

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

**Paul Kopanycia
v.
PECO Energy Company**

**Public Meeting February 9, 2017
2526619-OSA
Docket No. C-2016-2526619**

MOTION OF COMMISSIONER JOHN F. COLEMAN, JR.

Before the Commission are Exceptions and Reply Exceptions to the Initial Decision of Administrative Law Judge Darlene D. Heep of June 9, 2016 dismissing the above-captioned formal complaint for failure to prosecute and meet the burden of proof. The Complainant alleged that PECO Energy Company had threatened to terminate service over an unpaid balance and requested a payment arrangement as well as review of the amount of the arrearage, eligibility for medical certificates, and a review of a prior complaint which had not been adjudicated. An in-person evidentiary hearing was scheduled for this matter for March 31, 2016. The Complainant was sent the standard hearing notice with the date, time, and location of the hearing. The notice also informed that the case would be dismissed if the Complainant did not appear at the scheduled hearing and that any requests to change the hearing date must be submitted five days in advance of the hearing date. The Complainant also was sent the standard prehearing order, which reaffirmed the date, time, and location of the hearing and which reaffirmed the procedures for requesting a change of the hearing date.

On March 30, 2016, the Complainant served PECO with a letter addressed to the Commission's Secretary requesting permission to withdraw the Complaint. The Complainant also mentioned that it would not object to mediation. On March 30, 2016, PECO replied in writing to the ALJ that it objected to the withdrawal of the Complaint and that it declined to participate in mediation. On March 31, 2016, PECO appeared at the evidentiary hearing but the Complainant did not. PECO moved to have the case dismissed with prejudice for failure to prosecute and meet the burden of proof, which the ALJ granted. In his Exceptions, the Complainant maintained that he had withdrawn the Complaint and that he was awaiting a decision on his request for mediation.

In reviewing this matter, I am guided by Commission precedent involving the reversal or modification of Initial Decisions where Complaints had been dismissed with prejudice for failure to appear at evidentiary hearings. The Commission has, on rare occasions, reversed or otherwise modified these Initial Decisions where the record showed that the Complainant had made a good faith effort to participate in the evidentiary hearing.¹

¹ *Wiggins v. PECO Energy Company*, C-2010-2190335 (Order entered October 27, 2011).

The Commission has also permitted the withdrawal of applications instead of denials, where the applicant had properly filed the withdrawal with the Secretary and there was no sign of abuse of the Commission's processes.²

However, none of these precedents are applicable to this case. There is no evidence that the Complainant made a good faith effort to attend the hearing, or alleged any other unique circumstance to warrant his absence. In fact, the Complainant was well aware of the date of the hearing, as evidenced by the request to withdraw the Complaint the day before it was to take place. And, as PECO notes, this customer should be very familiar with Commission procedures regarding complaint proceedings, having previously filed six informal and seven formal complaints with this Commission.³

Additionally, even if the Complainant's letter of March 30, 2016 is treated as a Petition to Withdraw the Complaint, it should not be granted. Petitions to withdraw are governed by Section 5.94 of the Commission's regulations, which specifies that when considering the request, the Commission must consider the petition, any objections thereto and the public interest. Here, the request was made one day prior to the scheduled hearing, and PECO objected to the request. Moreover, the basis for the withdrawal was the Complainant's request for mediation. However, upon further review, it is clear the Complainant was not abandoning his cause of action; rather, he was simply seeking to change the manner in which it would be brought to resolution. This is evident by the fact that the Complainant filed Exceptions to the Initial Decision inquiring as to the status of his mediation request, but also, seeking a substantive resolution on his payment

² *Application of Comfort Transport, LLC, for the right to transport as a common carrier, by motor vehicle, persons in paratransit service, from the City and County of Philadelphia, and the Counties of Bucks, Delaware, Montgomery, to points in Pennsylvania, and return*, Docket No. A-2016-2549430 (Order entered January 6, 2017); *Application of Blessed Transportation, LLC, for the right to transport as common carrier, by motor vehicle, persons in paratransit service from the City and County of Philadelphia, and the counties of Bucks and Montgomery, to points in Pennsylvania, and return*, Docket No. A-2015-2549943 (Order entered January 6, 2017).

³ On at least three occasions, this Complainant has filed complaints with this Commission that were later dismissed with prejudice for failure to appear at an in-person evidentiary hearing. *Kopanycia v. PECO Energy Company*, Docket C-2011-2251399 (Initial Decision issued December 13, 2011); *Kopanycia v. PECO Energy Company*, Docket C-2012-2325105 (Initial Decision issued December 18, 2012); *Kopanycia v. PECO Energy Company*, Docket C-2015-2480378 (Initial Decision issued December 7, 2015). In another case, the Complainant failed to participate in a telephonic hearing in a complaint proceeding, resulting in its dismissal with prejudice. *Kopanycia v. PECO Energy Company*, Docket C-2012-2283948 (Initial Decision issued June 21, 2012). In all of these cases, PECO took the time and effort to prepare for and sometimes travel to the hearing. In all of these previous cases, the Office of Administrative Law Judge allocated a specific time and/or location for a hearing, which could have been used to take evidence for another case. And, in at least two of these cases, the Complainant had already been granted a continuance prior to the dismissals, demonstrating that both PECO and the Commission have attempted to work cooperatively with this customer in bringing these cases to a just resolution. The repeated filing of and failure to prosecute complaints, even after continuances have already been given in some cases, wastes the finite resources of this agency and thereby infringes on the rights of other customers and utilities to a timely resolution of pending matters.

arrangement request.⁴ And, under our procedural rules, a party cannot simultaneously ask to withdraw a complaint and at the same time ask that it be assigned for mediation.⁵ Rather, our process is that the complaint remains pending subject to the outcome of the mediation. For these reasons, I do not believe it would be in the public interest to grant the request to withdraw the Complaint.

Furthermore, a request to withdraw a complaint and/or to mediate a complaint does not automatically stay the scheduled hearing date. As the Complainant should know, the proper procedure to change a hearing date is to request a continuance in writing no later than five business days prior to the hearing. No such request was made by the Complainant in this case.

By not attending the hearing, the Complainant took the risk that his Complaint would be dismissed, as explained in the Pre-Hearing Notice and Prehearing Order. Granting the request to withdraw effectively converts this Initial Decision to a dismissal without prejudice, to the very real prejudice to PECO's interests in the timely resolution of the underlying dispute, which involves an arrearage in excess of \$6,000, and the Commission's interest in judicial economy. By allowing this form of contested withdrawals of complaints on the eve of evidentiary hearings, a precedent could be established by which parties could game the procedural rules of the Commission to indefinitely delay a decision on the merits of the underlying dispute, again, to the actual prejudice of other parties and the Commission.

Accordingly, I move that the Exceptions be denied and the Initial Decision affirmed in its entirety.

THEREFORE, I MOVE THAT:

1. The Initial Decision of Administrative Law Judge Darlene D. Heep be affirmed.
2. The Office of Special Assistants prepare an Opinion and Order consistent with this Motion.

DATE: February 9, 2017



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COMMISSIONER

⁴ In his Exceptions, the Complainant states the following: "In withdrawing this complaint, I requested mediation in this matter and have not received any response." Exception of Complainant. At the same time, the Complainant alleges that PECO did not take into account changed circumstances when denying a payment agreement. Exception of Complainant.

⁵ "Parties may request mediation during the course of a proceeding." 52 Pa. Code §69.392(b)(2) (relating to availability of mediation in Commission proceedings). Mediation is at the consent of both parties, unless otherwise ordered by the Commission. 52 Pa. Code §69.392(c) and (d).