

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Lenwood Washington	:	
	:	
v.	:	F-2016-2572180
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Andrew M. Calvelli
Administrative Law Judge

INTRODUCTION

This Decision grants a Motion to Dismiss for Failure to Prosecute because the Complainant failed to appear for the hearing at the designated date and time despite being given notice of the hearing.

HISTORY OF THE PROCEEDING

On October 20, 2016, Lenwood Washington filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO), at Docket Number F-2016-2572180. The Complaint was a timely appeal of a decision of the Commission's Bureau of Consumer Services in Case Number 3468348. In his Complaint, Mr. Washington averred that PECO was threatening to shut off his utility service or had already shut off his utility service, further averred that he would like a payment agreement, and finally averred that PECO had improperly denied his request for service at his new address.

The formal Complaint was served on PECO electronically by the Commission's Secretary on October 29, 2016.¹

On November 9, 2016, PECO filed an Answer in response to Mr. Washington's Complaint. In its Answer, PECO admitted or denied the various averments made in the Complaint. Specifically, PECO denied that it had improperly denied service to Mr. Washington at the new address, because its records indicated that Mr. Washington had been residing at the new address for some period of time prior to Mr. Washington's request for service in his name at that address. PECO then requested that Mr. Washington's Complaint be dismissed.

On January 11, 2017, a Telephonic Hearing Notice was issued establishing an Initial Telephonic Hearing for Friday, February 17, 2017 at 10:00 a.m. and assigning me as the Presiding Officer. A Prehearing Order was issued on February 10, 2017 setting forth various procedural rules that would govern the hearing.

The Hearing Notice indicated to the parties that: "You may lose this case if you do not take part in this hearing and present facts on the issues raised." Similarly, the Prehearing Order stated: "YOU MAY LOSE THIS CASE IF YOU DO NOT TAKE PART IN THIS HEARING AND PRESENT EVIDENCE ON THE ISSUES RAISED." Both the Hearing Notice and the Prehearing Order were sent via first-class mail to Mr. Washington at the address provided on his Complaint. The postal authorities did not return either of those documents to the Commission as being undeliverable to Mr. Washington.

The hearing convened on February 17, 2017 as scheduled. Shawane Lee, Esquire appeared on behalf of PECO. No one appeared on behalf of Mr. Washington. The record in this case consists of the hearing transcript of 12 pages. The record closed in this proceeding when the transcript was filed with the Commission on February 23, 2017.

¹ PECO has signed a waiver of the Section 702 requirements for service of formal complaints, 66 Pa.C.S. § 702, and has agreed to electronic service instead under the Commission's Waiver of 702 program. Service is listed in the Audit History of the Commission's docketing system for this case as having been effected on October 20, 2016.

FINDINGS OF FACT

1. The Complainant in this case is Lenwood Washington.
2. The Respondent in this case is PECO Energy Company.
3. No one appeared at the hearing on behalf of Mr. Washington. Tr. 6.
4. On January 11, 2017, Mr. Washington received notice of the hearing when the Commission mailed a Hearing Notice to the address he provided on his Complaint.
5. On February 10, 2017, Mr. Washington also received notice of the hearing when the Commission mailed a Prehearing Order to the address he provided on his Complaint.
6. Neither the Hearing Notice nor the Prehearing Order was returned to the Commission by the postal authorities as being undeliverable to Mr. Washington as addressed.
7. Beginning at 10:00 A.M. on February 17, 2017, the date and time set for the hearing in this matter, Mr. Washington did not answer two separate calls from the Presiding Officer to the telephone number that he provided on his Complaint. Tr. 6.
8. The Presiding Officer received a message in response to both calls that were placed to Mr. Washington; the message was that the number was not reachable, and the message provided an error code of PPS 6180. Tr. 6.
9. PECO confirmed that its records showed Mr. Washington's phone number as being the same number that the Presiding Officer had attempted to call. Tr. 10.
10. During the hearing, counsel for PECO made a Motion to Dismiss the Complaint with prejudice, due to Mr. Washington's failure to appear and prosecute his case. Tr. 8.

