

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Clem Marable

v.

Philadelphia Gas Works

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C-2017-2609460

INITIAL DECISION

Before
Benjamin J. Myers
Administrative Law Judge

INTRODUCTION

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

HISTORY OF THE PROCEEDING

On June 14, 2017, Clem Marable (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (Respondent). The complaint alleges that the Respondent improperly placed the Complainant's gas service in another person's name and that there were incorrect charges on the Complainant's bill. The Complainant requested that the Commission order the Respondent to place the account for gas utility service into his name and to provide him with a payment arrangement.

The Respondent filed an answer on July 5, 2017. The answer admitted that the Respondent was seeking a payment arrangement. However, the Respondent denied the allegation that incorrect charges appeared on the Complainant's bill. In addition, Respondent

asserted that the utility had already placed the account in the Complainant's name and had been turned on at the Complainant's request. The answer requested that the Commission deny the complaint.

By notice dated July 12, 2017, the Commission scheduled this matter for an initial telephonic hearing on August 14, 2017 at 10:00 a.m. and assigned the case to me. A prehearing order was issued on July 19, 2017 addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the requirement that the parties make contact via the conference number provided in the notice of hearing to participate in the hearing.

On July 31, 2017, the Complainant faxed OALJ a packet of documents. The first page of this facsimile was the July 19, 2017 prehearing order issued to both of the parties. Presumably in compliance with the prehearing order, the Complainant submitted exhibits to OALJ in advance of the August 14, 2017 telephonic hearing – and utilized the prehearing order he received as a cover page for his facsimile.

A telephonic hearing was conducted on August 14, 2017 at 10:00 a.m. The Complainant failed to appear for that hearing. The Complainant did not call the conference number shown on July 12, 2017 hearing notice at 10:00 a.m.

It was verified with the support staff for the Office of Administrative Law Judge (OALJ) in Harrisburg that the Complainant had not contacted that office to indicate that the Complainant would be unable to participate in the telephonic hearing. No voice mail or email messages were received from the Complainant stating that he would be unable to participate in the hearing. After providing additional time for the Complainant to call in, the hearing commenced at approximately 10:00 a.m. and did not adjourn until 10:13 a.m. The Complainant did not make contact to participate in the hearing during this period of time.

Upon commencement of the hearing, Graciela Christlieb, Esquire, counsel for the Respondent, moved to dismiss the complaint for failure to appear and prosecute. N.T. 8. I informed the Respondent that I would take its motion under advisement. N.T. 8.

The Complainant had no contact with OALJ thereafter. The record closed on August 17, 2017, the date the transcript was filed with the Secretary's Bureau.

On September 18, 2017, OALJ received a one page facsimile from the Complainant. This facsimile was a hand-written note from the Complainant indicating that he “had a phone hearing on August 14, 2017” but that he “did not receive it”. The Complainant requested that he be rescheduled for a hearing as soon as possible. This correspondence provided no additional information or explanation. The correspondence concluded with the Complainant’s name as well as a reference to the prehearing (order) and the docket number of this matter. This correspondence was sent directly to OALJ and had not been filed with the Secretary’s Bureau. In addition, there was no indication that the correspondence had been served upon the Respondent or Respondent’s counsel.

The undersigned caused the Complainant’s correspondence to be filed with the Secretary’s Bureau to become a part of the record in this matter. In addition, a copy of the Complainant’s correspondence was emailed to Respondent’s counsel. This email advised Respondent that any responses to the Complainant’s request should be filed with the Secretary’s Bureau.

For the reasons set forth below, this decision grants the Respondent's motion to dismiss the complaint.

FINDINGS OF FACT

1. The Complainant in this case is Clem Marable.
2. The Respondent in this case is Philadelphia Gas Works.
3. On June 14, 2017, the Complainant filed a complaint with the Commission against the Respondent.

4. The Respondent filed an answer on July 5, 2017.
5. By notice dated July 12, 2017, the Commission scheduled this matter for an initial telephonic hearing on August 14, 2017 at 10:00 a.m.
6. The Commission sent the notice of the telephonic hearing to the Complainant by regular first-class mail to the address stated on the complaint.
7. The Commission's hearing notice was not returned as undeliverable by the postal authorities.
8. On July 19, 2017, a prehearing order was sent to the parties addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the requirement that the parties make contact via the conference number provided in the notice of hearing to participate in the August 14, 2017 telephonic hearing.
9. The Complainant received this prehearing order.
10. On July 31, 2017, the Complainant faxed a copy of this prehearing order back to OALJ with other documents.
11. The Complainant failed to appear at the August 14, 2017 telephonic hearing.
12. The record in this matter closed on August 17, 2017, the date the transcript was filed with the Secretary's Bureau.
13. On September 18, 2017 the Complainant faxed correspondence to OALJ asking that a hearing be rescheduled in this matter.

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 administrative agency provides the parties notice and the opportunity to be heard.

The Commission sent notice of the telephonic hearing in this case to the Complainant on July 12, 2017, by regular first-class mail to the address stated on the complaint. There is no evidence that this mail was ever returned as being undeliverable by the postal authorities.

In addition, a prehearing order was issued on July 19, 2017, which, inter alia, directed the parties to make contact via the conference number provided in the notice of hearing to participate in the August 14, 2017 telephonic hearing. The prehearing order, which was mailed to the Complainant at the address shown on the complaint, was also never returned as being undeliverable by the postal authorities. When such documents are mailed to a party and are not returned as being undeliverable, there is a rebuttable presumption that the Complainant received these documents. *See, Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974); *Geary v. Verizon Pennsylvania Inc.*, Docket No. C-2009-2118625 (Order entered September 16, 2010) (*Geary*).

