

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held December 7, 2023

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Jonathan DiBello

C-2023-3041825

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Jonathan DiBello (Complainant) filed on October 16, 2023, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Eranda Vero, issued on September 27, 2023. PECO Energy Company (PECO or the Company) filed its Reply Exceptions on October 23, 2023. For the reasons stated below, we shall deny the Exceptions of the Complainant, adopt the Initial Decision of ALJ Vero, and dismiss the Formal Complaint (Complaint).

I. History of the Proceeding

On July 19, 2023, the Complainant filed a Complaint with the Commission against PECO. The Complaint is a timely appeal of a decision issued by the Commission's Bureau of Consumer Services (BCS) at BCS Case Number 3906727 on July 6, 2023, which denied Complainant's Informal Complaint and request for a payment arrangement based on Complainant's pending Chapter 13 bankruptcy action. The Complainant stated in his Complaint that: (1) he is unable to pay his PECO bills timely and in full; (2) PECO is threatening to shut off, or has already shut off, his electrical service; (3) his request for a payment arrangement was wrongfully denied based on the finding the Commission has no jurisdiction to establish a payment arrangement for past due balances accrued after the filing of a Chapter 13 bankruptcy proceeding. The Complainant requested the Commission establish a payment arrangement for past due amounts accrued after the filing of his Chapter 13 bankruptcy. Complaint at 2, ¶ 6.

On August 7, 2023, PECO filed an Answer (Answer) denying the material allegations of the Complaint. Alongside its Answer, PECO also filed a New Matter. In its New Matter, PECO avers the Complainant has an active Chapter 13 bankruptcy petition pending in the Eastern District of Pennsylvania at Docket Number 22-12547. The New Matter included a Notice to Plead stating the Complainant's written response was due within twenty (20) days of service, or August 28, 2023. Answer at 1, 3.

PECO also filed a Preliminary Objection on August 7, 2023. The Preliminary Objection asked for dismissal of the Complaint, arguing that the Commission does not have subject matter jurisdiction to issue a payment arrangement to a customer with an active Chapter 13 bankruptcy. PECO's Preliminary Objection included a Notice to Plead stating a written response was due within ten (10) days from service, or August 17, 2023. Preliminary Objection at 1, 4-6.

The Complainant filed a Response to PECO's Preliminary Objection on August 17, 2023. In his Response, the Complainant argued that arrearages to PECO accrued after his bankruptcy petition filing were not covered under his Chapter 13 plan. The Complainant argued that post-petition debts were not eligible for inclusion in his Chapter 13 bankruptcy plan and the Commission had jurisdiction to provide him with a payment arrangement. The Complainant also indicated he could only include the amounts due to PECO in his Chapter 13 plan with PECO's consent. Response at 1.

On August 25, 2023, the Commission issued a Motion Judge Assignment, assigning this matter and the pending Preliminary Objection to ALJ Vero.

On September 5, 2023, the Complainant filed an untimely Response to PECO's New Matter, denying the material allegations of the New Matter. The Complainant renewed his assertion that he is entitled to a payment arrangement pursuant to Pennsylvania law, that the Commission has jurisdiction to issue such a payment arrangement, and that BCS's denial of his Informal Complaint was in error. Response to New Matter, at 1.

On September 27, 2023, the Commission issued the Initial Decision of ALJ Vero, in which the ALJ found PECO's Preliminary Objection should be sustained and the Complaint dismissed. Initial Decision at 7.

As noted *supra*, the Complainant filed Exceptions on October 16, 2023. PECO filed its Reply Exceptions on October 23, 2023.

On November 8, 2023, the Complainant filed a document entitled “Sur-Reply to Reply Exceptions of PECO Energy Company.”¹

II. Discussion

A. Legal Standards

1. Burden of Proof

Pursuant to Section 332(a) of the Public Utility Code (Code), the Complainant, the proponent of a rule or order, bears the burden of proof. 66 P.a. C.S. §332(a). To satisfy the burden of proof, the Complainant, as the party seeking relief, must establish a sufficient case that PECO is responsible for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). This 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). This standard requires the Complainant’s evidence be more convincing, by even the smallest amount, than the evidence presented by PECO. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). This Commission’s decisions 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 & West Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the evidentiary burden shifts to PECO to present persuasive evidence rebutting that of the Complainant. If PECO’s evidence is of co-equal weight,

¹ Commission Regulations do not allow for the filing of sur-replies to Reply Exceptions, *see* 52 Pa. Code § 5.535. For this reason, we shall not consider the Sur-Reply to Reply Exceptions in this matter.

the Complainant has not satisfied their burden of proof, and must provide additional evidence to rebut that of PECO. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the evidentiary 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 to prove their case by a preponderance of the evidence. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

2. Preliminary Objections

Section 5.101 of our Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.101, provides that preliminary objections may be filed in response to a pleading, must include a notice to plead, and state the legal and factual grounds supporting the objections. 52 Pa. Code § 5.1010 (a). Preliminary objections are limited to the following grounds:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

Commission preliminary objection practice is analogous to civil practice regarding preliminary objections. *Equitable Small Transportation Intervenor v. Equitable Gas Company*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994). Preliminary objections seeking dismissal of a pleading will only be granted where relief is clearly warranted and free from doubt. *Interstate Traveller Servs., Inc. v. Pa. Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Phila. Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991), adopted by the Commission in *Montague v. Phila. Elec. Co.*, 66 Pa. P.U.C. 24 (1988).