DISCUSSION

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950). In this proceeding, Mr. Washington has filed a Complaint against PECO Energy Company. Mr. Washington, therefore, has the burden of proof in this proceeding.

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). This due process requirement is satisfied when the parties are accorded notice and the opportunity to be heard. Id.

No one appeared on behalf of Mr. Washington at the date and time set for the hearing in his case despite notice of the hearing. Commission regulations address circumstances when a party fails to appear in a proceeding. Section 5.245 provides:

§ 5.245. Failure to appear, proceed or maintain order in proceedings.

- (a) After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will:
- (1) Be deemed to have waived the opportunity to participate in the conference or hearing.
 - (2) Not be permitted to reopen the disposition of a matter accomplished at the conference or hearing.
 - (3) Not be permitted to recall witnesses who were excused for further examination.

52 Pa.Code § 5.245(a).

The Hearing Notice and the Prehearing Order were sent to Mr. Washington by regular first class mail. Neither the Hearing Notice nor the Prehearing Order was returned to the Commission by the postal authorities as being undeliverable. Accordingly, it must be presumed that these documents sent to Mr. Washington in the ordinary course of business were received by Mr. Washington. Berkowitz v. Mayflower Securities, Inc., 455 Pa. 531, 317 A.2d 584 (1974); Meierdierck v. Miller, 394 Pa. 484, 147 A.2d 406 (1959); Samaras v. Hartwick, 698 A.2d 71 (Pa. Super. 1997); Judge v. Celina Mutual Insurance Co., 303 Pa. Super. Ct. 221, 444 A.2d 658 (1982). Of note, both the Hearing Notice and the Prehearing Order stated that, if a party fails to participate in the hearing, the hearing may proceed without that party and a decision may be entered against that party.

No one appeared on behalf of Mr. Washington at the time of the hearing. Nor did anyone ever request a postponement or continuance of the hearing. As such, Mr. Washington had notice and an opportunity to be heard in this proceeding, but chose not to appear. Therefore, Mr. Washington's due process rights have been fully protected. Sentner v. Bell Telephone Company of Pennsylvania, Docket No. F-00161106 (Order entered October 25, 1993); *see also*, 52 Pa.Code § 5.245(a).

During the hearing, counsel for PECO moved to have the Complaint dismissed with prejudice for lack of prosecution. By failing to appear and present any evidence in support of his Complaint, Mr. Washington has failed to carry his burden of proof. Thus, it is appropriate to dismiss the Complaint with prejudice. Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (Order entered December 26, 1995); El-Ayazra v. West Penn Power Company, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa.Code § 5.245. Accordingly, the merits of the Complaint will not be addressed in this Initial Decision.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).

4. 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). This due process requirement is satisfied when the parties are accorded notice and the opportunity to be heard. Id.

5. After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will: 1) be deemed to have waived the opportunity to participate in the conference or hearing; 2) not be permitted to reopen the disposition of a matter accomplished at the conference or hearing; and 3) not be permitted to recall witnesses who were excused for further examination. 52 Pa.Code § 5.245(a).

6. Mr. Washington's due process rights have been fully protected. Sentner v. Bell Telephone Company of Pennsylvania, Docket No. F-00161106 (Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

7. Mr. Washington has failed to carry his burden of proof in this proceeding because he failed to appear at the hearing in order to present his case to the Commission.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss the formal Complaint of Lenwood Washington at Docket Number F-2016-2572180 for failure to prosecute is granted.
2. That the formal Complaint filed by Lenwood Washington against PECO Energy Company at Docket Number F-2016-2572180 is hereby dismissed with prejudice.
3. That this matter shall be marked closed by the Secretary's Bureau.

Date: March 22, 2017

_____/s/_____
Andrew M. Calvelli
Administrative Law Judge