It is however clear that the Complainant received the prehearing order as he returned a copy of it as a cover page with other documents to OALJ via a facsimile on July 19, 2017. The first paragraph of this prehearing order states that the Complainant must call the toll-free telephone number shown on the notice of hearing to participate in the hearing on August 14, 2017 and that his failure to do so could result in a decision being entered against him.

The Complainant did not appear for the scheduled hearing because he did not call the conference number shown on the July 12, 2017 hearing notice. Under these circumstances, it appears the Complainant had ample opportunity to appear and be heard in

this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of the Complainant have been fully protected. Sentner v. Bell Telephone Co. of Pa. Docket No. F-00161106 (Opinion and Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

More than one month after failing to appear for the scheduled hearing, and after the close of the record in this matter, the Complainant submitted correspondence to OALJ requesting that the hearing in this matter be rescheduled. Based on this sequence of events, the Complainant's correspondence must be viewed as a request to reopen the record in this matter.

The Commission's regulations at 52 Pa. Code §5.245(a) relate to the reopening of the record. It provides that where the Complainant has failed to appear for a hearing, he shall not be permitted to reopen the record unless the presiding officer determines that the failure to appear was unavoidable and the interests of the other party would not be prejudiced.

The Commission has addressed reopening the record where the complainant failed to be available for a telephonic hearing. In Nestorick v. UGI Utilities, Inc., Docket No. C-2010-2202901 (Order entered February 16, 2012) (Nestorick), the Commission denied a complainant's request to reopen the record where the complainant was not home at the time scheduled for a telephonic hearing. In support of her request to reopen the record, the Complainant claimed that the Commission had not notified her of the hearing.

In denying the complainant's request to reopen the record, the Commission in Nestorick observed that it had mailed a hearing notice to the complainant at her address and that the hearing notice had not been returned to the Commission as undeliverable. The Commission in Nestorick therefore concluded that the complainant received notice of the hearing. The Commission in Nestorick stated that, once the Commission provides notice of a hearing, it is the responsibility of the parties to be present for the hearing.

In this case, the Commission sent notice of the telephonic hearing to the Complainant on July 12, 2017, by regular first-class mail to the address stated on the complaint. The notice was never returned to the Commission as being undeliverable by the postal

authorities. In addition, a prehearing order was issued on July 19, 2017 to the same address and was, again, never returned to the Commission as undeliverable. The Complainant clearly received notice of the scheduled hearing because the Complainant returned a copy of the prehearing order as a cover page with other documents to OALJ via a facsimile on July 19, 2017. The Complainant therefore had notice of the hearing and had the responsibility to be present for the August 14, 2017 telephonic hearing.

The Commission's Rules of Practice and Procedure do recognize that there may be circumstances where the Complainant's failure to appear at a hearing may be beyond his control and reopening the record is appropriate. Pursuant to 52 Pa.Code § 5.245(a), where the Complainant has failed to appear for a hearing, he shall not be permitted to reopen the record unless the presiding officer determines that the failure to appear was unavoidable and the interests of the other parties would not be prejudiced.

The Commission has discussed what constitutes an unavoidable failure to appear. In Bethay v. PECO Energy Company, Docket No. F-2011-2266250 (Order entered August 2, 2012), for example, the Commission denied the complainant's request to reopen the record where the complainant did not appear for a hearing because she was hospitalized for knee replacement surgery. Here, the Complainant has provided no explanation for his failure to appear at the August 14, 2017 telephonic hearing and has not demonstrated that his failure to appear was unavoidable. The Complainant has also failed to provide any explanation as to why he waited for a period of over one month after the scheduled date of the hearing in this matter to request that the record be reopened. The Complainant's general request to reopen the record, without more, is appropriately denied.

It should be noted that the Respondent had counsel and a witness available to participate at the scheduled time of the hearing. The Respondent has already incurred expenses in this proceeding that will likely be borne by its ratepayers. To reschedule another hearing and force the Respondent to incur these same expenses a second time would be unfair where the Complainant's failure to appear at the hearing is not alleged to have been unavoidable or for any other good cause.

Finally, Section 332(a) of the Public Utility 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 failing to appear and proffer any evidence to support his complaint, the Complainant has failed to meet this burden. Under these circumstances, the complaint should be dismissed with prejudice. Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (Opinion and 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.

CONCLUSIONS OF LAW

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

2. The due process rights of the Complainant have been fully protected in this proceeding. Sentner v. Bell Telephone Co. of Pa., Docket No. F-00161106 (Opinion and Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

3. By failing to appear for the hearing and proffer any evidence to support the complaint, the Complainant has failed to meet his burden of proving that he is entitled to the relief that he seeks from the Commission. 66 Pa.C.S. § 332(a).

4. Once the Complainant received notice of the August 14, 2017 telephonic hearing from the Commission, it was the Complainant's responsibility to be present for the hearing. Nestorick v. UGI Utilities, Inc., Docket No. C-2010-2202901 (Order entered February 16, 2012).

5. The Complainant has failed to demonstrate that his failure to appear at the August 14, 2017 telephonic hearing was unavoidable and the interests of the Respondent would

