

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Adam Kessler	:	
	:	
v.	:	C-2017-2630792
	:	
PECO Energy Company	:	

INITIAL DECISION
ON REMAND

Before
Marta Guhl
Administrative Law Judge

INTRODUCTION

This initial decision on remand denies the Complainant’s request for a payment arrangement because he did not satisfy his burden to demonstrate that he is eligible for a payment arrangement under the Public Utility Code.

HISTORY OF THE PROCEEDING

On October 15, 2017, Adam Kessler (Complainant) filed a formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO or Respondent). In the Complaint, Mr. Kessler sought a payment arrangement.

On November 8, 2017, PECO filed an Answer and New Matter, denying the material allegations of the Complaint and indicating that the Complainant had an active bankruptcy proceeding that was pending.

On January 4, 2018, a Hearing Notice was issued for a call-of-the-docket session on Monday, January 29, 2018 at 9:30 a.m. However, the matter was continued at the request of the parties and the case was rescheduled for March 23, 2018 at 10:00 a.m. via Hearing Cancellation/Reschedule Notice dated January 19, 2018.

A Prehearing Order was issued on January 26, 2018 which provided the parties with the procedures for the hearing.

On March 22, 2018, Mr. Kessler emailed PECO indicating "I Adam Kessler would like to withdraw my complaint." On the same date, PECO indicated that it did not oppose the Complainant's request.

On June 25, 2018, an Initial Decision was served on the parties which granted the Complainant's request to withdraw his Complaint.

On July 25, 2018, the Complainant filed Exceptions to the Initial Decision with the Secretary's Bureau. PECO filed Reply Exceptions on July 31, 2018.

On January 17, 2019, the Commission entered an Opinion and Order which granted the Complainant's Exceptions and remanded the matter for a hearing on the merits of the case.

On April 10, 2019, a Hearing Notice was issued which scheduled an Initial Hearing on remand for Thursday, May 21, 2019 at 10:00 a.m.

On April 15, 2019, I issued Prehearing Order #2 which reiterated the procedures for the parties to follow.

The hearing convened as scheduled on May 21, 2019. The Complainant represented himself and testified on his own behalf. PECO was represented by counsel,

Shawane Lee, Esquire. PECO also presented the testimony of Michael Begley, a regulatory assessor and offered seven exhibits which were entered into the record.

The record closed on June 24, 2019, when I received my copy of the 48-page hearing transcript.

FINDINGS OF FACT

1. The Complainant is Adam Kessler, who lives at 1752 Lafayette Drive, Jamison, Pennsylvania 18929 (Service Address). Tr. 11.

2. The Respondent is PECO Energy Company.

3. The Complainant resides at the Service Address with his wife and three children, ages 26, 22, and 17. Tr. 15.

4. The Complainant works full time for Seventh Street Medical Supply.
Tr. 13.

5. The Complainant is a salaried employee who earns \$1,528.00 per week.
Tr. 14.

6. The Complainant's wife also works and earns a gross take home pay of \$550.00 per week. Tr. 15-16.

7. The Complainant's 26-year old child earns \$500.00 per week. Tr. 16.

8. The Complainant's 22-year old child earns \$635.00 biweekly. Tr. 16.

9. The Complainant's current household income of \$12,547.00¹ per month with five household members places the household at 499% of the Federal Poverty guidelines.²

10. The Complainant filed a petition for Chapter 13 bankruptcy on October 6, 2014. Tr. 36, 38; PECO Exh. 2.

11. PECO set aside the pre-petition balance of \$5,601.82 after it was notified of the bankruptcy proceeding. Tr. 36; PECO Exh. 2.

12. The Complainant's bankruptcy proceeding is awaiting discharge. Tr. 39.

13. The Complainant has had two prior Company-issued payment arrangements which defaulted in 2015 and 2017. Tr. 33-35; PECO Exh. 3.

14. The Complainant has not made any payments to his account since March 21, 2018. Tr. 33; PECO Exh. 1.

15. Between October 9, 2017 and March 21, 2018, the Complainant only made four payments to his account. Tr. 33; PECO Exh. 1.

