

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Nathian Rivera	:	
	:	
v.	:	F-2017-2597363
	:	
PPL Electric Utilities Corporation	:	

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 March 30, 2017, Nathian Rivera (Mr. Rivera) filed with the Pennsylvania Public Utility Commission (Commission) a formal complaint against PPL Electric Utilities Corporation (PPL), at Docket Number F-2017-2597363. In the complaint, Mr. Rivera was seeking a payment arrangement. The complaint was processed and served by the Commission on April 5, 2017.

On April 21, 2017, PPL filed an answer to the complaint. In its answer, PPL admitted or denied the various averments Mr. Rivera made in his complaint. PPL contended that

Mr. Rivera had already been provided with a prior payment arrangement and requested dismissal of the complaint.

On May 1, 2017, a Telephonic Hearing Notice was issued establishing an Initial Telephonic Hearing for Thursday, June 15, 2017 at 10:00 a.m. and assigning me as the Presiding Officer.

The Hearing Notice indicated to the parties: “You may lose this case if you do not take part in this hearing and present facts on the issues raised.” The Hearing Notice was sent to Mr. Rivera at the address provided on his complaint via first-class mail. The postal authorities did not return the Hearing Notice to the Commission as being undeliverable to Mr. Rivera.

A Prehearing Order was sent to the parties on May 24, 2017. The Prehearing Order also advised the parties that they must be available for the hearing or they would risk losing the case. The Prehearing Order sent to Mr. Rivera was not returned to the Commission by the postal authorities as being undeliverable.

The hearing convened on June 15, 2017 as scheduled. Graig Schultz, Esquire appeared on behalf of PPL. Mr. Rivera appeared *pro se*. At the start of the hearing, Mr. Rivera indicated that he did not receive any of the mailings relating to the hearing, because he moved and thought his friend had called the Commission to update his address. Tr. 6/15/17 at 6, 14. Mr. Rivera indicated that he thought he could proceed with the hearing (Tr. 6/15/17 at 15), but the Presiding Officer declined and decided to postpone the hearing for another date so that Mr. Rivera could receive all of the hearing-related documents prior to any hearing. Tr. 6/15/17 at 15 – 17. The hearing was then postponed after Mr. Rivera provided his updated address of 645 North Jordan Street, Allentown, PA 18102. Tr. 6/15/17 at 19 – 21.

On September 6, 2017, a Further Telephonic Hearing Notice was issued establishing a Further Telephonic Hearing for Tuesday, October 17, 2017.

The Further Telephonic Hearing Notice indicated to the parties: “You may lose this case if you do not take part in this hearing and present facts on the issues raised.” The Further Telephonic Hearing Notice was sent to Mr. Rivera at the updated address of 645 North Jordan Street via first class mail.

On September 20, 2017, the postal authorities did return the October 17, 2017 Further Telephonic Hearing Notice to the Commission as being undeliverable to Mr. Rivera at the updated address of 645 North Jordan Street. The scheduler for the case then called the home phone number listed on Mr. Rivera’s complaint and spoke to someone who introduced herself as Mr. Rivera’s mother (*see* Returned Mail Memo in the Commission’s Docket entries in this proceeding). This person stated that Mr. Rivera no longer lives with her and that she did not have his current apartment number. Id. The scheduler left a message with that person for Mr. Rivera to call back. Id.

On September 25, 2017, the scheduler for the case attempted to call Mr. Rivera at the mobile phone number on Mr. Rivera’s complaint. Id. The scheduler did not reach Mr. Rivera and left a message indicating that Mr. Rivera needed to update his apartment number so that the returned hearing documents could be re-sent. Id. The scheduler also mentioned the date and time of the Further Telephonic Hearing in the message. Id.

Prehearing Order #2 was sent to the parties on October 3, 2017. This Prehearing Order also advised the parties that they must be available for the hearing or they would risk losing the case. This Prehearing Order sent to Mr. Rivera was not returned to the Commission by the postal authorities as being undeliverable to the 645 North Jordan Street address.

