

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Richard and Marie A. Fugo	:	
	:	
v.	:	C-2015-2519399
	:	
Pennsylvania-American Water Company	:	

INITIAL DECISION

Before
Mark A. Hoyer
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision dismisses the complaint filed in this matter for failure of Complainants to appear for the hearing and prosecute their complaint.

HISTORY OF THE PROCEEDING

Richard and Marie A. Fugo (Complainants) filed a formal complaint on December 14, 2015, with the Pennsylvania Public Utility Commission (Commission) at Docket No. C-2015-2519399 against Pennsylvania-American Water Company (Respondent or PAWC). The complaint alleges that PAWC was not given permission to install a smart meter and that the installation of a new smart meter would have a negative impact on “our staff and patients.” As relief, Complainants requested that the present metering system remain intact.

On January 11, 2016, PAWC filed an answer and new matter. PAWC denied the material allegations contained in the complaint but admitted that it sought to replace the meter and include the installation of a radio receiving device which would enable PAWC to obtain

remote readings and eliminate the need for meter readings during inclement weather. PAWC requested that the complaint be dismissed with prejudice. Complainants did not file an answer to Respondent's new matter.

On August 9, 2016, a Telephonic Hearing Notice was mailed to the parties scheduling an initial telephonic hearing for September 13, 2016. A standard Prehearing Order was issued by me on August 10, 2016. On September 1, 2016, PAWC filed a Motion for Judgment on the Pleadings. Complainants did not file an answer to PAWC's motion. The scheduled hearing was cancelled.

On November 10, 2016, a Prehearing Conference Notice was mailed to the parties scheduling an initial telephonic prehearing conference for December 22, 2016 to discuss, among other things, the burden of proof. The conference was held as scheduled but Complainants failed to appear. Michael A. Gruin, Esquire appeared on behalf of PAWC.

On February 23, 2017, a Telephonic Hearing Notice was mailed to the parties scheduling an initial telephonic hearing for Wednesday, March 22, 2017, at 10:00 a.m. A Second Prehearing Order was issued by me on March 1, 2017, setting forth the date and time of the scheduled initial telephonic hearing. The Prehearing Order further advised the parties, *inter alia*, that “[y]ou may lose this case, if you do not take part in this hearing and present evidence on the issues raised. 52 Pa.Code § 5.245.” Second Prehearing Order, p. 3.

On March 22, 2017, at 10:00 a.m., I attempted to contact Complainants at the telephone number listed on the Telephone Hearing Notice and on the complaint. I recorded a detailed message on Complainants' answering machine in which I identified myself and the purpose of the telephone call and requested that Complainants call the main office telephone number in Pittsburgh within 15 minutes to advise if there was an alternate telephone number where they could be reached for the hearing. After recording the message, I attempted to call the same number a second time and again the answering machine picked up the call and I recorded another detailed message. Complainant did not call in to provide an alternate telephone number between 10:00 a.m. and 10:15 a.m. I attempted to call Complainants again at 10:16 a.m. but they

did not answer the telephone. The hearing convened at 10:18 a.m. Complainants were not present for the hearing and no representative appeared on their behalf. Counsel for PAWC, Michael E. Gruin, Esquire, was present and ready to proceed. Counsel did not have an alternate telephone number for contacting Complainants and there was no alternate number listed on the formal complaint.

On the hearing record, counsel for PAWC made a motion to dismiss the complaint for failure to appear and prosecute the complaint. The record consists of a transcript of the prehearing conference on December 22, 2016 and a transcript of the initial telephone hearing on March 22, 2017. The record was closed by Interim Order dated April 19, 2017.

FINDINGS OF FACT

1. On December 14, 2015, Complainants, Richard and Marie A. Fugo, filed a formal complaint against Respondent, Pennsylvania-American Water Company.
2. A Telephone Hearing Notice was mailed to the parties on February 23, 2017, scheduling the initial telephonic hearing for Wednesday, March 22, 2017, at 10:00 a.m.
3. A Second Prehearing Order was issued on March 1, 2017.
4. The Telephone Hearing Notice and Second Prehearing Order were mailed to Complainants at the address provided on the complaint and were not returned to the Commission by the United States Postal Service as undeliverable.
5. Complainants were not present for the scheduled initial telephonic hearing on March 22, 2017.
6. No representative appeared on behalf of Complainants at the scheduled hearing or entered a notice of appearance in this proceeding.

7. Complainants did not file a petition to withdraw their complaint and no certificate of satisfaction has been filed with the Commission.

8. Complainants did not request a continuance of the March 22, 2017, initial telephonic hearing.

DISCUSSION

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, however, when the parties are accorded notice and the opportunity to appear and be heard. *Id.*

Notice of the scheduled initial telephonic hearing in this case was sent to Complainants on February 23, 2017, by regular first-class mail to the address stated in the complaint. This piece of mail was never returned to the sender, the scheduling staff for the Office of Administrative Law Judge in Harrisburg. In addition, I issued a Second Prehearing Order on March 1, 2017, that advised the parties, *inter alia*, that “[y]ou may lose this case, if you do not take part in this hearing and present evidence on the issues raised.” Prehearing Order, p. 3. This Order, which was also mailed to Complainants at the address stated on the complaint, was never returned. Accordingly, one must presume this mail, which was sent in the ordinary course of business, was received by the addressee. 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); and Judge v. Celina Mutual Insurance Co., 303 Pa.Super. 221, 444 A.2d 658 (1982).

Neither Complainants nor a representative appeared for the scheduled initial hearing on March 22, 2017. Complainants’ absence is unexplained. Complainants did not request a continuance of the hearing. Neither a petition to withdraw the complaint¹ nor a

¹ 52 Pa.Code § 5.94.

certificate of satisfaction² was filed with the Commission. Under these circumstances, it appears Complainants had ample opportunity to appear and be heard in this proceeding, but failed to appear for the scheduled hearing. Therefore, the due process rights of Complainants have been fully protected. Sentner v. Bell Telephone Company of Pennsylvania, Docket No. F-00161106 (Order entered October 25, 1993); and 52 Pa.Code § 5.245(a).

As the party seeking affirmative relief from the Commission, Complainants bear the burden of proof. 66 Pa.C.S. § 332(a). By failing to appear and proffer any evidence to support their complaint, Complainants have failed to meet this burden. Complainants' failure to appear is unexcused. Complainants have waived the opportunity to participate in the hearing and this case may be dismissed with prejudice. 52 Pa.Code § 5.245(a); Jefferson v. UGI Utilities, Inc., (Opinion and Order entered December 26, 1995 at Docket No. Z-00269892); El-Ayazra v. West Penn Power Company, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016).

CONCLUSIONS OF LAW

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

2. Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review, 645 A.2d 944 (Pa.Cmwlth. 1994).

3. The due process rights of Complainants have been fully protected in this proceeding.

4. By failing to appear and proffer any evidence to support this complaint, Complainants have failed to meet their burden of proving that they are entitled to the relief they seek from the Commission. 66 Pa.C.S. § 332(a).

² 52 Pa.Code § 5.24.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Pennsylvania-American Water Company to dismiss the complaint of Richard and Marie A. Fugo at Docket No. C-2015-2519399, made at the initial telephone hearing on March 22, 2017, is granted.
2. That the complaint filed by Richard and Marie A. Fugo against Pennsylvania-American Water Company at Docket No. C-2015-2519399 is dismissed with prejudice.
3. That the Docket in this proceeding, Docket No. C-2015-2519399, be marked closed.

Date: June 27, 2017

/s/
Mark A. Hoyer
Deputy Chief Administrative Law Judge