16. The Complainant's total balance with PECO is \$8,049.08, which are all post-petition arrears. Tr. 32; PECO Exh. 1.

¹ Monthly income is calculated as follows: $\$1,528 \times 52 = \$79,456 / 12 = \$6,621$ per month for Complainant
 $\$550 \times 52 = \$28,600 / 12 = \$2,383$ per month for Complainant's wife
 $\$500 \times 52 = \$26,000 / 12 = \$2,167$ per month for Complainant's 26-year old child
 $\$635 \times 26 = \$16,510 / 12 = \$1,376$ per month for Complainant's 22-year old child
 $\$6,621 + \$2,383 + \$2,167 + \$1,376 = \$12,547.00$ Total monthly household income.

² *Federal Register*, Vol. 84, No. 22, February 1, 2019, pp. 1167-1168. See <http://aspe.hhs.gov/poverty>.

DISCUSSION

The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, Complainant has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a).

To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent public utility is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Pa. Dep't of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlth. 1984).

Upon the presentation by the 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 weight, the Complainant has not satisfied his burden of proof. The Complainant would be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa.Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 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).

Effect of Bankruptcy Proceeding on Commission Jurisdiction

The Complainant filed a petition for Chapter 13 bankruptcy on October 6, 2014. Tr. 36, 38; PECO Exh. 2. PECO set aside the pre-petition balance of \$5,601.82 after it was notified of the bankruptcy proceeding. Tr. 36; PECO Exh. 2. The Complainant's bankruptcy proceeding is awaiting discharge. Tr. 39. The Complainant's total balance with PECO is \$8,049.08, which are all post-petition arrears. Tr. 32; PECO Exh. 1. The Complainant is requesting a payment arrangement on the post-bankruptcy petition arrears.

Pursuant to 28 U.S.C. § 1334, federal district courts (and their bankruptcy courts) have jurisdiction over all civil proceedings arising under Title 11, and the bankruptcy court has exclusive jurisdiction of all property of the debtor:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

* * *

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

28 U.S.C. §§ 1334 (a) and (e).

The Commission recently dealt with the issues related to requests for payment arrangements on arrears that have accrued after the filing of Chapter 13 bankruptcy. *See Danjou v. West Penn Power Company*, Docket No. F-2018-3006430 (Opinion and Order entered July 22, 2019). The Commission stated the following regarding the eligibility of a complainant for a Commission-issued payment arrangement while Chapter 13 bankruptcy is awaiting discharge:

As referenced above, pursuant to 28 U.S.C. § 1334, federal district courts and their United States Bankruptcy Courts have jurisdiction over all civil proceedings arising under Title 11, including a Chapter 13 petition for bankruptcy. Section 1334 further establishes that the bankruptcy court has exclusive jurisdiction of all property of the debtor. *See*, Title 28 of the United States Code Section 1334, 28 U.S. C. §1334 (a) and (e) (pertaining to jurisdiction of the federal district courts and their bankruptcy courts).

Unlike a Chapter 7 bankruptcy proceeding (in which a debtor's estate is expeditiously liquidated and distributed to creditors), a Chapter 13 bankruptcy allows a debtor to repay debts under the management of a bankruptcy trustee, who controls the debtor's estate and makes the distributions (based on determinations of the debtor's income and expenses) until the bankruptcy petition is discharged or dismissed. Pursuant to Chapter 13 of the Bankruptcy Code, 11 U.S.C. § 1306(a)(1) and (2), the debtor's estate includes both property and earnings acquired “. . . after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, or 11, or 12 of this title [11 USCS §§ 701 et seq., 1101 et seq., or 1201 et seq.], whichever occurs first.” By statute, the debtor's assets (with certain limited exceptions not relevant here), whether acquired pre- or post-petition, are included within the estate for disposition by the Bankruptcy Court. As explained by the United States Court of Appeals for the Third Circuit in *Begley v. Philadelphia Electric Co.*, 760 F.2d 46, 50 (3d Cir. Pa. 1985), discussing a Commission proceeding (*Anyanwu v. Philadelphia Electric Co.*, 55 Pa. P.U.C. 221 (1981)), “Further, *Anyanwu* involved a Chapter 13 reorganization, under which the bankruptcy court retains jurisdiction over both pre-petition and post-petition income and obligations . . .”. *Id.*

It is well established that the Commission lacks jurisdiction to order a payment arrangement for a debtor with an active Chapter 13 bankruptcy proceeding, even where the balance is a post-bankruptcy filing arrearage. *See, Lekawa v. West Penn Power*

Company and Titan Gas & Power, LLC, Docket No. F-2017-2629733 (Final Order entered January 17, 2019), *citing Perez v. PECO Energy Company*, Docket No. C-2016-2551605 (Final Order entered May 18, 2017); *Chavous v. PECO Energy Company*, Docket No. F-2010-2215689 (Final Order entered December 20, 2011); *Kossmann v. PECO Energy Company*, Docket No. C-2017-2583425 (Final Order entered August 31, 2017).

