

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Office of the Administrative Law Judge
801 Market Street, 4th Floor, Suite 4063
Philadelphia, PA 19107

Mindy Jaye Zied, and) F-2015-2500342
Binnie A. Zied, *Complainants*) (P-2015-2520474 - April 21, 2016)
v.)
PECO Energy Company,)
(an Exelon Corp.), *Respondents*)
_____)

IN RESPONSE TO THE P.U.C.'S APRIL 21, 2016 ORDER DUE ON OR
BEFORE MAY 11, 2016

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SECRETARY'S BUREAU

Mindy Jaye Zied
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DATE: May 5, 2016

INTRODUCTION

On April 21, 2016, a Public Meeting was held by the Public Utilities Commission in Harrisburg, PA., pertaining to the Interlocutory question that the Complainant's, Mindy and Binnie Zied raised before the Commission.¹

In a 5-0 vote, the Commission answered the material question in the affirmative in part, (Attachment A) and issued a ruling which returned this matter to the Office of the Administrative Law Judge (OALJ) for such proceedings as may be necessary².

In their discussion, the Commission set forth the criteria which was set forth in the ALJ's November, 2015 Order, which set forth the following options for the Complainant's to proceed with:

- (1) by agreeing to mediation;
- (2) by agreeing to settlement negotiations;
- (3) through a telephonic evidentiary hearing;
- (4) through an in-person hearing; or
- (5) by withdrawing the Complaint and proceeding in the appropriate federal or municipal court.

¹ The question raised to the Commission on Interlocutory Review was as follows:

"Whether in the Commonwealth of Pennsylvania in order to be in compliance with the American with Disabilities Act of 1990, [42 U.S.C. §§ 12101-12213, specifically] §12132, an in-person hearing can be waived by a self-represented individual and/or individuals who are impaired by permanent non-physical disabilities, which include but are not limited to, communication difficulties, and/or by a ninety-seven year old individual who suffers from health problems, allowing the merits of a complaint to be heard solely on the paperwork submitted as an alternative form of communication/accommodation request to either the disabilities in question and/or the age and/or physical health of that elderly self-represented complainant."

² As stated by the Commission, (pg. 10, 11) "We find that this approach is in the public interest, as it provides a reasonable accommodation for the Complainants while protecting the due process rights of all the Parties."

On April 21, 2016, the Commission ruled that in addition to the five aforementioned criteria, that the parties may opt to an additional criteria, and that is to submit written testimony and accompanying exhibits, including direct testimony by the Complainants and rebuttal testimony by PECO, instead of presenting oral testimony during a hearing, which is consistent with Section 5.412 of the Regulations that already exist.

Also included in the April 21, 2016 ORDER were instructions for the Complainants to set forth which of the (6) criteria which would be the most appropriate in order for them to proceed with their hearing/complaint against PECO, and to do so within 20 days from the date of the April 21, 2016 ORDER.

Based upon Mindy Zied's disability(s), and prior communications with PECO and Counsel, it is believed that the first (4) criteria would not and could not work. The 5th criteria which includes the option of State Court, based on a prior experience of Ms. Zied and her inability to understand the complex procedures required by the State Court, that option would also have to be precluded by the Complainant's. Due to the fact that there is no present avenue for Ms. Zied to proceed in the Federal Court at the moment, until the Third Circuit Court of Appeals issues decisions in the pending appeals of USCA 3rd Circuit Case 15-2152; USCA 3rd Circuit Case #15-2668; USCA 3rd Circuit Case #15-2821, that, too is not an avenue of relief that the Complainants are able to pursue.

Based upon the belief that the August 24, 2015 Formal Complaint; the September, October, (October 7, 2015 containing 13 Exhibits equalling 267 pages) & November submissions

(letters and motions) by both Mindy and Binnie Zied support their side of the argument, and support the allegations against PECO, the Complainants' choose to proceed on the paperwork, letters, affidavits, emails, and (continued)

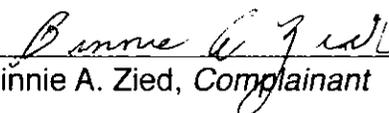
additional evidence already submitted to this tribunal on the 6th criteria offered by the PUC, (written testimony and evidence submitted) based upon the health and disabilities of both Complainants.

