

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

James Clayton	:	
	:	
v.	:	C-2017-2634808
	:	
PECO Energy Company	:	

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 at the hearing and prosecute the Complaint.

HISTORY OF THE PROCEEDING

On November 20, 2017, Complainant, James Clayton, filed a Complaint with the Pennsylvania Public Utility Commission (Commission or PUC) against PECO Energy Company (PECO or Company or Respondent). The Complainant checked the following boxes on the Complaint form:

- The utility is threatening to shut off my service or has already shut off my service; and
- Other.

The Complainant provided information that a medical form was sent by facsimile to the Company confirming the need for electric service for the Complainant's medication.

For relief the Complainant requested that the shut-off be put on hold until he received a determination on CRISIS and UESF¹ grants for which he had already applied.

The Complaint was served on PECO electronically (eService) by the Commission's Secretary on November 21, 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 December 5, 2017, Shawane L. Lee, Esquire, counsel for the Respondent, filed an Answer to the Complaint. The Answer recited the allegations by the Complainant and the relief sought.

The Answer stated the Complainant enrolled in the Company's Customer Assistance Program (CAP) on July 23, 2003 and is actively enrolled in CAP and has an outstanding balance of \$643.58 entirely comprised of CAP arrears.

The Respondent averred that the Complainant is not entitled to a Commission-issued payment agreement on his balance pursuant to 66 Pa.C.S. § 1405(c)² because the entire balance is comprised of CAP arrears. The Respondent requested that the Commission dismiss the Complaint.

A corrected Hearing Notice dated December 12, 2017, notified the parties that an initial in-person hearing was scheduled for Tuesday, February 6, 2018, at 1:30 p.m.³ This Notice indicated that the case was assigned to the undersigned Administrative Law Judge (ALJ) as the

¹ CRISIS and UESF are: (1) a federally funded program for income-eligible customers who are either without heat or who have received a 10-day shut-off notice for their heating service, and (2) Utility Emergency Service Fund grants, respectively.

² 66 Pa.C.S. § 1405(c) states, "Customer assistance program rates shall be timely paid and shall not be the subject of payment arrangements negotiated or approved by the commission."

³ A Hearing Notice dated December 6, 2017, scheduled the hearing for Tuesday, February 13, 2018, at 9:30 a.m. before Administrative Law Judge Guhl; consequently, the hearing was rescheduled.

presiding officer. The Hearing Notice also directed the Complainant to be present no later than 1:15 p.m. on the scheduled hearing day and to wait for the presiding ALJ to call his case.

A Prehearing Order dated December 13, 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 at 2:20 p.m. The Complainant was not present. Attorney Lee as counsel for the Respondent was present along with one potential witness. The Complainant failed to communicate why he could not be present at the scheduled hearing. 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. The undersigned stated that the Respondent's motion would be considered and ruled upon in writing and adjourned. The record closed on February 20, 2018, when the undersigned received the transcript for the proceeding.

To date, there has been no further communication from the Complainant. This matter is ripe for decision.

FINDINGS OF FACT

1. The Complainant is James Clayton, who is requesting that any termination of service at 10714 Haldeman Avenue, Apt. B5, Philadelphia, Pennsylvania (service address) be delayed until determinations are made on grants for which he applied.

2. The Respondent is PECO Energy Company, a jurisdictional public utility that provides electric and gas distribution service in the Commonwealth of Pennsylvania.

3. On November 20, 2017, the Complainant filed a Complaint with the Commission against the Respondent.

4. The Respondent filed its Answer on December 5, 2017.

5. A corrected Hearing Notice dated December 12, 2017, was sent by regular first-class mail to the Complainant and scheduled an evidentiary hearing for Tuesday, February 6, 2018, at 1:30 p.m.

6. A Prehearing Order, dated December 13, 2017, advised the Complainant of the proper procedure to participate in the hearing and to obtain a continuance to reschedule the hearing date.

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

8. Neither the Complainant nor any counsel representing the Complainant timely appeared at the scheduled hearing on February 6, 2018.

9. The Complainant did not settle or withdraw the Complaint.

DISCUSSION

In this Complaint, the Complainant requested that the Respondent delay any termination of service at the service address pending a determination on grants for electric service assistance. The issue in this proceeding is 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.

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 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).

The Commission sent a corrected Hearing Notice dated December 12, 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 December 13, 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 also stated the day, date and time for the scheduled 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 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 February 6, 2018, 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).

The Respondent’s counsel moved that the Complaint be dismissed with prejudice for failure to prosecute. The due process rights of the Complainant have been protected. The Complainant had notice of the scheduled hearing and failed to appear to prosecute his Complaint.

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.

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 corrected Hearing Notice dated December 12, 2017, the Complainant had notice of the day, date, 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, James Clayton, failed to sustain his burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion by Shawane Lee, Esquire on behalf of PECO Energy Company to dismiss the formal Complaint of James Clayton at Docket No. C-2017-2634808 for lack of prosecution is granted.
2. That the formal Complaint filed by James Clayton against PECO Energy Company at Docket No. C-2017-2634808 is dismissed in its entirety with prejudice.
3. That the Docket No. C-2017-2634808 is to be marked closed.

Dated: March 20, 2018

/s/
Angela T. Jones
Administrative Law Judge