The party filing preliminary objections may not rely only on its own factual assertions but must accept, for the purposes of disposing of the preliminary objection, all well-pleaded material facts of the other party, including fairly determined inferences from those facts. *Raynor v. D'Annunzio*, 243 A.3d 41 (Pa. 2020); *County of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985). In ruling on a preliminary objection, the Commission must assume the factual allegations included in the Complaint are true and resolve any doubt in favor of the non-moving party by rejecting the preliminary objections. *Id.*, see also *Commonwealth v. UPMC*, 208 A.3d 898 (Pa. 2019); *Dep't of Auditor Gen. v. State Emps. Retirement Sys.*, 836 A.2d 1053 (Pa. Cmwlth. 2003) (citing, *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

B. Initial Decision

The ALJ made nine (9) Findings of Fact and reached four (4) Conclusions of Law. I.D. at 3, 7-8. We shall adopt and incorporate herein by reference the ALJ's Finding of Facts and Conclusions of Law, unless they are reserved or modified by this Opinion and Order, either expressly or by necessary implication.

The Initial Decision noted that PECO filed its Preliminary Objection asserting the Commission did not have subject matter jurisdiction to issue a payment plan

for a customer with an active Chapter 13 bankruptcy. I.D. at 5. ALJ Vero explained that the Commission, as a creation of the General Assembly, has only the powers and authority granted to it via the Public Utility Code, and that subject matter jurisdiction is a prerequisite to the Commission utilizing its power to decide a controversy. *Id.*, citing *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977); *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlt. 1992).

Citing to 28 U.S.C. § 1334, the ALJ emphasized federal district courts (and their associated bankruptcy courts) have jurisdiction over all civil proceedings arising under Title 11, and that this authority gives the bankruptcy court exclusive jurisdiction of all property of the debtor. I.D. at 6. Highlighting a key distinction between Chapter 13 and Chapter 7 bankruptcy proceedings, ALJ Vero noted a Chapter 13 bankruptcy allows a debtor to repay debts under the supervision and management of a bankruptcy trustee, who controls the debtor's estate and makes required distributions and payments until the bankruptcy petition is discharged or dismissed. *Id.* The ALJ continued, citing to 11 U.S.C. § 1306(a)(1) and (2) for the proposition that pre-petition and post-petition assets are included within the estate for disposition in the bankruptcy, contrary to the assertions in the Complaint. *Id.* The ALJ noted that while a Chapter 7 bankruptcy proceeding is one 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-petition 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. 1985), discussing a Commission proceeding, *Anyanwu v. Philadelphia Electric Co.*, 55 Pa. P.U.C. 221 (1981). *Id.*

It is undisputed that Mr. DiBello has an active Chapter 13 Bankruptcy proceeding before the United States Bankruptcy Court for the Eastern District of Pennsylvania under Docket Number 22-12547. I.D. at 6; New Matter ¶¶ 1- 2; Response to New Matter ¶¶ 1- 2. Because the pending Chapter 13 bankruptcy petition denies the Commission the ability to order disbursement of Mr. DiBello’s assets, the Commission lacks jurisdiction to establish a payment arrangement for Mr. DiBello’s utility service.

In granting PECO’s Preliminary Objection, ALJ Vero cited to a long line of Commission precedent establishing the Commission lacks jurisdiction to order a payment arrangement for a debtor with an active Chapter 13 bankruptcy proceeding, even where the balance at issue is a post-bankruptcy filing arrearage. I.D. at 7, *internal citations omitted*. Therefore, given the lack of subject matter jurisdiction, the ALJ granted PECO’s Preliminary Objection and dismissed the Complaint. *Id.* at 7-8.

C. Exceptions² and Reply Exceptions

The Complainant’s Exceptions consist of three (3) typewritten pages in which the Complainant takes exception to the ALJ’s Initial Decision. The Complainant renews his argument that the Commission has subject matter jurisdiction to issue a payment arrangement to him despite his pending Chapter 13 bankruptcy filing, that the

² We note that the format of the Exceptions does not strictly comply with Section 5.533(b) of our Regulations, which requires that each exception be numbered and identify the finding of fact and conclusion of law to which exception is taken and cite to the relevant pages of the Initial Decision. 52 Pa. Code § 5.533(b). Nevertheless, recognizing that the Complainant is appearing *pro se*, we will accept the Exceptions as filed, pursuant to Section 1.2(a) of our Regulations, and consider the merits.

Commission erred in granting the Preliminary Objection and dismissing his Complaint, and points to various provisions of federal law as support for these assertions.