Should additional paperwork be required as to the continuing processing of these claims, it would be of great assistance to the Complainants' for the OALJ's office to either elaborate and set forth any further instructions and/or rules and/or codes where said instructions are located to ensure that the Complainants will be capable of complying with as to the rules and regulations that they themselves are unfamiliar with, unskilled in law and procedures of the Public Utility Commission.

Respectfully Submitted,



Mindy Jaye Zied, Complainant



Binnie A. Zied, Complainant

Date: 5/5/2016

Attached: April 21, 2016 PUC COMMISSION ORDER
CERTIFICATE OF SERVICE

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ATTACHMENT A

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held April 21, 2016

Commissioners Present:

Gladys M. Brown, Chairman
Andrew G. Place, Vice Chairman
Pamela A. Witmer
John F. Coleman, Jr.
Robert F. Powelson

Mindy Jaye Zied and Binnie A. Zied

P-2015-2520474

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Petition for Interlocutory Review and Answer to Material Question (Petition), filed by Mindy Jaye Zied and Binnie A. Zied (Complainants) on December 22, 2015, in the above-captioned proceeding. PECO Energy Company (PECO, Respondent, or Company) did not file a brief or other response to the Petition.

In the Petition, the Complainants request interlocutory Commission review and answer to the following material question:

Whether in the Commonwealth of Pennsylvania in order to be in compliance with the Americans with Disabilities Act of 1990, [42 U.S.C. §§ 12101-12213, specifically] § 12132, an in-person hearing can be waived by a self-represented individual and/or individuals who are impaired by permanent non-physical disabilities, which include but are not limited to, communication difficulties, and/or by a ninety-seven year-old individual who suffers from health problems, allowing the merits of a complaint to be heard based solely on the paperwork submitted as an alternative form of communication/accommodation request to either the disabilities in question and/or the age and/or physical health of that elderly self-represented complainant.

The Complainants request that the Commission answer the material question in the affirmative. Petition at 2.

For the reasons more fully discussed below, we shall answer the material question in the affirmative, in part, and return this matter to the Office of Administrative Law Judge (OALJ) for such proceedings as may be necessary.

History of the Proceeding

On August 24, 2015, the Complainants filed a Formal Complaint¹ alleging that there were incorrect charges on Mindy Zied's bills from PECO for electric service. This Complaint was given the Docket No. F-2015-2500342. The Complainants claimed the amount owed was the result of an improper transfer of a balance accrued at 1948 Kentwood Street, Philadelphia, Pennsylvania (service address) prior to Mindy Zied's alleged occupancy at the service address. The Complainants also alleged that there were no meters at the service address from March 23, 2014, through June 13, 2014, to generate accurate billing of the amount of electric usage at the service address. The Complainants disputed the amounts billed over that time period. Complaint at 2. The Complainants

¹ The Complaint was a timely appeal of an informal Bureau of Consumer Services (BCS) decision at BCS Case No. 003322542.

stated that they reached a settlement with a PECO customer service representative regarding the unmetered electric usage bill from March 23, 2014, until June 13, 2014, which resulted in a balance due of \$133.94, and that PECO failed to honor that settlement. *Id.* at 5. The Complainants further contested a deposit assessed to Mindy Zied's account on the basis that PECO previously told Mindy Zied that no deposit was required for her account. *Id.* at 2.

On September 10, 2015, the Respondent filed an Answer denying all material allegations of fact and conclusions of law in the Complaint. The Respondent stated that the Complainant Mindy Zied was responsible for the transferred balance attributable to the Complainant Binnie Zied's account based on the Respondent's contention that Mindy Zied resided at the service address and benefitted from the electric service. Answer at 5-6. The Respondent also averred that the charges were correct and that the security deposit assessed to Mindy Zied's account was in compliance with its tariff and Section 1404(a) of the Public Utility Code (Code), 66 Pa. C.S. § 1404(a). Answer at 4.

On September 15, 2015, the Complainants filed an objection to the Respondent's Answer and also moved for an immediate judgment in their favor. By Order dated November 2, 2015, Administrative Law Judge (ALJ) Angela T. Jones indicated that the document the Complainants filed would be considered a preliminary objection. In the Order, the ALJ overruled the objection and denied the Complainants' request because the Motion failed to conform to the seven grounds available for filing objections set forth in 52 Pa. Code § 5.101(a)(1)-(7).

