

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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|------------------------|---|----------------|
| Floyd Tillman | : | |
| | : | |
| v. | : | F-2017-2634002 |
| | : | |
| Philadelphia Gas Works | : | |

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|------------------------|---|----------------|
| Philadelphia Gas Works | : | |
| Respondent/Appellant | : | |
| | : | |
| v. | : | F-2017-2633954 |
| | : | |
| Floyd & Martha Tillman | : | |
| Complainant/Appellee | : | |

INITIAL DECISION

Before
Benjamin J. Myers
Administrative Law Judge

INTRODUCTION

This decision dismisses two consolidated complaints. The complaint of Floyd Tillman v. Philadelphia Gas Works at Docket No. F-2017-2634002 is dismissed for failure to prosecute the complaint. The complaint of Philadelphia Gas Works v. Floyd and Martha Tillman at Docket No. F-2017-2633954 is dismissed because the request of Philadelphia Gas Works (PGW) to withdraw its appeal in the matter is granted.

HISTORY OF THE PROCEEDING

On September 25, 2017, the Commission's Bureau of Consumer Services (BCS) issued a decision in the matter of Floyd & Martha Tillman v. Philadelphia Gas Works at BCS No. 3563222. That decision found a total account balance of \$27,201.30 and that a payment arrangement would be granted with a monthly budget amount of \$351.00 per month plus the amount of \$4,534.00 per month towards the outstanding account balance.

On November 6, 2017, PGW (Respondent/Appellant) filed an appeal to BCS No. 3563222 with an attached certificate of service indicating that its appeal had been served on both Floyd and Martha Tillman (Complainants/Appellees). In this appeal, PGW alleged that BCS had provided a commercial customer with residential end use a payment arrangement without consideration of payment history and lack of good faith in keeping the customer's account in good standing. In addition, PGW referred to a previous Commission decision in which the Complainants were prohibited from filing additional informal and formal complaints pertaining to claims of inaccurate meter rebilling already adjudicated.¹ PGW's appeal also took issue with those portions of the BCS decision which cited PGW for violations of various sections of the Public Utility Code at 52 Pa. Code §§ 56.1 and 56.151(2),(4). PGW requested that the Commission find that the Complainants were not eligible for a payment arrangement and that BCS had exceeded its authority in granting one to the Complainants. PGW's appeal of the BCS decision was docketed by the Secretary's Bureau as Philadelphia Gas Works v. Floyd and Martha Tillman at Docket No. F-2017-2633954.

On November 8, 2017, Floyd Tillman² filed a formal complaint with the Commission also appealing the decision in BCS No. 3563222. Mr. Tillman alleged that certain charges on the account with PGW were incorrect and requested a more reasonable payment arrangement. Mr. Tillman's appeal of the BCS decision was docketed by the Secretary's Bureau as Floyd Tillman v. Philadelphia Gas Works at Docket No. F-2017-2634002. PGW filed an answer to this complaint on December 6, 2017. In its answer PGW generally denied the

¹ Floyd Tillman v. Philadelphia Gas Works, Docket No. C-2014-2445229 (Order entered March 16, 2017).

² The gas service account with PGW is solely in the name of Martha Tillman and has been deemed a commercial account with residential end use.

averments of the complaint. Specifically, PGW denied that there were any incorrect charges to the account. In addition, PGW again argued that the Complainants are not entitled to a payment arrangement for the account due to a poor payment history.

On January 8, 2018, the Commission issued a hearing notice in the matter of Floyd Tillman v. Philadelphia Gas Works at Docket No. F-2017-2634002 and scheduled this matter for an initial telephonic hearing on February 12, 2018 at 10:00 a.m. On January 12, 2018, a second hearing notice was issued also scheduling the matter of Philadelphia Gas Works v. Floyd and Martha Tillman at Docket No. F-2017-2633954 for an initial telephonic hearing at the same time on February 12, 2018. On January 17, 2018, a consolidation order was issued consolidating both of these docket numbers into the same proceeding as captioned above.

On January 18, 2018, a prehearing order was issued addressing, *inter alia*, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements. The prehearing order also reminded the parties that they were required to call the toll-free conference number at 10:00 a.m. to participate in the hearing and that their failure to participate could result in a decision being entered against that party. The hearing notices, consolidation order and prehearing order were all sent to the address provided by the Complainants in the complaint form. None of those documents were returned to the Commission as being undeliverable by the postal authorities.

