

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Andrew Menichino
for Caravan II, LLC

v.

Pennsylvania Power Company

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C-2018-2647292

INITIAL DECISION

Before
Benjamin J. Myers
Administrative Law Judge

INTRODUCTION

This decision dismisses the complaint in this matter because the Complainant, a corporation, failed to secure an attorney to represent it in this proceeding.

HISTORY OF THE PROCEEDING

On February 7, 2018, Andrew Menichino, a member of Caravan II, LLC (Complainant) filed a complaint with the Commission against Pennsylvania Power Company (Respondent). This complaint raised allegations relating to the billing of service provided by the Respondent to the Complainant's business.

On March 5, 2018, Respondent filed an answer and new matter with an attached notice to plead. Respondent admitted or denied the various allegations of the complaint. In its new matter, Respondent argued that because Complainant was a corporation it was required to

be represented by counsel and that failure of the Complainant to obtain counsel should result in the dismissal of the complaint. Complainant did not file an answer to Respondent's new matter.

On March 15, 2018, a hearing notice was issued scheduling this matter for a telephonic hearing on April 2, 2018. A second hearing notice was issued on this same day moving the date of the hearing to April 26, 2018. This hearing notice was sent to both parties as well as Louis Perrotta and Malcolm Pollard, individuals both identified as counsel for the Complainant in the complaint form.

On March 19, 2018, a prehearing order was issued addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

On March 22, 2018, the Office of Administrative Law Judge (OALJ) received correspondence from Louis Perrotta indicating that he did not represent the Complainant and requested that his name be removed from this matter.

On April 24, 2018, OALJ received email correspondence from the Complainant requesting a continuance of the April 26, 2018 telephonic hearing and an extension of 60 days for the rescheduling of the hearing. The Complainant indicated that he had suffered injuries in a car accident nine months ago which have caused him difficulty maintaining concentration and have required him to attend continuing rehabilitation therapy. The Complainant asserted that those circumstances have made it difficult to gather necessary documentation for the hearing and present it to his attorney in a timely manner. The Complainant then indicated that he had contacted two attorneys regarding representation in this matter, but he had not received an acceptance from either due to "unavailability at that time".

Respondent's counsel sent email correspondence to OALJ that same day in response to the Complainant's requests. Respondent indicated that it opposed a continuance of the April 26, 2018 telephonic hearing and cited several reasons for this opposition – including the time and preparation already expended by Respondent in preparation for the hearing.

Respondent also believed that Complainant's requests were merely attempts to delay the resolution of this matter so that he could complete the sale of the property while receiving service from the Respondent and further delaying the resolution of an outstanding account balance in excess of \$73,959.

In this correspondence, Respondent also made a motion to dismiss the complaint due to the lack of filing of an entry of appearance by an attorney on behalf of the Complainant, Caravan II, LLC, as a corporation. Respondent argued that the Commission's regulations require attorney representation of corporations in adversarial proceedings before the Commission. In addition to the hearing notice and prehearing order sent in this matter advising that representation by an attorney was required, Respondent asserted that this was not the Complainant's first complaint filed with the Commission so he was well aware that counsel was required for the complaint to proceed. Respondent argued that the Complainant had received more than ample time since the filing of the complaint on February 7, 2018 to obtain counsel and requested that the complaint be dismissed with prejudice for lack of counsel.

On April 25, 2018 an order was issued granting the Complainant's continuance and directing that this matter be rescheduled for an initial telephonic hearing on June 4, 2018. This order also directed the Complainant to obtain counsel and for that counsel to enter a written notice of appearance in this matter pursuant to 52 Pa. Code § 1.24(b) on or before May 25, 2018. This order further indicated that Complainant's failure to do so would result in the dismissal of the complaint. As of the date of this decision, no counsel has entered an appearance on the behalf of the Complainant. The complaint in this matter will therefore be dismissed.

FINDINGS OF FACT

1. The Complainant in this matter is Caravan II, LLC.
2. The Respondent in this matter is Pennsylvania Power Company.
3. The Complainant is a corporation.