On October 7, 2015, the Complainants served the ALJ with a "Motion for an Immediate Decision/Summary Judgement" and "Brief in Lieu of Hearing," which the

ALJ treated as a Motion for Summary Judgment (Motion).² Among other things, the Complainants requested that reasonable accommodations be made and that the ALJ decide the proceeding based on written submittals or a written brief instead of an in-person or telephonic hearing. The Complainants stated that Mindy Zied is “permanently disabled with a non-physical disability” and indicated that her mental health condition does not allow her to effectively participate in a telephonic hearing. Motion at 4. The Complainants also stated that Binnie Zied’s “health would be in jeopardy” if she had to attend a hearing and noted her age of ninety-seven as a factor that prohibits her physical attendance at a hearing. *Id.* at 3. The Motion contained thirteen attachments.

By Secretarial Letter issued October 9, 2015, the Commission’s Secretary indicated that the cover page of the Complainants’ Motion was sent to the Office of Governor Tom Wolf. The Secretarial Letter stated that, since this matter is still pending before the Commission and due to the statutory prohibition on *ex parte* communications, the Secretary served a copy of the Complainants’ correspondence to Governor Wolf’s office on the ALJ and PECO in order to cure any *ex parte* communication.

On November 2, 2015, PECO filed a Motion to File Response to Complainants’ Motion for Summary Judgment *Nunc Pro Tunc*. The Respondent acknowledged that its response was not timely due to an administrative oversight. The Respondent also noted that the Complainants’ Motion was procedurally defective because it did not contain a Notice to Plead.

PECO also filed a Response to the Complainants’ Motion on November 2, 2015. In its Response, PECO disputed any settlement between the Parties and denied that the Company removed the meter at the service address without notice. PECO averred

² The ALJ noted that the Motion was not filed with the Commission. Accordingly, the ALJ filed the Motion with the Secretary’s Bureau on November 10, 2015, and provided a copy of the Motion to PECO’s counsel.

that there were several genuine issues of material fact pending in this case which would make summary judgment inappropriate. The Respondent contended that an in-person hearing was required to assess the credibility of witnesses and the amount of witnesses and documents potentially required to effectively advocate the matter.

In the Order Denying Motion for Summary Judgment dated November 17, 2015 (*November 2015 Order*), the ALJ initially found that it was reasonable to consider PECO's Response, because the ALJ had not yet ruled on the Motion prior to PECO filing its Response, *nunc pro tunc*, and the Complainants' Motion failed to contain the required Notice to Plead. *November 2015 Order* at 5. In ruling on the Motion, the ALJ concluded that the documents presented by the Complainants did not excuse their attendance because, as listed Complainants in this case, they are responsible for the allegations made in the Complaint and bear the burden of proof concerning the allegations. The ALJ stated that the Complainants' filings contain material questions of fact, including whether PECO's actions toward the Complainants constituted fraudulent conduct; whether the removal and replacement of the meter at the service address complied with the Commission's Rules and Regulations; whether PECO and the Complainants reached a settlement; and whether the Complainants' bills for electric service were correct. *Id.* at 7. The ALJ provided the Complainants with the following five options for proceeding with the Complaint:

- (1) by agreeing to mediation;
- (2) by agreeing to settlement negotiations;
- (3) through a telephonic evidentiary hearing;
- (4) through an in-person hearing; or
- (5) by withdrawing the Complaint and proceeding in the appropriate federal or municipal court.

Id. at 7-8. The ALJ determined that, because material issues of fact were present, summary judgment was not appropriate. Accordingly, the ALJ directed the

Complainants to inform the ALJ and the Respondent regarding their choice for presenting the Complaint based on the five options provided above. *Id.* at 8.

On December 22, 2015, the Complainants filed the instant Petition. The Petition requested a stay of the hearing that was scheduled for January 28, 2016.

By Order dated December 28, 2015, ALJ Jones directed that the proceeding at Docket No. F-2015-2500342 be stayed until the Commission rules on the instant Petition.

By Secretarial Letter issued December 28, 2015, the Commission waived the thirty-day period for consideration set forth in 52 Pa. Code § 5.303 in order to provide adequate time for a thorough review of the question raised. *See* 52 Pa. Code § 1.2(c); *see also, C.S. Warthman Funeral Home, et al. v. GTE North, Incorporated*, Docket No. C-00924416 (Order entered June 4, 1993).

