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April 22, 2016

VIA E-FILING ONLY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: David Wapensky v. PPL Electric Utilities Corporation
Docket No: C-2015-2476806

Dear Ms. Chiavetta:

Attached for eFiling in the above-captioned matter is Respondent PPL Electric Utilities Corporation's Motion to Dismiss Complainant's Complaint with Prejudice.

Please note that this filing was eFiled with the Commission on the date indicated above.

Very truly yours,

GRAIG M. SCHULTZ

GMS/ejm
Enclosure

cc: David Wapensky (w/enc.)
Administrative Law Judge Dennis J. Buckley (w/ enc.); *via email only*
Kimberly R. Hanson (w/enc.) *via email only*
Amy M. Bellizia (w/enc.) *via email only*

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DAVID WAPENSKY,
Complainant,

No. C-2015-2476806

v.

PPL ELECTRIC UTILITIES
CORPORATION,
Respondent.

**RESPONDENT PPL ELECTRIC UTILITIES CORPORATION'S MOTION TO
DISMISS COMPLAINANT'S COMPLAINT WITH PREJUDICE**

AND NOW, comes Respondent PPL Electric Utilities Corporation, by and through its counsel, Gross McGinley, LLP, and moves to dismiss Complainant's Complaint with prejudice as follows:

HISTORY OF THIS PROCEEDING

1. On or about April 12, 2015, Complainant David Wapensky ("Complainant") initiated this action with the filing of a Complaint (the "First Complaint") at Docket number C-2015-2476806.
2. On or about May 4, 2015, in response to Complainant's Complaint, Respondent PPL Electric Utilities Corporation ("Respondent") filed Preliminary Objections as well as an Answer to Complainant's Complaint.
3. On or about September 9, 2015 -- for reasons not entirely clear to Respondent -- Complainant filed another Complaint (the "Second Complaint") also at docket number C-2015-2476806.

4. Complainant never served the Second Complaint upon Respondent. In fact, Respondent only became aware of the filing of the Second Complaint upon notice from the Honorable Dennis J. Buckley, on December 22, 2015.¹

5. On or about January 11, 2016, Respondent filed its Answer to the Second Complaint.

6. Thereafter, on March 8, 2016, the Pennsylvania Public Utility Commission (the "Commission") issued a Telephonic Hearing Notice scheduling an initial telephonic hearing for this matter for April 4, 2016, at 10:00 a.m.

7. Of significance, the Telephonic Hearing Notice stated, *inter alia*, "Attention: You may lose this case if you do not take part in this hearing and present facts on the issues raised." See Telephonic Hearing Notice at p. 2 (emphasis in original).

8. On the morning of April 4, 2016, counsel for Respondent convened with Respondent's hearing witness in anticipation of the hearing which was scheduled for 10:00 a.m.

9. Several minutes before 10:00 a.m., counsel for Respondent and Respondent's witness called into the bridge line which was to be used by the parties and the Administrative Law Judge ("ALJ") for the purpose of the initial telephonic hearing.

10. Counsel for Respondent and Respondent's witness waited on the bridge line for approximately fifteen (15) minutes; however, neither Complainant nor Judge Buckley called into the bridge line.

11. At approximately 10:20 a.m., counsel for PPL contacted the Commission to speak with Judge Buckley regarding the initial telephonic hearing.

¹ Administrative Law Judge Buckley ("Judge Buckley") was assigned to this action by way of Motion Judge Assignment Notice dated June 2, 2015.

12. Counsel for Respondent was informed by the Commission that Judge Buckley was not presently in his office, and that he would return counsel's call as soon as he could be located.

13. Approximately five (5) minutes later, Judge Buckley called counsel for Respondent and informed counsel that Complainant had notified him by phone -- earlier that morning -- that the parties had settled this action, and therefore, the hearing was not necessary.

14. In reality, this action was not settled prior to the scheduled initial telephonic hearing. Moreover, counsel for Respondent, Respondent's witness, and Respondent through its other agents and employees, never spoke with Complainant prior to the initial telephonic hearing.²

15. The representation made by Complainant to the ALJ that this action had settled was patently false, and made by Complainant when he knew this information to be false.³

COMPLAINANT'S PRIOR ATTEMPTS TO AVOID PAYING FOR HIS ELECTRIC SERVICE AND AVOID A COMMISSION ORDER

16. Respondent incorporates by reference all prior paragraphs of its Motion as if set forth at length herein.

17. Complainant's conduct, as described above, is yet another attempt to avoid this Commission entering a Final Order on his Complaint, and one of many efforts to avoid paying for his electric service.

² It is well understood by Respondent that the Commission strongly encourages the parties to an action to engage in settlement discussions prior to a hearing. Additionally, it is Respondent's practice to contact its customers in advance of each scheduled hearing in order to attempt to resolve customer complainants without the need for a formal Commission hearing. However, for the reasons set forth more fully herein, Respondent did not engage in settlement discussions with Complainant prior to the April 4, 2016 initial telephonic hearing due to the excessive number of Complainant's prior defaulted payment arrangements, and the numerous formal Complaints filed by Complainant.

³ Complainant was seeking to avoid a Final Order and or Commission-ordered payment arrangement on his Complaint, so that he could continue his pattern of filing formal complaints and defaulting on payment arrangements. *See* 66 Pa.C.S.A. § 1405(d).

18. More specifically, Complainant has filed nine (9) formal complaints since April of 2009 -- April 2, 2009, March 24, 2010, April 8, 2013, August 15, 2013, March 25, 2014, July 8, 2014, October 30, 2014, April 12, 2015, and most recently, September 9, 2015.