The hearing convened on October 17, 2017 as scheduled. Graig Schultz, Esquire appeared on behalf of PPL. Mr. Rivera did not appear at the hearing, as he did not answer two separate calls from the Presiding Officer to each of the telephone numbers he provided on his complaint. Tr. 10/17/17 at 9 – 10. The first calls were made to Mr. Rivera’s home and mobile phone numbers listed on the complaint at the time of the hearing (9:58 a.m.), and the Presiding Officer left messages indicating that he was attempting to reach Mr. Rivera for his hearing and

would call back in ten minutes. Id. at 4 – 5. The Presiding Officer also advised that if he was unable to reach Mr. Rivera a second time that the hearing would proceed in Mr. Rivera’s absence. Id. at 4 – 5. The Presiding Officer again called Mr. Rivera at 10:12 a.m., and again received Mr. Rivera’s voice mail at both phone numbers and left messages at both phone numbers indicating that the hearing would proceed in Mr. Rivera’s absence. Id. at 8 – 9.

During this hearing, counsel for PPL stated that he had spoken to Mr. Rivera the prior morning, and that Mr. Rivera stated he did not receive the hearing exhibits. Id. at 6. Counsel then e-mailed the exhibits to Mr. Rivera and told Mr. Rivera that because the parties could not settle the case during the phone call, the hearing would take place the next day at 10:00 a.m. Id. at 6.

Counsel for PPL then made a motion to dismiss the complaint, due to Mr. Rivera’s failure to appear and prosecute his case. Id. at 7-9.

The record in this case consists of the hearing transcript from June 15, 2017 of 22 pages, along with the hearing transcript from October 17, 2017 of 13 pages. The record closed in this proceeding when the October 17, 2017 transcript was filed with the Commission on November 1, 2017.

FINDINGS OF FACT

1. The Complainant in this case is Nathian Rivera.
2. The Respondent in this case is PPL Electric Utilities Corporation.
3. No one appeared at the October 17, 2017 hearing on behalf of Mr. Rivera. Tr. 10/17/17 at 9 – 10.
4. Although the Further Telephonic Hearing Notice of the October 17, 2017 hearing was returned by the postal authorities, Mr. Rivera received notice of the hearing on

September 25, 2017 when the case scheduler left a phone message for Mr. Rivera. (Returned Mail Memo in the Commission's docket entries).

5. Mr. Rivera also received notice of the hearing on October 3, 2017 when the Commission mailed Prehearing Order #2 to Mr. Rivera's updated address of 645 North Jordan Street.

6. Prehearing Order #2 was not returned to the Commission by the postal authorities as being undeliverable to Mr. Rivera at his updated address of 645 North Jordan Street.

7. Prehearing Order #2 advised the parties that they could lose their case if they failed to appear at the scheduled hearing on October 17, 2017.

8. Mr. Rivera also received notice of the October 17, 2017 hearing when counsel for PPL spoke to him the day before the hearing and reminded him of the upcoming hearing. Tr. 10/17/17 at 6.

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, Mr. Rivera filed a complaint against PPL, requesting a payment arrangement. Mr. Rivera, 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 Mr. Rivera 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. Section 5.245 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.

Prehearing Order #2 was sent to Mr. Rivera by regular first class mail and was not returned to the Commission as being undeliverable. Accordingly, it must be presumed that the Hearing Notice and Prehearing Order sent to Mr. Rivera in the ordinary course of business were received by Mr. Rivera. 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, Prehearing Order #2 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.

Mr. Rivera also was notified of the October 17, 2017 hearing by counsel for PPL on October 16, 2017 when counsel called to discuss possible settlement of the case. Tr. 10/17/17 at 6. After the settlement discussions were unsuccessful, counsel advised Mr. Rivera of the hearing the next morning. Id.

No one appeared on behalf of Mr. Rivera at the time of the hearing, nor did anyone ever request a postponement or continuance of the hearing. As such, Mr. Rivera had notice and an opportunity to be heard in this proceeding, but chose not to appear. Therefore, Mr. Rivera'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 PPL moved to have the complaint dismissed for lack of prosecution. Tr. 10/17/17 at 7 – 9. By failing to appear and present any evidence in support of his complaint, Mr. Rivera 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). "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).

3. 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.

4. 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).

5. Mr. Rivera'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).

6. Mr. Rivera failed to carry his burden of proof in this proceeding because he failed to appear at the hearing to present his case to the Commission.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PPL Electric Utilities Corporation to dismiss the formal complaint of Nathian Rivera at Docket Number F-2017-2597363 is granted.

2. That the formal complaint filed by Nathian Rivera at Docket Number F-2017-2597363 is hereby dismissed.