Discussion

Legal Standards

As a preliminary matter, we note that any issue we do not specifically delineate 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 raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

The Complainants filed their Petition pursuant to Section 5.302 of the Commission's Regulations, 52 Pa. Code § 5.302. During the course of a proceeding and pursuant to the provisions of 52 Pa. Code § 5.302, a party may seek interlocutory review

and answer to a material question which has arisen or is likely to arise. The standards for interlocutory review are well established. Section 5.302 of our Regulations requires that the petitioning party "state . . . the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, the error and any prejudice flowing therefrom could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

Pursuant to 52 Pa. Code § 5.303, the Commission may take one of the following courses of action on requests for interlocutory review and answer to a material question:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.
- (2) Determine that the petition was improper and return, the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.

Generally, Petitions for Interlocutory Review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course in order to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009), at 3.

The Complainants' Petition

The Complainants' Petition concerns ALJ Jones' rulings in the *November 2015 Order*. The material question raised in the Petition is as follows:

Whether in the Commonwealth of Pennsylvania in order to be in compliance with the Americans with Disabilities Act of 1990, [42 U.S.C. §§ 12101-12213, specifically] § 12132, an in-person hearing can be waived by a self-represented individual and/or individuals who are impaired by permanent non-physical disabilities, which include but are not limited to, communication difficulties, and/or by a ninety-seven year-old individual who suffers from health problems, allowing the merits of a complaint to be heard based solely on the paperwork submitted as an alternative form of communication/accommodation request to either the disabilities in question and/or the age and/or physical health of that elderly self-represented complainant.

The Complainants request that the Commission answer the material question in the affirmative. Petition at 2. The Complainants have attached the thirteen documents that were attached to their October 7, 2015 Motion.

In support of their Petition, the Complainants aver that Pennsylvania and federal law set forth requirements regarding the provision of reasonable accommodation requests for individuals with disabilities. The Complainants cite to 201 Pa. Code Ch. 2, which governs reasonable accommodations under the Americans with Disabilities Act of 1990 (ADA), and to the ADA, specifically 42 U.S.C. § 12132.³ Petition at 8-9. The Complainants state that Mindy Zied is considered a person who is in a protected class

³ Section 12132 provides the following: "Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

based on her permanent psychological disabilities, which include bipolar disorder, paranoid disorder, and communication impairments. They also state that Binnie Zied is ninety-seven, suffers from health issues, and is a cancer survivor. Petition at 3, 4. The Complainants argue that the ALJ did not provide direction or instruction concerning the further ability for Mindy Zied to obtain the accommodation she was requesting based on her communicative disabilities or provide any information about appeal procedures. The Complainants claim that the ALJ did not allow for a reasonable accommodation for both Complainants that would enable them to effectively participate in the hearing process in this case. Petition at 14-15.

Disposition

Based upon our review of the Petition and the applicable law, we find that the Complainants' Petition supports the necessity for interlocutory review in order to prevent substantial prejudice or to expedite the conduct of the proceeding. The manner in which the Complainants are permitted to present their case will impact the due process rights of all Parties and their abilities to effectively participate in this proceeding. Because the Complainants' accommodation request affects the presentation of the Complainants' entire case and any testimony and exhibits that the Complainants wish to submit for the record, any potential error or prejudice that may flow from the *November 2015 Order* should be addressed at this time. We find that doing so will expedite the conduct of this proceeding and provide guidance to the Parties concerning the manner in which they will be expected to present their cases, while also ensuring the development of a factual record upon which the ALJ can issue a decision.

The material question presented by the Complainants requests a waiver of an in-person hearing and the ability to present the merits of the Complaint case based

solely on paperwork which they submit.⁴ In the *November 2015 Order*, the ALJ provided the Complainants with the following options for proceeding with their Complaint:

- (1) by agreeing to mediation;
- (2) by agreeing to settlement negotiations;
- (3) through a telephonic evidentiary hearing;
- (4) through an in-person hearing; or
- (5) by withdrawing the Complaint and proceeding in the appropriate federal or municipal court.

While we agree with the ALJ that the Complainants may proceed with any of these five options, we conclude that we can provide the Complainants with an additional accommodation option that is consistent with our procedural Regulations.

