

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Howard Smith	:	
	:	
v.	:	C-2017-2608475
	:	
Philadelphia Gas Works	:	

INITIAL DECISION

Before
Angela T. Jones
Administrative Law Judge

INTRODUCTION

The undersigned through this decision dismisses the formal complaint (Complaint) filed in this matter for failure of the Complainant to appear for the hearing and prosecute the Complaint. The Respondent’s counsel requested that the Complainant be barred from filing future informal and formal complaints with the Pennsylvania Public Utility Commission (Commission) because the Complainant is alleged to have abused the Commission’s administrative process. The undersigned did not find that the Complainant abused the Commission’s administrative process, and therefore, the request to bar future complaints is denied.

HISTORY OF THE PROCEEDING

On June 8, 2017, Complainant, Howard Smith, electronically filed (efiled) a Complaint with the Pennsylvania Public Utility Commission (Commission or PUC) against Philadelphia Gas Works (PGW or Company or Respondent). The Complainant indicated that the Company is threatening to terminate gas service at 2404 S. Millick Street, Philadelphia,

Pennsylvania (service address). The Complainant indicated that he had a previous complaint against PGW, but he was hospitalized and missed the hearing. The Complainant also stated that there are incorrect charges on his bill. The Complainant contended that he attempted to pay for his gas service but the utility refused to accept anything less than the full payment due which was significantly more than the Complainant expected to pay.

The Complaint was served electronically (eService) by the Commission's Secretary on June 8, 2017, according to the audit history of the docket. The eService is pursuant to the Waiver of Section 702 program, under which the Respondent waives the service requirements in 66 Pa.C.S. § 702.

On June 28, 2017, Laureto Farinas, Esquire, counsel for the Respondent, filed an Answer to the Complaint. The Answer admitted that the Respondent issued a termination notice on a past due balance of \$5,344.75 on May 31, 2017. The notice stated that service could be shut off as early as June 12, 2017.

The Answer also provided the Complainant's history of payment arrangements citing enrollment in the Company's customer assistance program (CAP) on March 10, 2012, but service on August 7, 2013 to a different individual at the service address closed the Complainant's account as of August 12, 2013. The Complainant's account was deactivated for CAP on October 16, 2013, with an outstanding balance of over \$1,000.00, which included CAP arrears. The Complainant re-established service effective September 1, 2014 with a payment arrangement on the outstanding balance. On November 25, 2014, because timely, full payments for service rendered were not received by PGW, a broken payment arrangement resulted. On April 6, 2015, PGW terminated service for non-payment. On April 14, 2015, PGW restored service and established another payment arrangement with the Complainant for an outstanding balance more than \$2,500.00. On July 25, 2015, the payment arrangement was broken due to failure to receive timely payments made in full.

The Answer also provided some history of the Complainant with the Commission's informal complaint process with the Bureau of Consumer Services (BCS).

Specifically, the Respondent noted in its Answer that the Complainant filed an informal complaint with the PUC's Bureau of Consumer Services (BCS), at BCS Case No. 3424842. BCS Case No. 3424842 was dismissed on August 6, 2016, because the Complainant's outstanding balance included CAP arrears. The Commission is prohibited by statute at Section 1405(c) of the Pennsylvania Public Utility Code (Code) from issuing a payment arrangement on an outstanding balance that includes CAP rates. 66 Pa.C.S. § 1405(c).

The Respondent requested that the Commission find against the Complainant and dismiss the Complaint.

A Hearing Notice dated July 6, 2017, notified the parties that an initial in-person hearing was scheduled for Wednesday, August 9, 2017, at 10:00 a.m. This Notice indicated that the case was assigned to the undersigned Administrative Law Judge (ALJ) as the presiding officer.

A Prehearing Order dated July 10, 2017, provided procedural rules and guidelines for the proceeding and emphasized the following:

- (1) a request to change the scheduled hearing should be sent at least five days prior to the hearing date;
- (2) the request for a hearing change is to be in writing and sent to all parties of record; and
- (3) a caution that Complainant may lose the case if he does not take part in the hearing and present evidence on the issues raised.

The evidentiary hearing convened as scheduled. Attorney Farinas appeared representing the Respondent and accompanied by one potential witness. The undersigned recessed to allow time for the Complainant to appear or to communicate a reasonable explanation as to why he could not be present at the scheduled hearing. The undersigned reconvened at approximately 10:20 a.m. and the Complainant remained absent from the evidentiary hearing without communicating why he failed to appear.