Since the nature of a Chapter 13 bankruptcy is an on-going repayment plan in which all of a debtor's assets (including property, income and debts acquired pre-petition and post-petition) are included in the debtor's estate under the exclusive control of the bankruptcy trustee, the Commission is without jurisdiction to issue an order that affects the disposition of the income or assets of a debtor who has an active Chapter 13 bankruptcy proceeding even where the subject of the payment arrangement is a post-petition arrearage.

Danjou at 7-9.

The Complainant's Chapter 13 bankruptcy claim is still awaiting discharge. In this matter, the Complainant is requesting a payment arrangement on arrears that have accrued since he filed his Chapter 13 bankruptcy petition. As such, the Commission lacks jurisdiction in this matter. Therefore, the Complainant's Complaint requesting a payment arrangement must be dismissed.

CONCLUSIONS OF LAW

1. Pursuant to 28 U.S.C. § 1334, federal district courts (and their bankruptcy courts) have jurisdiction over all civil proceedings arising under Title 11, and the bankruptcy court has exclusive jurisdiction of all property of the debtor. 28 U.S.C. §§ 1334 (a) and (e).

2. A Chapter 13 bankruptcy allows a debtor to repay debts under the management of a bankruptcy trustee, who controls the debtor's estate and makes the distributions (based on determinations of the debtor's income and expenses) until the bankruptcy petition is discharged or dismissed. Pursuant to Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 1306(a)(1) and (2), the debtor's estate includes both property and earnings acquired "... after

the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, or 11, or 12 of this title [11 USCS §§ 701 et seq., 1101 et seq., or 1201 et seq.], whichever occurs first.” *Danjou v. West Penn Power Company*, Docket No. F-2018-3006430 (Opinion and Order entered July 22, 2019).

3. By statute, the debtor’s assets (with certain limited exceptions not relevant here), whether acquired pre- or post-petition, are included within the estate for disposition by the Bankruptcy Court. *Danjou v. West Penn Power Company*, Docket No. F-2018-3006430 (Opinion and Order entered July 22, 2019).

4. It is well established that the Commission lacks jurisdiction to order a payment arrangement for a debtor with an active Chapter 13 bankruptcy proceeding, even where the balance is a post-bankruptcy filing arrearage. *Danjou v. West Penn Power Company*, Docket No. F-2018-3006430 (Opinion and Order entered July 22, 2019) *citing* *Lekawa v. West Penn Power Company and Titan Gas & Power, LLC*, Docket No. F-2017-2629733 (Final Order entered January 17, 2019), *citing* *Perez v. PECO Energy Company*, Docket No. C-2016-2551605 (Final Order entered May 18, 2017); *Chavous v. PECO Energy Company*, Docket No. F-2010-2215689 (Final Order entered December 20, 2011); *Kossmann v. PECO Energy Company*, Docket No. C-2017-2583425 (Final Order entered August 31, 2017).

5. Since the nature of a Chapter 13 bankruptcy is an on-going repayment plan in which all of a debtor’s assets (including property, income and debts acquired pre-petition and post-petition) are included in the debtor’s estate under the exclusive control of the bankruptcy trustee, the Commission is without jurisdiction to issue an order that affects the disposition of the income or assets of a debtor who has an active Chapter 13 bankruptcy proceeding even where the subject of the payment arrangement is a post-petition arrearage. *Danjou v. West Penn Power Company*, Docket No. F-2018-3006430 (Opinion and Order entered July 22, 2019).

6. The Commission lacks jurisdiction in this matter.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint filed by Adam Kessler against PECO Energy Company, at Docket No. C-2017-2630792, is denied and dismissed.
2. That the docket at Docket No. C-2017-2630792 be closed.

Dated: September 3, 2019

/s/
Marta Guhl
Administrative Law Judge