

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robin Callahan	:	
	:	
v.	:	C-2019-3009813
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Marta Guhl
Administrative Law Judge

INTRODUCTION

This initial decision dismisses the Complainant’s formal Complaint because she failed to meet her burden of proof that the Respondent violated the Public Utility Code, Commission regulations or orders with respect to the termination notice that was issued on her account. The decision also dismisses the portion of the Complaint related to the deposit issued on the Complainant’s account.

HISTORY OF THE PROCEEDING

On May 10, 2019, Robin Callahan (Complainant) filed a formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO or Respondent). In the Complaint, Ms. Callahan indicated that the utility was threatening to shut off her service and there were incorrect charges on her bills. Specifically, the Complainant indicated that PECO had assessed her a deposit and requested that the Company remove the deposit assessment.

On May 16, 2019, PECO filed an Answer, denying the material allegations of the Complaint.

On May 31, 2019, a Hearing Notice was issued for an initial in-person hearing on Thursday, July 11, 2019, at 10:00 a.m. and the matter was assigned to me.

A Prehearing Order was issued on June 5, 2019, which provided the parties with the procedures for the hearing.

On July 1, 2019, the Complainant requested a continuance of the hearing due to a medical procedure. PECO did not object to the request. I granted the continuance via an Order dated July 3, 2019.

On July 8, 2019, a Hearing Cancellation/ Reschedule Notice was issued and the matter was rescheduled for an initial hearing on Friday, August 9, 2019 at 10:00 a.m.

The hearing convened as scheduled on August 9, 2019. The Complainant represented herself and testified on her own behalf. PECO was represented by counsel, Shawane Lee, Esquire. PECO also presented the testimony of Michael Begley, a regulatory assessor, and offered ten exhibits which were entered into the record.

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

FINDINGS OF FACT

1. The Complainant is Robin Callahan, who lives at 1937 Beech Lane, Bensalem, Pennsylvania 19020 (Service Address). Tr. 7.
2. The Respondent is PECO Energy Company.

3. The Complainant filed for bankruptcy on December 11, 2018. Tr. 8, 13; PECO Exh. 2.
4. PECO sent a letter requesting a deposit to the Complainant on February 28, 2019. Tr. 14.
5. The Complainant's bankruptcy petition was dismissed on March 8, 2019. Tr. 8, 15; PECO Exh. 2.
6. A deposit of \$515.00 was applied to the Complainant's account on March 11, 2019. Tr. 14; PECO Exh. 1.
7. On April 11, 2019, the deposit amount was credited back to the Complainant's account, after PECO received notice that the bankruptcy proceeding was dismissed. Tr. 16; PECO Exh. 1.
8. The Complainant was sent a ten-day shut off notice by PECO on April 22, 2019. Tr. 9, 18; PECO Exh. 3.
9. PECO successfully completed a 72-hour notice to the Complainant on May 1, 2019. Tr. 18-19; PECO Exh. 3.
10. Collection activity on the Complainant's account was suspended on May 13, 2019 after the Complainant filed the instant Complaint. Tr. 19; PECO Exh. 3.
11. PECO issued a new ten-day shut off notice to Complainant on August 1, 2019, for current charges in the amount of \$462.39. Tr. 19; PECO Exh. 3.
12. The Complainant's total balance with PECO is \$8,181.47. Tr. 13; PECO Exh. 1.

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 her 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).

Deposit

The Complainant disputes the deposit that PECO assessed to her account. PECO acknowledged that it assessed a deposit on the Complainant's account but credited the deposit back to her account after the bankruptcy proceeding was dismissed.

Section 366 of the United States Bankruptcy Code, 11 U.S.C. § 366, provides, as follows:

(a) Except as provided in subsections (b) and (c) of this section, a utility may not alter, refuse or discontinue service to, or discriminate against, the trustee of the debtor solely on the basis that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

(b) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

11 U.S.C. § 366(a)-(b) (emphasis added).

With respect to complaint proceedings filed with the Commission, after the filing of a bankruptcy petition, the Commission has held, in *Anyanwu v. Philadelphia Electric Company*, 55 Pa. PUC 221, 222 (1981), that:

As provided by § 1471 of Title 28, United States Code, 28 U.S.C. § 1471, a United States District Court and its bankruptcy court has jurisdiction over all civil proceedings arising under Title 11, and the bankruptcy court has exclusive jurisdiction of all property of

the debtor, wherever located, as of the commencement of the proceeding. Thus, the complainant's filing of a petition for personal bankruptcy has preempted this commission from establishing any payment schedule with respects to any amounts owed by the complainant to the Respondent. Accordingly, we must dismiss this complaint for lack of subject matter jurisdiction.

It is noted that under § 366(b), 11 U.S.C. § 366(b), the respondent may terminate service if adequate assurance of payment has not been made. While this commission is without jurisdiction to determine what constitutes "adequate assurance of payment," we will require that the respondent, in the event it elects to proceed under § 366(b), adhere to the provisions of Title 52, Pennsylvania Code, Chap 56, with respect to notice and personal contact prior to termination. However, we cannot require the respondent to comply with the provision of 52 Pa. Code §§ 56.111 through 56.118.