Counsel for the Respondent moved to dismiss the Complaint with prejudice for lack of prosecution.

Counsel also requested that the Complainant be barred from filing further formal complaints on the outstanding balance until the current balance is paid in full. The Respondent stated the Complainant's outstanding balance as of August 9, 2017, was \$5,180.17 and contained CAP arrears. Counsel for the Respondent stated that the instant Complaint is the second formal complaint made to the Commission regarding the Complainant's outstanding balance at the service address. Attorney Farinas suggested that the filing of two formal complaints in the same year regarding an outstanding balance that increases is abuse of the procedural process.

The undersigned stated that the Respondent's motion and request would be considered and ruled upon in writing and adjourned. The record closed on August 9, 2017, when the evidentiary hearing adjourned.

This matter is ripe for decision.

FINDINGS OF FACT

1. The Complainant is Howard Smith, who receives gas service from the Respondent at 2404 S. Millick Street, Philadelphia, Pennsylvania (service address).

2. The Respondent is Philadelphia Gas Works, a jurisdictional public utility that provides gas distribution service in the Commonwealth of Pennsylvania.

3. On June 8, 2017, the Complainant filed a Complaint with the Commission against the Respondent.

4. The Respondent filed its Answer on June 28 2017, which admitted to threatening to terminate gas service but denied the remaining allegations in the Complaint.

5. A Hearing Notice dated July 6, 2017, was sent by regular first-class mail to the Complainant and scheduled an evidentiary hearing for Wednesday, August 9, 2017, at 10:00 a.m.

6. A Prehearing Order dated July 10, 2017, advised the Complainant of the proper procedure to obtain a continuance to reschedule the hearing date.

7. None of the documents mailed to Complainant was returned to the Commission by the United States post office as undeliverable.

8. Neither Complainant nor any counsel representing Complainant timely appeared at the scheduled hearing on August 9, 2017.

9. Complainant did not settle or withdraw the Complaint.

DISCUSSION

In this Complaint, the Complainant alleged the following:

- (1) the utility threatened to terminate his gas service;
- (2) incorrect charges on his bill; and
- (3) the utility failed to accept payment unless it was the full amount due.

These issues in this proceeding are determined by whether the Complainant sustained his burden of proof. By failing to participate in the hearing, the Complainant was unable to meet this burden.

A. Failure to Prosecute

1. Legal Standard of Review

The party seeking affirmative relief from the Commission bears the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the Complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976). This responsibility or accountability to the named utility must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlt. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). A preponderance of the evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

Administrative agencies, like the Public Utility Commission, are required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlt. 1984). 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.Cmwlt. 1994).

2. Disposition

The Commission sent a Hearing Notice dated May 30, 2017, to the Complainant by regular first class mail to the address listed on the Complaint. This document was never returned to the sender, the scheduling staff of the Office of Administrative Law Judge (OALJ) in Harrisburg.

The undersigned issued a Prehearing Order dated June 2, 2017, which *inter alia*, instructed the parties that any request to change the scheduled hearing date should state the

agreement or opposition of the other party and be submitted in writing no later than five days prior to the hearing. The Prehearing Order, which was mailed to the Complainant at the address shown in the Complaint, was never returned by the U.S. post office as undeliverable. Accordingly, it is presumed that this mailing, which was done through the ordinary course of business, was received by the Complainant. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meirerdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 444 A.2d 658 (Pa.Super. 1982).

The Complainant is deemed to have received all of these documents and had sufficient notice of the day, date and time of the scheduled hearing. The Complainant was notified of the scheduled hearing date and time, as well as how to contact the OALJ for the hearing. The Complainant made no attempt whatsoever to notify the presiding officer that he did not plan to participate in the scheduled August 9, 2017, hearing.

Under these circumstances, the Complainant had ample opportunity to appear and be heard in this proceeding, but chose not to do so. Once notice of a hearing and the opportunity to be heard has been provided to the parties, it is the responsibility of both parties to appear and participate in the hearing. The due process rights of the Complainant have been fully protected. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

Section 332(a) of the Public Utility Code (Code), 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of any request for relief. As the party bringing this Complaint, the Complainant bears the burden of proving by a preponderance of the evidence that he is entitled to relief. By choosing not to appear and proffer any evidence to support the Complaint, the Complainant has failed to meet this burden.