Exc. at 1-2.

In its Reply Exceptions, PECO submits that the Initial Decision correctly found the Commission lacked subject matter jurisdiction and points to Commission precedent for its position that the Commission does not have subject matter jurisdiction and the ALJ's Initial Decision was correct. R. Exc. at 2, 4, *citing Michelle Chavous v. PECO Energy Company*, Docket No. F-2010-2215689 (Final Order entered December 20, 2011). PECO asks the Commission to reject the Exceptions and uphold the Initial Decision of ALJ Vero.

D. Disposition

We note that any issue or argument not specifically addressed in this Order shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider, expressly or at length, each contention or argument made by the Parties. *Consolidated Rail Corp. 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).

Section 5.101 exists to promote judicial economy by avoiding the cost and time associated with hearings when no factual dispute exists. If no factual dispute relevant to the resolution of the matter exists, a hearing is unnecessary and granting of a preliminary objection is appropriate. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989).

Upon review, we find that in this matter, there are no genuine issues as to the material facts. At the time of the Complainant's Informal Complaint and during the

pendency of the Formal Complaint, the Complainant had an active Chapter 13 bankruptcy proceeding pending. *See*, Complaint at 2, ¶ 6. For this reason, we agree with the ALJ's Initial Decision granting the Preliminary Objection and dismissing the Complaint.

In every matter before the Commission, we must decide initially whether the Commission has jurisdiction over the Parties and subject matter at dispute. As a creature of legislation, the Commission possesses only the authority the state legislature has specifically granted to it in the Public Utility Code (Code). 66 Pa. C.S.A. §§ 101, et seq. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (1977); *Allegheny County Port Authority v. Pa. PUC*, 427 Pa. 562, 237 A.2d 602 (1967); *Behrend v. Bell of Pa.*, 390 A.2d 233 (Pa. Super. 1978); *Pa. Department of Highways v. Pa. PUC.*, 182 A.2d 267 (Pa. Super. 1962); and *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pa. PUC*, 43 A.2d 348 (Pa. Super. 1945).

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.

It is well accepted that the Commission is without jurisdiction to order a payment arrangement to a debtor with an active, pending Chapter 13 bankruptcy proceeding, even when the arrearage subject to a Formal Complaint is a post-petition arrearage. This is because of the nature of a Chapter 13 bankruptcy, which is an on-going repayment plan in which all of a debtor's assets are included in the estate under the control of a trustee. *See, Danjou v. West Penn Power Co.*, Docket No. F-2018-3006430 (Opinion and Order entered July 22, 2019); *see also, Lekawa v. West Penn Power Co.*, Docket No. F-2017-2629733 (Order entered January 17, 2019) (citing *Perez v. PECO Energy Co.*, Docket No. C-2016-2551605 (Order entered May 18, 2017); *Chavous v. PECO Energy Co.*, Docket No. F-2010-2215689 (Final Order entered December 20, 2011); *Kossmann v. PECO Energy Co.*, Docket No. C-2017-2583425 (Order entered August 31, 2017)).

In a Chapter 7 bankruptcy proceeding a debtor's estate is expeditiously liquidated and distributed to creditors, however, 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.” Or, 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 ...” *Chavous v. PECO Energy Co.*, Docket No, F-2010-2215689, at 5-6 (Final Order entered December 20, 2011).

Accordingly, the Commission is without jurisdiction to issue an order that affects the disposition of a debtor’s income or assets, since, as noted above, all of a debtor’s estate (including property and income acquired post-petition) is subject to the exclusive control of the bankruptcy trustee. By statute, all of a debtor’s assets (with certain limited exceptions not relevant here), whether acquired pre- or post-petition, is included within the estate for disposition by the Bankruptcy Court. *Id.* at 6.

Section 703 of the Public Utility Code, 66 Pa. C.S. § 703(b), provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. See also, 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and is not required to resolve questions of law, policy, or discretion. *Dee-Dee Cab, Inc. v. Pa. PUC*, 817 A.2d 593 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003). The public interest does not require a hearing in this case. As PECO is entitled to judgment as a matter of law, a hearing in this case is not necessary or in the public interest. *Id.*

For the reasons set forth above, the Commission lacks jurisdiction to address the Complainant’s request for a payment arrangement regarding his post-bankruptcy petition account and arrearages with PECO. Therefore, we shall deny the Complainant’s Exceptions.

III. Conclusion

Based on our review of the Initial Decision, the Exceptions and Reply Exceptions, and the record in this proceeding, we shall deny the Exceptions of Jonathan DiBello, and adopt the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Jonathan DiBello, filed on October 16, 2023, are denied, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Eranda Vero, issued on September 27, 2023, is adopted.
3. That the Formal Complaint filed by Jonathan DiBello on July 19, 2023, against PECO Energy Company at Docket No. C-2023-3041825, is dismissed, consistent with this Opinion and Order.

4. That this proceeding be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: December 7, 2023

ORDER ENTERED: December 7, 2023