**PENNSYLVANIA**

**PUBLIC UTILTY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held June 11, 2015

Commissioners Present:

Gladys M. Brown, Chairman

John F. Coleman Jr., Vice Chairman

James H. Cawley

Pamela A. Witmer

Robert F. Powelson

Tracey McDonald

v. F-2013-2394318

Philadelphia Gas Works

**OPINION AND ORDER**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Cynthia Williams Fordham issued on April 2, 2015, in the above-captioned case. No Exceptions have been filed. However, we have exercised our right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall modify the ALJ’s Initial Decision that dismissed the Complaint, with prejudice, to a dismissal, without prejudice.

**History of the Proceeding**

On November 23, 2013, Tracey McDonald (Complainant) filed a Formal Complaint (Complaint) with the Commission against the Philadelphia Gas Works (PGW or Respondent) alleging that: (1) her gas service was terminated on September 30, 2013; (2) there were incorrect charges on her bill for service from August through September 2013; (3) she did not receive a ten-day shut off notice; and (4) she offered to pay the outstanding balance to the PGW representative who came to the service address on September 30, 2013. As relief, the Complainant requested that the Commission order PGW to restore her service and to establish a payment arrangement with PGW to pay off her outstanding account balance.[[1]](#footnote-1) Complaint at 3.

On December 17, 2013, PGW filed an Answer to the Complaint. In its Answer, PGW admitted that it terminated the Complainant’s gas service on September 30, 2013, for non-payment of bills. PGW denied that there were any incorrect charges on the Complainant’s bill and stated that the Complainant had an unpaid balance of $393.58. PGW also stated that it issued a shut off notice on August 28, 2013, with a shut off date of on or up to sixty days after September 9, 2013. PGW Answer at 1.

On February 25, 2014, a Prehearing Order was sent to the parties. The time, date and location of the March 24, 2014, hearing was included in the hearing notice and the Prehearing Order.

On the morning of the hearing, ALJ Fordham discovered that the Prehearing Order indicated that the hearing would start at 2:00 p.m. Since the time on the hearing notice and the Prehearing Order differed, ALJ Fordham called the Complainant the morning of the hearing to notify her that the hearing was at 10:00 a.m. When the Complainant did not answer, ALJ Fordham left a message informing the Complainant that the hearing was at 10:00 a.m.. Tr. at 4, 5.

ALJ Fordham conducted an evidentiary hearing in this matter on March 24, 2014, in the Philadelphia Regional Office at 801 Market Street. The Complainant did not appear. Therefore, the hearing in this matter was started at 10:18 a.m. Graciela Christlieb, Esquire, represented the PGW. Wendy Vacca, a customer review officer for PGW, was present but did not testify. The Respondent’s counsel moved to dismiss the Complaint with prejudice for lack of prosecution. Tr. at 6.

The record consists of the pleadings and a seven-page transcript. The record in this case closed on April 14, 2014, when the transcript was received.

On April 2, 2015, the Commission issued the Initial Decision of ALJ Fordham in which the ALJ granted PGW’s Motion to dismiss the Complaint with prejudice for failure to prosecute.

**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 shiftback and forth during a proceeding, the burden of proof never shifts. The burden of proofalways remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC,* 768 A.2d 1217 (Pa. Cmwlth. 2001).

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).

**ALJ’s Initial Decision**

In her Initial Decision, ALJ Fordham made five Findings of Fact and reached six Conclusions of Law. I.D. at 3, 5-6. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted, without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

As noted, the ALJ granted PGW’s Motion to Dismiss the Complaint with prejudice for failure to prosecute. In dismissing the Complaint, the ALJ cited to *Volgstadt v. UGI Penn Natural Gas, Inc*., Docket No. F-02266429 (Order entered September 12, 2008) and *Martin Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995), and noted that the Complainant failed to sustain her burden.

**Disposition**

The Hearing Notice that was sent to the Complainant on February 12, 2014, informed the Parties that the hearing in this proceeding was scheduled for Monday, March 24, 2014, *at 10 a.m.* while the Prehearing Order, dated February 25, 2014, advised the Parties that the hearing would be held on Monday, March 24, 2014, *at 2 p.m.* Neither the Hearing Notice nor the Prehearing Order was returned to the Commission, indicating that both were received by the Complainant. The Complainant never called the ALJ or the Commission to question the discrepancy. The record demonstrates that on the morning of the March 24, 2014 hearing, ALJ Fordham discovered the timing discrepancy and called the Complainant to notify her that the hearing would be held at 10 a.m. When the Complainant did not answer, the ALJ left a message informing the Complainant that the hearing would be held at 10 a.m. The hearing proceeded at 10:18 a.m. on March 24, 2014. The Complainant did not appear and PGW moved to dismiss the matter, with prejudice, for lack of prosecution. In her Initial Decision, the ALJ granted PGW’s motion and dismissed the Complaint, with prejudice. I.D. at 5, Ordering Paragraph No.1 at 6.

We are of the opinion that an argument can be made that because the hearing times in the Hearing Notice and the Prehearing Oder differed, that the Complainant was not afforded due process. We have previously stated that it is in the public interest that all litigants, particularly pro se litigants, be afforded a meaningful opportunity to be heard. *See e.g., Amir V. Williams v. PECO Energy Co*., Docket No. C‑2010-2190024 (Order entered January 14, 2011). Therefore, in order to cure this error, we shall modify the ALJ’s Initial Decision which dismissed the case, with prejudice, to a dismissal, without prejudice. This will allow the Complainant to refile the Complaint if she chooses.

**Conclusion**

Based on our review of the record, we shall modify the ALJ’s Initial Decision that dismissed the Complaint, with prejudice, to a dismissal, without prejudice, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Initial Decision of Administrative Law Judge Cynthia Williams Fordham, issued on April 2, 2015, is modified consistent with the discussion in this Opinion and Order.

2.That the Formal Complaint filed by Tracey McDonald against Philadelphia Gas Works at Docket No. F-2013-2394318 is dismissed, without prejudice, consistent with this Opinion and Order.

3. That the proceeding docketed at F-2013-2394318 be marked closed.

**BY THE COMMISSION,**



Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: June 11, 2015

ORDER ENTERED: July 2, 2015

1. This Complaint is a timely appeal of a Bureau of Consumer Services (BCS) Decision at BCS Docket No. 3156105. [↑](#footnote-ref-1)