

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Donald Saxman

v.

West Penn Power Company

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C-2015-2513370

INITIAL DECISION

Before
Tiffany L. Tran
Special Agent

INTRODUCTION

This initial decision grants the Respondent's Motion to Dismiss the Complainant's Formal Complaint for lack of prosecution because the Complainant failed to appear at the scheduled hearing.

HISTORY OF THE PROCEEDING

On November 16, 2015, Donald Saxman (Complainant) filed a Formal Complaint (Complaint) against West Penn Power Company (West Penn or Respondent) requesting a payment arrangement.

On December 2, 2015, West Penn filed its Answer, averring that the Complainant had defaulted on three prior, company-issued payment arrangements. Respondent requested that the Complaint be dismissed and submitted that the matter might be appropriate for mediation.

By Telephone Hearing Notice dated March 17, 2016, a hearing was scheduled for Tuesday, April 26, 2016, and the matter was assigned to me as presiding officer pursuant to 52 Pa.

Code Section 56.174. The Hearing Notice advised the parties of the location, date and time of the scheduled hearing and warned in bold and italicized type: “*Attention: You may lose the case if you do not come to this hearing and present facts on the issues raised.*”

I also issued a Prehearing Order dated March 25, 2016. The Prehearing Order directed the parties to comply with various procedural requirements and directed that a request to change the scheduled hearing should be sent to me at least five days prior to the hearing date, be in writing and state the agreement or opposition of the other party. It warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to attend the hearing, including the dismissal of the complaint. It also explained that the Complainant bears the burden of proof to establish that the Respondent violated its tariff, the Public Utility Code, or a Commission order or regulation, and that she is entitled to the relief requested in the Complaint.

The telephonic hearing convened as scheduled on April 26, 2016. Counsel for PGW, John L. Munsch, Esquire, was present with a witness and was prepared to proceed. I attempted to contact the Complainant at the residential telephone number provided on the Formal Complaint form at 10:00 a.m., but received no response. I left a voice message identifying myself and the purpose for the call, and indicated that I would attempt to contact the Complainant again in fifteen minutes. When I attempted to contact the Complainant via the mobile telephone number provided on the Formal Complaint form, I received an automatic message identifying the number as belonging to “the Saxmans” and an indication that the voice mail box was full. I informed Respondent’s counsel that I would try to contact the Complainant again in fifteen minutes. I checked with the support staff of the Office of Administrative Law Judge (OALJ) to see if the Complainant had contacted the office, and likewise checked my email and telephone messages. There were no messages from the Complainant. When I called the Complainant at his residential number a second time at 10:15 a.m., I again received no response. I left a voicemail indicating that the hearing would proceed in his absence and stating that he should contact OALJ using the information provided in the telephonic hearing notice if he had any questions. A second call to the Complainant’s mobile number again indicated that the number belonged to the Complainant, and that the voice mailbox was full.

Therefore, I convened the hearing in the absence of the Complainant around 10:20 a.m.¹ No witnesses were presented and no exhibits were introduced into the record. Respondent's counsel moved that the Complaint be dismissed with prejudice for lack of prosecution pursuant to 52 Pa.Code § 5.245. In accordance with Commission policy, I am granting the Motion.

The record was closed on April 26, 2016, at the conclusion of the hearing.

FINDINGS OF FACT

1. The Complainant in this case is Donald Saxman.
2. The Respondent in this proceeding is West Penn Power, a jurisdictional public utility providing electrical service in the Commonwealth of Pennsylvania.
3. By Hearing Notice dated March 17, 2016, a hearing was scheduled for Tuesday, April 26, 2016 at 10:00 a.m., with both parties given notice.
4. Both parties were advised of the procedures for requesting a continuance of a scheduled hearing, as well as the date, time, and location by Prehearing Order dated March 25, 2016.
5. The Complainant was advised that the Complaint would be dismissed if he failed to appear for a scheduled hearing by the March 17, 2016, Hearing Notice and the March 25, 2016, Prehearing Order.
6. Respondent appeared for the hearing at the scheduled location, date, and time by legal counsel and a proposed witness and was prepared to proceed.
7. Complainant failed to appear for the scheduled hearing.

¹ A tape recording of the proceeding was made, no court reporter being present.

8. Complainant did not settle or withdraw the Complaint nor obtain a continuance prior to the scheduled hearing.

9. Neither the Hearing Notice, nor the Prehearing Order, both of which contained the location, date and time of the scheduled hearing, were returned by the postal authorities as undeliverable.

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, 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. Commonwealth, Dep't of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.

Cmwlth. 1984). However, this due process requirement is satisfied when the parties are provided notice and the opportunity to appear and be heard. *Id.*

Notice of the April 26, 2016 hearing in this case was sent to the Complainant on March 17, 2016, by regular first-class mail to the address stated on the Complaint. This piece of mail was never returned to the sender, the scheduling staff for the Office of Administrative Law Judge in Harrisburg. Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406 (1959); *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974). Therefore, the Complainant is deemed to have received this document and had sufficient notice of the location, date and time of the scheduled hearing.

The Complainant was notified of the scheduled hearing location, date and time, as well as how to contact the OALJ office. Despite this, he made no attempt to notify me that he would not be attending the hearing, and has not contacted OALJ or myself to explain his absence since the date of the hearing. Under these circumstances, it appears Complainant had ample opportunity to appear and be heard in this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of the Complainant have been fully protected.

By not appearing for the scheduled hearing, the Complainant failed to bear his burden of proof. Consequently, the Complaint will be dismissed.

As the Commission stated in *Mumma v. PPL Electric Utilities Corp.*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002), "It is well-established law that once timely notice of a hearing and the opportunity to be heard have been provided, it is the responsibility of the parties to be present and participate in the hearing. See, *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984); *Plummer v. Columbia Gas of Pa., Inc.*, Docket No. Z-00847836 (Opinion and Order entered September 27, 2001). The Pennsylvania Commonwealth Court has made it clear that in administrative hearings, "a party's own negligence is not sufficient good cause as a matter of law for failing to appear at a . . . hearing." *Eat 'N Park Hospitality Group, Inc. v. Unemployment Compensation Board of Review*, 2008 Pa. Commw. LEXIS 663.

Due to the waste of the Commission's and Respondent's time, money, and energy occasioned by the Complainant's failure to appear at a hearing of which he had notice, this Complaint will be dismissed with prejudice in accordance with well-established Commission precedent. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995); *Evans v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00957229 (Opinion and Order entered July 12, 1996); *King v. PECO Energy Co*, Docket No. C-00967919 (Opinion and Order entered January 16, 1997); *Kenny v. PPL Electric Utilities Corporation*, Docket No. C-20042399 (Final Order entered October 13, 2004); *Jones v. The Peoples Natural Gas Company d/b/a Dominion Peoples*, Docket No. C-20054885 (Opinion and Order entered February 14, 2006).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and subject matter of 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.
3. By failing to appear at the scheduled hearing and failing to present any evidence, the Complainant has failed to satisfy the burden of proof.
4. Notice properly mailed to a party's last known address and not returned is presumed to have been received. *Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406 (1959); *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974).
5. The Complainant had notice of the date, location and time of the scheduled hearing.
6. The due process rights of Complainant have been fully protected in this proceeding. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

