

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Curry Distributing, Inc.	:	
	:	
v.	:	C-2017-2586197
	:	
West Penn Power 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 January 26, 2017, Curry Distributing, Inc. (Curry) filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn) at Docket Number C-2017-2586197. In the Complaint, Curry averred that West Penn would not change the billing out of the previous tenant's name, because West Penn was insisting that Curry pay the previous tenant's bill. Curry also requested a reasonable payment arrangement if the parties could not reach an agreement. The Commission's Secretary electronically served the formal Complaint on West Penn on January 30, 2017.¹

¹ West Penn 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.

On February 20, 2017, West Penn filed an Answer in response to Curry's Complaint.² In its Answer, West Penn admitted or denied the various averments made in the Complaint. Specifically, West Penn denied that Curry was a customer of West Penn, and further denied that there was incorrect billing for the customer of record. West Penn then requested that Curry's Complaint be dismissed.

On February 27, 2017, a Telephonic Hearing Notice was issued establishing an Initial Telephonic Hearing for Tuesday, March 28, 2017 at 10:00 a.m. and assigning me as the Presiding Officer. A Prehearing Order was issued on March 9, 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 Curry at the address provided on the Complaint. The postal authorities did not return either of those documents to the Commission as being undeliverable to Curry.

The hearing convened on March 28, 2017 as scheduled. John Munsch, Esquire appeared on behalf of West Penn. No one appeared on behalf of Curry. The record in this case consists of the hearing transcript of 11 pages. The record closed in this proceeding when the transcript was filed with the Commission on April 18, 2017.

FINDINGS OF FACT

1. The Complainant in this case is Curry Distributing, Inc.
2. The Respondent in this case is West Penn Power Company.

² West Penn also filed an Amended Answer on March 21, 2017, to correct an inadvertent omission in the original Answer. Commission Regulations permit such an amendment under 52 Pa. Code § 5.91.

3. No one appeared at the hearing on behalf of Curry Distributing, Inc. Tr. 5.
4. On February 27, 2017, Curry received notice of the hearing when the Commission mailed a Hearing Notice to the address provided on the Complaint.
5. On March 9, 2017, Curry also received notice of the hearing when the Commission mailed a Prehearing Order to the address provided on the Complaint.
6. Neither the Hearing Notice nor the Prehearing Order was returned to the Commission by the postal authorities as being undeliverable to Curry as addressed.
7. Beginning at 10:00 A.M. on March 28, 2017, the date and time set for the hearing in this matter, Curry did not answer two separate calls from the Presiding Officer to the telephone number provided on the Complaint. Tr. 7, 8.
8. The Presiding Officer received a voice message in response to both calls that were placed to Curry. Tr. 7, 8.
9. After receiving the first voice message, the Presiding Officer left a message that he would call back in ten minutes to attempt to reach Curry a second time, but that if no one from Curry answered after the next call, the hearing would proceed in Curry's absence. Tr. 7, 8.
10. After receiving the second voice message, the Presiding Officer left a message indicating that the hearing would proceed in Curry's absence. Tr. 8, 9.
11. During the hearing, counsel for West Penn made a Motion to Dismiss the Complaint with prejudice, due to Curry's failure to appear and prosecute its case. Tr. 9, 10.

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, Curry has filed a Complaint against West Penn. Curry, 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 Curry 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. Specifically, 52 Pa. Code § 5.245(a) 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.

The Hearing Notice and the Prehearing Order were sent to Curry 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 Curry in the ordinary course of business were received by Curry. 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 Curry at the time of the hearing. Nor did anyone ever request a postponement or continuance of the hearing. As such, Curry had notice and an opportunity to be heard in this proceeding, but chose not to appear. Therefore, Curry'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 West Penn moved to have the Complaint dismissed with prejudice for lack of prosecution. By failing to appear and present any evidence in support of its Complaint, Curry has failed to carry his burden of proof. Thus, it is appropriate to dismiss the Complaint. 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. Curry Distributing, Inc.'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. Curry Distributing, Inc. has failed to carry its burden of proof in this proceeding because it failed to appear at the hearing in order to present its case to the Commission. El-Ayazra v. West Penn Power Company, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa.Code § 5.245.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of West Penn Power Company to dismiss the formal Complaint of Curry Distributing, Inc. at Docket Number C-2017-2586197 for failure to prosecute is granted.
2. That the formal Complaint filed by Curry Distributing, Inc. against West Penn Power Company at Docket Number C-2017-2586197 is hereby dismissed.
3. That this matter shall be marked closed by the Secretary's Bureau.

Date: May 2, 2017

/s/
Andrew M. Calvelli
Administrative Law Judge