On February 12, 2018 at 10:00 a.m., I dialed the toll-free conference number to begin the hearing. Laureto Farinas, Esquire, counsel for PGW, and his witness joined the conference call shortly thereafter. The start of the hearing was delayed until 10:12 a.m. to afford the Complainants additional time to join the conference call and participate in the hearing. However, despite this additional time the Complainants did not participate.

Upon commencement of the hearing, Mr. Farinas indicated that he had been in recent communication with Mr. Tillman and his non-attorney financial advisor, Mr. Brown, regarding a settlement. Mr. Farinas indicated that in those discussions Mr. Tillman and his advisor had agreed that PGW would withdraw its appeal in the matter of Philadelphia Gas Works v. Floyd and Martha Tillman at Docket No. F-2017-2633954. There was also a general

settlement discussion between the parties in the matter of Floyd Tillman v. Philadelphia Gas Works at Docket No. F-2017-2634002 but no settlement had been reached. Mr. Farinas made two motions: 1) that PGW's appeal in the matter of Philadelphia Gas Works v. Floyd and Martha Tillman at Docket No. F-2017-2633954 be withdrawn; and 2) that the complaint in the matter of Floyd Tillman v. Philadelphia Gas Works at Docket No. F-2017-2634002 be dismissed for failure to prosecute. Mr. Farinas was advised that his motions would be taken under consideration. The hearing concluded at 10:18 a.m. at which time the record in this matter was closed.

At 12:37 p.m. on February 12, 2018, the Office of Administrative Law Judge (OALJ) received a facsimile from Mr. Tillman's non-attorney financial advisor, Michael Brown of NWCS, Inc. Mr. Brown indicated in his facsimile that he had been unable to attend the 10:00 a.m. telephonic hearing that morning "due to an unforeseen issue" at his office. Mr. Brown further indicated that Mr. Tillman was willing to discuss settlement with PGW and that previous settlement discussions had occurred between the parties on February 9, 2018 at which time there had been an agreement in principle to "withdraw all motions and move towards settlement."

This facsimile was forwarded to counsel for PGW to inform him of the contact made with OALJ on the behalf of the Complainant and to advise him that the Complainant continued to wish to discuss settlement of the matter. Since that time, the parties have been in contact with OALJ on several occasions to provide updates on whether a settlement has been reached. At this time, there has been no indication that the parties have settled this matter. The two motions made by PGW at the time of hearing are ready for disposition. For the reasons discussed below, both motions will be granted.

FINDINGS OF FACT

1. The Complainants/Appellees in this matter are Floyd and Martha Tillman.
2. The Respondent/Appellant in this matter is Philadelphia Gas Works.

3. On September 25, 2017, the Commission's Bureau of Consumer Services issued a decision in the matter of Floyd & Martha Tillman v. Philadelphia Gas Works at BCS No. 3563222.

4. On November 6, 2017, PGW filed an appeal to BCS No. 3563222 with attached certificate of service indicating that its appeal had been served on the Complainants.

5. PGW's appeal was docketed by the Secretary's Bureau as Philadelphia Gas Works v. Floyd and Martha Tillman at Docket No. F-2017-2633954.

6. On November 8, 2017, Floyd Tillman filed a formal complaint also appealing the decision in BCS No. 3563222.

7. Mr. Tillman's complaint was docketed by the Secretary's Bureau as Floyd Tillman v. Philadelphia Gas Works at Docket No. F-2017-2634002.

8. On December 6, 2017, PGW filed an answer to this complaint.

9. On January 8, 2018 the Commission issued a hearing notice scheduling both of these matters for an initial telephonic hearing on February 12, 2018 at 10:00 a.m.

10. The notice of the telephonic hearing was sent to the Complainants by regular first-class mail to the address stated on the complaint.

11. The Commission's hearing notice was never returned as being undeliverable by the postal authorities.

12. On January 17, 2018, a consolidation order was issued consolidating both docket numbers into the same proceeding.

13. On January 18, 2018, a prehearing order was issued which reminded the parties that they were required to call the toll-free conference number at 10:00 a.m. to

participate in the February 12, 2018 telephonic hearing and that their failure to participate in the hearing could result in a decision being entered against that party.

14. The Complainants failed to appear at the February 12, 2018 telephonic hearing.

15. The record in this matter closed at the conclusion of the hearing on February 12, 2018.

DISCUSSION

Floyd Tillman v. Philadelphia Gas Works, Docket No. F-2017-2634002

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 Complainants on January 8, 2018, by regular first-class mail to the address stated on the complaint. This notice of hearing was never returned to OALJ as being undeliverable by the postal authorities.