Consistent with Section 5.412 of our Regulations, the Parties may submit written testimony and accompanying exhibits, including direct testimony by the Complainants and rebuttal testimony by PECO, instead of presenting oral testimony during a hearing. We note, however, that any written testimony and exhibits submitted by the Parties will still be subject to the procedural rules regarding admissibility and cross-examination of the sponsoring witness. 52 Pa. Code § 5.412(c). The ALJ has the authority to establish the schedule and directives for the filing and authentication of written testimony and exhibits and for cross-examination by other Parties. To the extent that the Parties reach settlements and/or stipulate to facts or to the authenticity of documents, 52 Pa. Code §§ 5.232, 5.234, or admit to facts, 52 Pa. Code § 5.350, this may reduce the necessity for oral presentation during an in-person or telephonic hearing.

We find that this approach is in the public interest, as it provides a reasonable accommodation for the Complainants while protecting the due process rights

⁴ To the extent that the Complainants are seeking a determination of a violation or appeal rights under the ADA, the Commission does not have jurisdiction over such actions. As the ALJ indicated, ADA claims should be brought before the appropriate federal or municipal court.

of all of the Parties. Because there are material issues of fact present, we cannot waive the Parties' rights to cross-examination or prohibit the Parties from responding to arguments made by each other. *See, Hess v. Pa. PUC*, 107 A.3d 246, 266 (Pa. Cmwlth. 2014) (stating that the Commission is bound by the due process provisions of constitutional law which include "notice and an opportunity to be heard on the issues, to be apprised of the evidence submitted, to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal"). Based on our determination, we direct that, within twenty days of the entry date of this Opinion and Order, the Complainants provide in writing to the ALJ and counsel for the Respondent their choice on how to present the Complaint from the six options that have been provided.

Conclusion

For the reasons set forth above, we shall answer the material question *presented by the Complainants in the affirmative, in part, and return this matter to the Office of Administrative Law Judge, consistent with the discussion in this Opinion and Order; THEREFORE,*

IT IS ORDERED:

1. That the Petition for Interlocutory Review and Answer to Material Question, filed by Mindy Jaye Zied and Binnie A. Zied on December 22, 2015, is granted.

2. That the following question is answered in the affirmative, in part, consistent with this Opinion and Order:

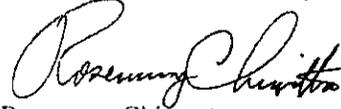
Whether in the Commonwealth of Pennsylvania in order to be in compliance with the Americans with Disabilities Act of 1990, [42 U.S.C. §§ 12101-12213, specifically] § 12132, an

in-person hearing can be waived by a self-represented individual and/or individuals who are impaired by permanent non-physical disabilities, which include but are not limited to, communication difficulties, and/or by a ninety-seven year-old individual who suffers from health problems, allowing the merits of a complaint to be heard based solely on the paperwork submitted as an alternative form of communication/accommodation request to either the disabilities in question and/or the age and/or physical health of that elderly self-represented complainant.

3. That this matter is returned to the Office of Administrative Law Judge for such proceedings as may be necessary, consistent with this Opinion and Order.

4. That, within twenty days of the entry date of this Opinion and Order, Mindy Jaye Zied and Binnie A. Zied shall provide in writing to the Administrative Law Judge and counsel for PECO Energy Company their choice for presenting the Complaint, consistent with the options discussed in this Opinion and Order.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 21, 2016

ORDER ENTERED: April 21, 2016

CERTIFICATE OF SERVICE

BEFORE THE PENNSYLVANIA UTILITY COMMISSION

MINDY JAYE ZIED,)
BINNIE A. ZIED,)
Complainants)
v.)
PECO ENERGY COMPANY/EXELON,)
Respondents)

Docket No. F-2015-2500342

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CERTIFICATE OF SERVICE

I, Mindy Jaye Zied hereby certify that I have this day served a copy of Complainants' Response to the PUC Commission's April 21, 2016 ORDER, upon all interested parties by mailing USPS first class postage pre-paid mail today to:

Shawane L. Lee
PECO Legal Department
Counsel for PECO Energy Company
2301 Market Street, S23-1
P. O. Box 8699
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TO
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ALS
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[Signature]
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Date: May 5, 2016

Mindy Campbell
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