19. Further, since April of 2012, Complainant has only made six (6) payments for his electric service -- April 4, 2012, May 4, 2012, July 2, 2012, March 30, 2015, September 14, 2015, and November 16, 2015 -- while at the same time presenting eight (8) checks to Respondent, which were returned due to insufficient funds -- June 8, 2012, July 20, 2012, August 3, 2012, April 9, 2013, July 18, 2013, July 23, 2013, June 27, 2014, and October 6, 2015. *See* PPL proposed hearing Exhibit "1."⁴

20. Even more egregious, Complainant has defaulted on a total of forty-five (45) payment arrangements since September 17, 2002. *See* PPL proposed hearing Exhibit "3."

21. The total amount owed by Complainant to Respondent is rapidly approaching \$10,000.⁵ *See* PPL proposed hearing Exhibit "1."

COMPLAINANT FAILED TO SATISFY HIS BURDEN OF PROOF

22. Respondent incorporates by reference all prior paragraphs of its Motion as if set forth at length herein.

23. As the party seeking affirmative relief from the Commission, Complainant bears the burden of proving by substantial evidence that he is entitled to the requested relief. *See* 66 Pa.C.S.A. § 332(a).

24. To satisfy this burden, Complainant must show that the named utility is responsible or accountable for the problem described in the Complaint. *See Patterson v. Bell*

⁴ Respondent's proposed hearing exhibits were served upon the ALJ and Complainant under cover letter dated March 24, 2016.

⁵ Complainant's total account balance was \$7,263.02 at the time of the April 4, 2016 Initial Telephonic Hearing.

Telephone Co. of Pennsylvania, 72 Pa. PUC 196 (1990) (citing *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. PUC 300 (1976)).

25. The Pennsylvania Supreme Court has held that the term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. See *Se-Ling Hosiery v. Marqilies*, 70 A.2d 858, 856 (Pa. 1950).

26. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. See *Samuel J. Lansberry, Inc. v. Pa. Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992) (citing *North American Coal Corp. v. Air Pollution Commission*, 279 A.2d 356 (Pa. Cmwlth. 1971)).

27. Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence. *Mill v. Pa. Public Utility Commission*, 447 A.2d 1100, 1101 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Public Utility Commission*, 623 A.2d 6, 7 (Pa. Cmwlth. 1993).

28. As it pertains to this action, Complainant knowingly misrepresented to the ALJ that this action was resolved, rather than proceed to the scheduled hearing and prosecute his claims against Respondent.

29. The effect of Complainant’s misrepresentation to the ALJ has the same effect as if Complainant failed to appear at the time of the initial telephonic hearing and prosecute his claims.

30. As such, Complainant’s Complaint should be dismissed with prejudice for law of prosecution pursuant to 52 Pa. Code § 5.245.

COMPLAINANT WAS AFFORDED DUE PROCESS BY THE COMMISSION

31. Respondent incorporates by reference all prior paragraphs of its Motion as if set forth at length herein.

32. The Commission is required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. Public Utility Commission*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (citing *Township of Middleton v. The Institute District of The County of Delaware*, 293 A.2d 885 (Pa. Cmwlth. 1972), *affirmed*, 299 A.2d 599 (Pa. 1973)).

33. In this regard, a notice which is mailed to a party's last known address and not returned by the post office is presumed to have been received by that party. *See Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944, 946 n.5 (Pa. Cmwlth. 1994), *appeal denied*, 653 A.2d 1234 (Pa. 1994) (citing *John Kenneth, Ltd. v. Unemployment Compensation Board of Review*, 444 A.2d 824 (Pa. Cmwlth. 1982)).

34. In the present case, the Commission's March 8, 2016 Telephonic Hearing Notice was sent to the address provided by the Complainant, and was not returned as undeliverable.

35. Therefore, Complainant is deemed to have received this document and had sufficient notice of the date and time of the scheduled hearing.

36. Further, once notice of a hearing and the opportunity to be heard has been provided, it is the responsibility of the parties to appear and participate in the hearing. *Sentner v. Bell Telephone Co. of Pennsylvania*, Opinion and Order entered October 25, 2003 at PUC Docket No. F-00161106.

37. More importantly, the Telephonic Hearing Notice issued by the Commission in this case specifically placed Complainant on notice that failure to participate could result in the dismissal of his case.

38. Given this, Complainant was clearly warned that his failure to participate in the evidentiary hearing could result in the loss of his claim.

39. Despite this, Complainant made a conscious and deliberate choice not to appear at the time of the Initial Telephonic Hearing, and did so at his own peril.

40. As such, Complainant's Complaint should be dismissed with prejudice for law of prosecution pursuant to 52 Pa. Code § 5.245.

CONCLUSION

41. Respondent incorporates by reference all prior paragraphs of its Motion as if set forth at length herein.

42. In light of the above, Complainant was afforded due process by the Commission.

43. Further, Complainant failed to satisfy his burden of proof.

44. Accordingly, Complainant's Complaint must be dismissed with prejudice.

WHEREFORE, based on the foregoing, Respondent PPL Electric Utilities Corporation respectfully requests that Complainant's Complaint be dismissed with prejudice.

Dated: April 22, 2016

Respectfully submitted,

By: /s/Graig M. Schultz

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Attorneys for Respondent,
PPL Electric Utilities Corporation

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DAVID WAPENSKY,
Complainant,

No. C-2015-2476806

v.

PPL ELECTRIC UTILITIES
CORPORATION,
Respondent.

CERTIFICATE OF SERVICE

This is to certify that Respondent PPL Electric Utilities Corporation's Motion to Dismiss Complainant's Complaint with Prejudice was mailed to the following by first class United States mail, postage on this the 22nd day of April, 2016.

David Wapensky
22 E. Ludlow Street
Summit Hill, PA 18250

GROSS MCGINLEY, LLP

By: /s/Graig M. Schultz
GRAIG M. SCHULTZ