In addition, a prehearing order was issued on January 18, 2018, which, inter alia, reminded the parties that they must call the toll-free number shown on the hearing notice to participate in the telephonic hearing and that failure to call the number and participate in the telephonic hearing would constitute a failure to appear. The prehearing order, which was also mailed to the Complainants at the address shown on the complaint, was never returned to OALJ as being undeliverable by the postal authorities. Accordingly, it must be presumed that this mail, which was sent in the ordinary course of business, was received by the Complainants. Berkowitz v. Mayflower Securities, Inc., 317 A.2d 584 (Pa.

1974); Meierdierck 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 Complainants did not appear for the scheduled hearing because they did not call the toll-free number shown on the January 8, 2018 hearing notice. Under these circumstances, it appears the Complainants 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 Complainants 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).

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 Complainants bear the burden of proving by a preponderance of the evidence that they are entitled to relief. By failing to appear and proffer any evidence to support their complaint, the Complainants have failed to meet this burden. Under these circumstances, PGW's motion will be granted and 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.

Philadelphia Gas Works v. Floyd and Martha Tillman, Docket No. F-2017-2633954

At the hearing, counsel for PGW made a motion to withdraw PGW's appeal in this matter. The Commission's Rules of Practice and Procedure at 52 Pa. Code § 5.94 permit parties to withdraw pleadings in a contested proceeding. The provision at 52 Pa. Code § 5.94(a) allows for the withdrawal of pleadings through a petition for leave to withdraw the pleading. The petition is granted only by permission of the presiding officer or the Commission. The presiding officer or Commission must consider the petition, any objections thereto and the public interest in determining whether to permit withdrawal of the pleading. Here, PGW has requested the withdrawal of its appeal by making a motion at the time of hearing rather than through a petition for leave to withdraw a pleading as provided under 52 Pa. Code § 5.94.

The regulation at 52 Pa. Code § 1.2(a) provides that the presiding officer or Commission may disregard an error or defect of procedure which does not affect the substantive rights of the parties. PGW's error in procedure may be disregarded if it does not affect the Complainants' substantive rights. After PGW filed its appeal to the underlying BCS decision, a copy of that appeal was served on the Complainants. The Complainants did not file an answer to PGW's appeal but instead filed a formal complaint and thus an appeal of their own. At the hearing, counsel for PGW asserted that during settlement discussions the Complainants had not objected to the withdrawal of PGW's appeal. In addition, correspondence sent to OALJ by the Complainants' non-attorney financial adviser after the hearing was concluded on February 12, 2018 references those same discussions and a previous agreement that PGW would be withdrawing its appeal. PGW's motion at the time of hearing to withdraw its appeal will be treated as a petition for leave to withdraw the pleading under the provision at 52 Pa. Code § 5.94(a). This will not adversely affect the Complainants' substantive rights since the Complainants had notice of PGW's intent to withdraw its appeal and an opportunity to respond. This treatment will also help to ensure a just, speedy and inexpensive determination of this proceeding.

The Commission has considered the withdrawal of pleadings in the past. In PPLICA v. PPL Elec. Utils. Corp., Docket No. C-2010-2153656, 2012 Pa. PUC LEXIS 39 (Order entered Jan. 12, 2012), the Commission found that a request to withdraw a complaint "should be viewed as a simple procedural request, and should be granted without conditions or Commission pronouncements related to the merits of the issues raised by the Complaint, or issues that may or may not be raised in other proceedings." Id. at 14. There have been no objections raised to PGW's withdrawal of its appeal by the Complainants. There is no indication that requiring PGW to move forward with an appeal it does not wish to pursue would be in the public interest. PGW's motion to withdraw its appeal in this matter will therefore be granted.

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 Complainants 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 Complainants have failed to meet their burden of proving that they are entitled to the relief that they seek from the Commission. 66 Pa.C.S. § 332(a).

4. The Commission's Rules of Practice and Procedure at 52 Pa. Code § 5.94 permit parties to withdraw pleadings in a contested proceeding by permission of the presiding officer or Commission.

5. In determining whether to permit withdrawal of the pleading, the presiding officer or Commission must consider the petition, any objections thereto and the public interest. 52 Pa. Code § 5.94.

6. A request to withdraw a complaint should be viewed as a simple procedural request and should be granted without conditions or Commission pronouncements related to the merits of the issues raised by the complaint, or issues that may or may not be raised in other proceedings. PPLICIA v. PPL Elec. Utils. Corp., Docket No. C-2010-2153656, 2012 Pa. PUC LEXIS 39 (Order entered Jan. 12, 2012).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Philadelphia Gas Works to dismiss the complaint filed by Floyd Tillman at Docket No. F-2017-2634002 is granted.

