

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Eartha Page	:	
	:	
v.	:	F-2016-2571178
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Marta Guhl
Administrative Law Judge

INTRODUCTION

This initial decision grants the Respondent’s Motion to Dismiss the Complainant’s Complaint for lack of prosecution because the Complainant failed to appear at the second scheduled hearing in this matter.

HISTORY OF THE PROCEEDING

On October 9, 2016, Eartha Page (Complainant) filed a formal Complaint (Complaint) against PECO Energy Company (PECO or Respondent) alleging that the company had shut off her service and requesting a payment arrangement.

On November 1, 2016, PECO filed its Answer, admitting that it had terminated service but denying the other material allegations of the Complaint.

This Complaint is the timely appeal of an informal complaint at the Bureau of Consumer Services (BCS) Case No. 3469972 in which the BCS dismissed the complaint

indicating that the Company had followed proper termination procedures and that the Complainant was not eligible for the payment arrangement under 66 Pa.C.S. § 1405(c).

By Hearing Notice dated November 8, 2016, a hearing was scheduled for Monday, January 9, 2017 at 9:30 a.m., as part of a call of the docket, and the matter was assigned to me. The Hearing Notice advised the parties of the location, date and time of the scheduled hearing and warned in bold and underlined type: “**Attention: You must be available in the hearing room when your case is called by the presiding Administrative Law Judge. If you are not present and prepared to go forward with your case when it is called, your case will be dismissed by the Administrative Law Judge.**”

A Prehearing Order was issued on November 9, 2017. 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 participate in 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 hearing convened as scheduled on January 9, 2017. Counsel for PECO was present with one potential witness and was prepared to proceed. Ms. Page was not present and had not contacted this office in advance of the hearing to indicate that she would or would not participate or that she was running late or needed a continuance or postponement. PECO contacted the Complainant at the time of the hearing and at that time the Complainant indicated to PECO and myself that she was having car problems and would not be able to attend the hearing. She requested a continuance and PECO did not object so I granted the request and determined that the matter should be rescheduled.

On January 13, 2017, a Hearing Cancellation/Reschedule Notice was issued indicating a new Initial In-Person Hearing was scheduled for Tuesday, February 21, 2017 at 10:00 a.m.

The second hearing convened as scheduled on February 21, 2017. Counsel for PECO again was present with one potential witness and was prepared to proceed. Ms. Page again was not present, and had not contacted this office in advance of the hearing to indicate that she would or would not participate or that she was running late.

The Complainant contacted my office after 10:20 a.m. to indicate that she had been waiting outside for the hearing to begin. My legal assistant directed her to put the pertinent information in writing regarding her appearance for the hearing. On the same date, she provided a hand written letter indicating that she had arrived at 10:02 a.m. and went to a window to sign in (sign in area for the Pennsylvania Department of Human Services) and that she was instructed to use the telephone in the center of the lobby to call the Philadelphia Office of Administrative Law Judge (OALJ) to be brought back for her hearing. Complainant alleged that she had trouble reaching someone in the office and that the clerk (from the Pennsylvania Department of Human Services) who assisted her was able to contact the office.

I provided the Complainant's letter to counsel for PECO via electronic mail and on February 21, 2017, PECO sent correspondence via electronic mail in response to the Complainant's claims. PECO contended that the Complainant did not attend her first hearing due to a flat tire and that she did not initiate contact with the Commission to explain her circumstance but rather PECO called her to find out where she was. Secondly, PECO alleged that on the date of the second hearing, PECO's witness checked the hallway, lobby and telephone areas at approximately 10:10 a.m. and did not see anyone waiting there. PECO's counsel also noted that after I had adjourned the hearing, she and the witness again did not see anyone in the hallway, lobby or telephone areas when leaving the building.

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

(Motion) pursuant to 52 Pa.Code § 5.245. In accordance with Commission policy, I am granting the Motion.

The record was closed on March 13, 2017 when I received the hearing transcript.

FINDINGS OF FACT

1. The Complainant in this case is Eartha Page whose mailing address is 1944 W. Westmoreland Street, Philadelphia, Pennsylvania 19140.
2. The Respondent in this proceeding is PECO Energy Company.
3. By Hearing Notice dated November 8, 2016, a hearing was scheduled for Monday, January 9, 2017, at 9:30 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 November 9, 2017.
5. The Prehearing Order also gave instructions for contacting the Philadelphia OALJ office, once at the building, in order to be let into the hearing room.
6. The Complainant failed to appear for the January 9, 2017, hearing due to transportation issues.
7. The Complainant requested a continuance of the January 9, 2017, hearing, which PECO did not object.
8. The presiding officer granted the continuance request at that time.

9. On January 13, 2017, a Hearing Cancellation/Reschedule Notice was issued indicating a new Initial In-Person Hearing was scheduled for Tuesday, February 21, 2017 at 10:00 a.m. and providing the location of the hearing.

10. The Complainant was advised that the Complaint would be dismissed if she failed to participate in the scheduled hearing by the November 8, 2016, Hearing Notice and the November 9, 2016, Prehearing Order.

11. Respondent participated in the hearing at the scheduled date and time by legal counsel and a proposed witness and was prepared to proceed.

12. The Complainant failed to appear for the scheduled hearing.

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

14. The Hearing Notice, which contained the date, location, and time of the scheduled hearing, was not returned by the postal authorities as undeliverable.

15. The Complainant did not contact the presiding officer's office until after 10:20 a.m. on February 21, 2017.

16. There was no indication that the Complainant arrived on time or followed the instructions provided in the Prehearing Order prior to the hearing.

17. This was the second hearing scheduled in this matter.

18. This was the Complainant's second time failing to appear for the scheduled hearing.

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 February 21, 2017 hearing in this case was sent to the Complainant on January 13, 2017, 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 date and time, and location for the hearing. Despite this, she made no attempt whatsoever to notify me that she was running late for the hearing. The Complainant also clearly failed to follow the procedures in the Prehearing Order, which indicated how to contact the Philadelphia OALJ office. This is the second time that the Complainant has failed to timely appear for a hearing. Under these circumstances, it appears Complainant had ample opportunity to be heard in this proceeding. Therefore, the due process rights of the Complainant have been fully protected.

By not appearing for the scheduled hearing, the Complainant failed to bear her burden of proof. Consequently, the Complaint must 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.Cmwlt. 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*, 970 A.2d 492, 494 (Pa.Cmwlt. 2008).

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 she 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); *El-Ayazra v. West Penn Power Company*, Docket No. F-2015-250-2509292 (Opinion and Order entered June 30, 2016).

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).

7. A formal Complaint may be dismissed if, after notice and opportunity to be heard, a Complainant fails to appear and prosecute the Complaint. *Mumma v. PPL Electric Utilities Corp.*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002).

8. The failure of the Complainant to appear for a scheduled hearing of which she had notice warrants dismissal of the Complaint with prejudice. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of PECO Energy Company to dismiss the Complaint filed at Docket No. F-2016-2571178 is granted;
2. That the Complaint of Eartha Page against PECO Energy Company at Docket No F-2016-2571178 is dismissed with prejudice; and
3. That Docket No. F-2016-2571178 be marked closed.

Date: May 19, 2017

/s/
Marta Guhl
Administrative Law Judge