The failure of the Complainant to appear at this scheduled hearing is unexcused. By his failure to attend the hearing and present evidence on the issue raised, the Complainant failed to sustain his burden of proof.

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.Cmwlth. 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.Cmwlth. 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 he 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 Corp.*, Docket No. C-20042399 (Final Order entered October 13, 2004); *Jones v. The Peoples Natural Gas Co. d/b/a Dominion Peoples*, Docket No. C-20054885 (Opinion and Order entered February 14, 2006); *El-Ayazra v. West Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016).

The Complainant waived the opportunity to participate in the hearing by failing to appear. This case will be dismissed. 52 Pa.Code § 5.245(a); *Martin W. Jefferson v. UGI Utilities, Inc.*, 1995 Pa. PUC LEXIS 159.

B. Respondent’s Request to Bar Future Complaints

The Respondent requested the Commission to bar the Complainant from filing future Complaints regarding his outstanding balance until the balance is paid in full. The

Respondent suggested that the bar is consistent with precedent that the Complainant has abused the Commission's procedural process by failing to show and prosecute two formal complaints within the current calendar year. The Respondent referenced the formal complaint, *Smith v. Philadelphia Gas Works*, Docket No. C-2016-2569010, and the instant Complaint to support its allegation for abuse of the Commission's procedural process by the Complainant.

1. Legal Precedent

The Commission has on occasion precluded a party from filing further informal and formal complaints when the party has been an abuser of the system. See, *Manu, et al. v. AT&T Communications of Pennsylvania, Inc.; the Bell Telephone Co. of Pennsylvania, Inc. & Philadelphia Electric Co., Inc.*, Docket Nos. F-09029141, C-00935014, C-00934970, C-00913621, (Opinion and Order entered May 9, 1994) (Commission found as abuse a constant pattern existed, which was to file a complaint, then have the hearing notices returned unclaimed and have requests for continuances made); *Dinion v. Duquesne Light Co.*, 91 Pa. PUC 550 (1998); *Attilio DiFilippo, Jr. v. PECO Energy Co.*, Docket No. Docket No. C-20027116 (Final Order entered October 3, 2002) (Commission found that the Complainant filed three previous complaints which were all dismissed with a fourth complaint filed which contained impertinent and scandalous matters as abusive conduct); *Seidenstricker v. Metropolitan Edison Co.*, Docket No. F-2008-2019388 (Final Order entered July 28, 2009) (Commission precluded filing further complaints pertaining to same account until the arrearage was paid in full finding that the Complainant abused the system by using Commission provisions to prevent termination of service while accruing an outstanding balance in excess of \$25,000.00); *Argento's Pizza v. Philadelphia Gas Works*, Docket Nos. C-2009-2138055 and C-2010-2167822 (Final Order entered October 1, 2010) (Complainant filed four complaints within 2½ years using the same allegations and filed a request for continuance to further delay the schedule for hearing; additionally, the Complainant had a poor payment history-20 bounced checks during the service account with an outstanding arrearage in excess of \$16,000.00) (*Argento*); and *Mazza v. PECO Energy Co.*, Docket No. C-2012-2318472 (Final Order entered April 23, 2014) (Complainant filed nine formal complaints, arrearage in excess of \$9,000.00, finding the Complainant used the system to avoid payment and to delay termination of service for non-payment).

In *Argento*, the following several factors resulted in a finding that the Complainant abused the administrative process of the Commission:

- (1) Constant pattern of complaint filed, and request for continuances made;
- (2) Significant number and nature of complaints the same;
- (3) Significant number of defaulted payments;
- (4) Significant number of tactics used to avoid payment and termination of service; and
- (5) Poor payment history.

Argento's Pizza v. Philadelphia Gas Works, Docket Nos. C-2009-213055 and C-2010-2167822, (Initial Decision dated August 2, 2010) at 6-7.

2. Disposition

In the instant Complaint, I do not find that the record supports an abuse of the administrative process through two filed formal complaint hearings in one calendar year where the Complainant failed to appear at both formal hearings.

The formal complaint that was previously filed on September 30, 2016, was at Docket No. C-2016-2569010. The presiding officer was Special Agent (SA) Waldemar. SA Waldemar granted a continuance for the initial telephonic hearing scheduled on December 6, 2016, because a physician sent by facsimile a note stating the patient, the Complainant, was using a medical apparatus that made it difficult to speak. The hearing convened and the Complainant and Attorney Farinas appeared. SA Waldemar granted the continuance which was unopposed.