In *Eleanor C.K. Smith v. Equitable Gas Company*, Docket No. Z-00275757 (Opinion and Order entered November 7, 1996), another proceeding brought before the Commission after the filing of a bankruptcy petition, the Commission stated (Slip Opinion, at 9) that:

The rationale behind the provisions of 11 USC § 366 ... is that a utility's exposure to loss should be limited to the 20 day period referenced in the Statute, and that a utility should not be forced "to provide services for which it may never be paid." *Begley v. Philadelphia Electric Company*, 760 F.2d 46, 49 (3rd Cir. 1985).

* * *

Accordingly, a termination pursuant to 11 USC § 366(b) falls under federal jurisdiction. Any motions or petitions pertaining to such deposits, known as "adequate assurances, " must, therefore, be brought before the Bankruptcy Court.

In *Eleanor C.K. Smith*, as in *Anyanwu*, the complaint was dismissed by the Commission for lack of subject matter jurisdiction. See also *Hodge v. Equitable Gas Company*, Docket No. C-00970450 (Opinion and Order entered October 20, 1998).

These decisions of the Commission are controlling with respect to the disposition of Ms. Callahan's claim that PECO violated a Commission Statute, regulation or Order when it assessed a security deposit to her account. The Complainant filed for bankruptcy on December 11, 2018. Tr. 8, 13; PECO Exh. 2. PECO sent a deposit letter to the Complainant on February 28, 2019. Tr. 14. The Complainant's bankruptcy petition was dismissed on March 8, 2019. Tr. 8, 15; PECO Exh. 2. A deposit of \$515.00 was applied to the Complainant's account on March 11, 2019. Tr. 14; PECO Exh. 1. On April 11, 2019, the deposit amount was credited back to the Complainant's account, after PECO received notice that the bankruptcy proceeding was dismissed. Tr. 16; PECO Exh. 1.

Based on the above, PECO credited the amount of the deposit back to the Complainant's account. As such, this issue is now moot and will be dismissed. Further, the Commission lacks jurisdiction to address the adequacy of the deposit when it is assessed during an active bankruptcy; therefore, this issue will be dismissed as well.

Termination Notice

The Complainant also indicated that PECO had issued her a termination notice in this matter. PECO acknowledged that it did issue a termination notice for charges that accrued after the Complaint was filed.

With regards to authorized termination, the Code provides that:

(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.

* * *

66 Pa.C.S. § 1406(a)(1). Shut off notices must meet the requirements set out in 52 Pa.Code § 56.91.

The Complainant was sent a ten-day shut off notice by PECO on April 22, 2019. Tr. 9, 18; PECO Exh. 3. PECO successfully completed a 72-hour notice to the Complainant on May 1, 2019. Tr. 18-19; PECO Exh. 3. Collection activity on the Complainant's account was suspended on May 13, 2019 after the Complainant filed the instant Complaint on May 10, 2019. Tr. 19; PECO Exh. 3. PECO issued a new ten-day shut off notice to Complainant on August 1, 2019 for current charges in the amount of \$462.39. Tr. 19; PECO Exh. 3. PECO established that it issued a termination notice for the current charges that accrued after Complainant filed her Complaint and the Complainant did not dispute this fact in her testimony. Based on the evidence provided, the Complainant did not meet her burden of demonstrating that PECO improperly issued her a termination notice, or that the contents of the notice issued failed to meet the notice requirements set out in 52 Pa.Code § 56.91.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to this proceeding. 66 Pa.C.S. § 701.
2. Pursuant to 66 Pa.C.S. § 332(a), the burden of proof in this proceeding is upon the Complainant. 66 Pa.C.S. § 332(a).
3. 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.
4. The Commission lacks the subject matter jurisdiction to adjudicate issues involving requests for a security deposit as an adequate assurance of payment arising under Section 366(b) of the United States Bankruptcy Code, 11 U.S.C. § 366(b). *Anyanwu v. Philadelphia Electric Company*, 55 Pa. PUC 221, 222 (1981).

5. Subject matter jurisdiction to adjudicate issues involving requests for a security deposit as an adequate assurance of payment arising under Section 366(b) of the United States Bankruptcy Code, 11 U.S.C. § 366(b), is vested in the United States District Court and its Bankruptcy Court. *Anyanwu v. Philadelphia Electric Company*, 55 Pa. PUC 221, 222 (1981).

6. A public utility may terminate service to a customer after notice as provided in subsection (b) for non-payment of any undisputed delinquent account by the customer. 66 Pa.C.S. § 1406(a)(1).

7. The Complainant has not met her burden of demonstrating that PECO violated the Commission's statute, regulations, or order in issuing the termination notice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal Complaint filed by Robin Callahan against PECO Energy Company, at Docket No. C-2019-3009813, is denied and dismissed.

2. That the formal Complaint at Docket No. C-2019-3009813 be closed.

Date: December 12, 2019

/s/
Marta Guhl
Administrative Law Judge