 2018 Federal poverty guidelines, Complainant was considered a level two customer and most programs require a customer to be a level one customer or below 150% of the Federal poverty level for eligibility, which Complainant was not.

However, I would urge Complainant and PGW to explore whether Complainant is currently eligible for assistance to low-income customers since under the 2019 guidelines, effective on January 11, 2019, Complainant is a level one customer. See, 2019 Federal Poverty Guidelines available at <https://aspe.hhs.gov/poverty->

Initial Payment Arrangement on Non-CAP Arrears

Given the length of time that has lapsed since the last Commission-issued payment arrangement (which became effective in January 2009) and the amount which was the subject of the BCS-issued payment arrangement (\$728),⁸ it does raise the question whether this balance has been satisfied. The Commission has clarified that a second or subsequent payment arrangement cannot be established on a balance which has already been the subject of a Commission-issued payment arrangement, but that a request for a payment arrangement on a new and wholly unrelated delinquent balance is a request for an initial payment arrangement. See, *Trocki v. UGI Penn Natural Gas, Inc.*, Docket No. F-2016-2574307 (Opinion and Order entered July 12, 2018), citing *Chapter 14 Implementation*, Docket No. M-00041802F0002 at 37-38 (Order entered September 12, 2005) (*Second Implementation Order*).

Complainant's outstanding balance at the time of the BCS-issued payment arrangement has not been satisfied. Respondent's witness, Ms. Jones, explained that subsequent to the BCS-issued payment arrangement, Complainant has consistently made partial and untimely payments, and she has missed payments as well, so that her balance has never been current, resulting in the current balance of \$8,313.96.

While the record does not contain Complainant's payment history since 2009,⁹ the record does show that on July 28, 2009, approximately seven months following the effective date of the BCS payment arrangement, Complainant entered into a new payment arrangement with Respondent, which was broken and followed by another payment arrangement entered into three months later on October 23, 2009. This was followed by placement into CRP, removal from CRP for nonpayment, and multiple payment arrangements, which were all broken. (PGW

guidelines (providing that an income of \$2,666 for a three-person household is 150% of the Federal poverty level). Thus, Complainant's gross monthly income of \$2,604.11 for her three-person household is now below 150% of the Federal poverty.

⁸ BCS decision No. 2464103 indicates that Complainant's outstanding remaining balance was \$728. (PGW Exhibit No. 4, p. 3). However, in other places the outstanding balance is listed as \$1,250 (PGW Exhibit 4, p. 2) and \$1,128.06 (PGW Exhibit 4, p. 3). However, it is clear that the BCS decision directs a level one payment arrangement to pay the monthly budget bill plus an additional \$15 towards the arrearage.

⁹ PGW Exhibit 1 is a statement of Complainant's account from January 1, 2016 to November 13, 2018.

Exhibit 2). Further, the record shows that on three occasions over approximately the last three years, Complainant's service was terminated and restored.¹⁰ Thus, under all these circumstances, Complainant has carried an account balance following the BCS payment arrangement.

Notwithstanding the above, even assuming *arguendo*, that I consider the BCS payment arrangement satisfied so that Complainant's instant request for a payment arrangement can be considered an initial request for a payment arrangement, the Commission has the responsibility to exercise its authority very judiciously. Specifically, the Commission will exercise its discretion to issue payment arrangements only on behalf of those who have demonstrated some evidence of a good faith effort to pay their utility bills or who have experienced a significant change of circumstances beyond their control. *Crawford v. National Fuel Gas Distribution Corp.*, Docket No. C-20066348 (Opinion and Order entered December 6, 2007).

The 2018 Federal Poverty Guidelines provide that a three-person household with a gross monthly household income of \$2,604.11 is between 150% and 250% of the Federal poverty level.¹¹ Pursuant to the Act, the Complainant's household income would make her eligible for a three-year payment arrangement to extinguish her outstanding non-CAP balance of \$7,452.88. 66 Pa.C.S. § 1405(b)(2). Specifically, this section provides:

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

* * *

¹⁰ See PGW Exhibit 1 which shows that on November 7, 2016, a balance of \$6,106.41 was written off and reactivated on November 19, 2016; on September 8, 2017, a balance of \$5,728.75 was written off and reactivated on October 1, 2017; and on November 1, 2017, a balance of \$5,655.36 was written off and reactivated on November 20, 2017.

¹¹ See, *Federal Register*, Vol. 83, No. 12, pp. 2642-2644 (January 18, 2018), also available at <http://aspe.hhs.gov/poverty> (providing that for a household of three, a gross monthly income greater than \$2,597.50 is more than 150% of the Federal poverty level and a gross monthly income less than \$4,329.17 is below 250% of the Federal poverty level).

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

* * *

66 Pa.C.S. § 1405(b)(2).

However, in order to determine the Complainant's eligibility for a Commission-issued payment arrangement, in addition to considering the Complainant's household income, Complainant's payment history with PGW must also be considered. *Crawford; Also see, Dorsey v. Philadelphia Gas Works*, Docket No. F-2012-2313679 (Opinion and Order entered November 22, 2013) wherein the Commission declined to issue a payment arrangement because of the complainant's poor payment history and an inability to keep prior payment arrangements with PGW.

The record demonstrates that Complainant has defaulted on twelve Company-issued payment arrangements, one Commission-issued payment arrangement, and was removed from CRP for nonpayment, resulting in the current outstanding balance of \$8,313.96. Based on the Complainant's poor payment history, as well as the Complainant's inability to keep multiple payment arrangements, I am constrained to conclude that the Complainant has not demonstrated a good faith effort to pay her bills. Even if the BCS payment arrangement had been satisfied, I would be constrained to conclude that the Commission lacks authority to order a payment arrangement in these circumstances.

The Complaint is denied.

CONCLUSIONS OF LAW

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

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. "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*, 364 Pa. 54, 70 A.2d 854 (1950).

4. The Responsible Utility Customer Protection Act, 66 Pa.C.S. §§ 1401-1418, applies to this proceeding.

5. The Commission is authorized to establish a payment arrangement between a public utility and a customer. 66 Pa.C.S. § 1405(a).

6. The Commission cannot grant a payment arrangement on any customer assistance program arrears. 66 Pa.C.S. § 1405(c)

7. 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 or applicant has defaulted on a previous payment arrangement established by a commission order or decision. 66 Pa.C.S. § 1405(d).

8. A "change in income" is defined as: "A decrease in household income of 20% or more if the customer's household income level exceeds 200% of the Federal poverty level or a decrease in household income of 10% or more if the customer's household income level is 200% or less of the Federal poverty level." 66 Pa.C.S. § 1403.

9. Complainant has failed to carry her burden of proving that she is eligible for a second or subsequent Commission-issued payment arrangement. 66 Pa.C.S. § 1405(d).

10. If the customer defaults on a payment arrangement as a result of a significant change in circumstance, the Commission may reinstate the payment arrangement and extend the remaining term for an initial period of six months. 66 Pa.C.S. § 1405(e).

11. Complainant has failed to carry her burden of proving that she is eligible for a reinstatement of the Commission-issued payment arrangement at BCS No. 2464103. 66 Pa.C.S. § 1405(e).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of Gwendolyn Mercer against Philadelphia Gas Works at Docket No. C-2018-3004601 is denied.
2. That the docket at Docket No. C-2018-3004601 be marked closed.

Date: January 14, 2019

_____/s/
Gail M. Chiodo
Special Agent