A further telephonic hearing was scheduled and convened on January 17, 2017. The Complainant failed to appear. Attorney Farinas moved for a dismissal with prejudice for lack of prosecution. SA Waldemar declined to dismiss the case with prejudice because she had knowledge of the Complainant's serious health problems and found that the Complainant's participation in the initial telephonic hearing merited some weight in favor of the Complainant.

This decision became final by Order entered April 14, 2017, without any filing of exceptions by the Complainant.

I simply do not find it reasonable to conclude that the filing of the instant Complaint is abusive in this scenario. It is accurate that the formal complaint at Docket No. C-2016-2569010 was held this calendar year and the Complainant failed to show at the hearing for the instant Complaint. However, these actions do not rise to a pattern as one of the factors to show abuse of the Commission's administrative system. The other factors that have supported a showing of abuse of the Commission's administrative system are not present in the record evidence.

Furthermore, SA Waldemar found that the first complaint at Docket No. C-2016-2569010 was **dismissed without prejudice** which means, "Dismissal without prejudice to the right of the complainant to sue again on the same cause of action. The effect of the words, 'without prejudice' is to prevent the decree of dismissal from operating as a bar to a subsequent suit." Black's Law Dictionary 245 (Abridged 5th ed. 1983). To penalize the Complainant when he does complain again, destroys the right granted previously, which was to dismiss without prejudice.

The request by Attorney Farinas to bar the Complainant from filing future informal or formal complaints on the outstanding balance of his gas service at the service address is denied because the record evidence does not support that the Complainant abused the administrative process.

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 properly mailed to a party's last known address and not returned by the post office is presumed to have been received. *Berkowitz v. Mayflower Securities, Inc.*, 317

A.2d 584 (Pa. 1974); *Meirerdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 444 A.2d 658 (Pa.Super. 1982).

3. By Hearing Notice dated May 30, 2017, the Complainant had notice of the date, location and time of the scheduled hearing. 52 Pa.Code § 5.201(a).

4. Once notice of a hearing and the opportunity to be heard has been provided, it is the responsibility of the parties to appear and participate in the hearing. *Sentner v. Bell Telephone Co. of Pennsylvania*, Docket No. F-00161106 (Order entered October 25, 1993).

5. As the party seeking affirmative relief from the Commission, the Complainant bears the burden of proof. 66 Pa.C.S. § 332(a).

6. The due process rights of the Complainant have been fully protected because the Complainant was afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlt. 1984).

7. A formal Complaint may be dismissed if, after notice and an 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 Complainant, Howard Smith, failed to sustain his burden of proof. 66 Pa.C.S. § 332(a).

9. The following factors support a finding of abuse of the Commission's administrative process:

- (1) Constant pattern of complaint filed, and request for continuances made;
- (2) Significant number and nature of complaints the same;
- (3) Significant number of defaulted payments;

- (4) Significant number of tactics used to avoid payment and termination of service; and
- (5) Poor payment history.

Manu, et al. v. AT&T Communications of Pennsylvania, Inc.; the Bell Telephone Co. of Pennsylvania, Inc. & Philadelphia Electric Co., Inc., Docket Nos. F-09029141, C-00935014, C-00934970, C-00913621, (Opinion and Order entered May 9, 1994); *Attilio DiFilippo, Jr. v. PECO Energy Co.*, Docket No. Docket No. C-20027116 (Final Order entered October 3, 2002); *Seidenstricker v. Metropolitan Edison Co.*, Docket No. F-2008-2019388 (Final Order entered July 28, 2009); *Argento's Pizza v. Philadelphia Gas Works*, Docket Nos. C-2009-2138055 and C-2010-2167822 (Final Order entered October 1, 2010); and *Mazza v. PECO Energy Co.*, Docket No. C-2012-2318472 (Final Order entered April 23, 2014).

10. The Respondent, PGW, failed to provide substantial evidence to support the allegation that the Complainant abused the administrative process.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion by Laureto Farinas, Esquire on behalf of Philadelphia Gas Works to dismiss the formal complaint of Howard Smith at Docket No. C-2017-2608475 for lack of prosecution is granted.

2. That the formal complaint filed by Howard Smith against Philadelphia Gas Works at Docket No. C-2017-2608475 is dismissed in its entirety with prejudice.

3. That the request by Laureto Farinas, Esquire on behalf of Philadelphia Gas Works to bar Howard Smith from filing a future informal or formal complaint regarding the