4. Andrew Menichino, a member of the corporation, filed the complaint in this matter on the behalf of the Complainant.

5. On March 15, 2018, a hearing notice was issued scheduling this matter for a telephonic hearing on April 26, 2018.

6. On March 19, 2018, a prehearing order was issued addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

7. On April 24, 2018, the Office of Administrative Law Judge received email correspondence from Andrew Menichino requesting a continuance of the April 26, 2018 telephonic hearing and an extension of 60 days for the rescheduling of the hearing.

8. The Respondent objected to this continuance request and made a motion that the complaint be dismissed due to Complainant's failure to be represented by counsel.

9. On April 25, 2018, an order was issued granting the continuance request and rescheduling the hearing for June 4, 2018.

10. This order also directed the Complainant to obtain counsel and for that counsel to enter a written notice of appearance in this matter pursuant to 52 Pa.Code § 1.24(b) on or before May 25, 2018.

11. The Complainant was advised that the failure to obtain counsel, and the failure of counsel to enter a written notice of appearance in this matter, would result in the dismissal of the complaint.

12. To date, no counsel has entered an appearance on the behalf of the Complainant.

DISCUSSION

The Commission's regulation at 52 Pa Code § 1.21(c) provides that in non-adversarial proceedings, a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. In addition, the Commission's regulation at 52 Pa. Code § 1.35(b)(ii) permits pleadings, including complaints, submittals, or other documentary filings to be signed by an officer of a corporation, trust, association or other organized group. In this case, Mr. Menichino signed and filed the complaint on the behalf of Caravan II, LLC. While Mr. Menichino, as a member of that corporation, could file the complaint on its behalf, he cannot represent Caravan II, LLC at a telephonic hearing.

The Commission regulation at 52 Pa. Code § 1.21(b) provides that persons in adversarial proceedings, except for individuals representing themselves, shall be represented by an attorney admitted to practice in the Commonwealth of Pennsylvania. The regulation at 52 Pa. Code § 1.8 defines an adversarial proceeding as one that is contested and which will be decided on the basis of a formal record.

This proceeding became an adversarial proceeding as defined by 52 Pa. Code § 1.8 when the Respondent filed its answer to the complaint. From that time forward, Complainant must be represented by counsel in order to prosecute its complaint. The Commission has previously addressed the need for corporations to be represented by counsel in adversarial proceedings.

In New Fizon Catering, Inc. v. PECO Energy Co., Docket Nos. C-2008-2065498 & C-2008-2079076 (Opinion and Order entered June 24, 2009) (New Fizon), the Commission ruled that attorney representation of a corporation was not at issue when the corporation filed a complaint because the simple filing of a complaint did not automatically trigger an adversarial proceeding. The Commission reasoned that until an answer is filed, it is not known whether a complaint will be contested.

Therefore in this case, Mr. Menichino as a member of the corporation, could file a complaint on behalf of Caravan II, LLC without attorney representation since it did not automatically trigger an adversarial proceeding. However, once the Respondent filed an answer this matter became an adversarial proceeding and attorney representation was required to continue to prosecute the complaint. New Fizon.

The Commission's regulations requiring attorney representation in adversarial proceedings are consistent with Pennsylvania court decisions holding that a corporation must have counsel in order to proceed in any legal action because a corporation cannot represent itself. Smaha v. Landy, 638 A.2d 392 (Pa. Cmwlth. 1994). Pennsylvania courts have ruled that a corporation can only act through its agents and an agent representing it in court must be an attorney admitted to practice. Walcavage v. Excell 2000, Inc., 480 A.2d 281 (Pa. Super 1984).

In Cars R Us c/o Holman Copeland v. Philadelphia Gas Works, Docket No. C-2008-2033437 (Opinion and Order entered February 4, 2010) (Cars R Us) and Torino Incorporated v. PECO Energy Co., Docket No. C-2008-2034595 (Opinion and Order entered February 2, 2010) (Torino), the Commission affirmed its decision in New Fizon that a corporate officer may file a complaint on behalf of a corporation but that the corporation must be represented by an attorney in an adversarial proceeding. In Cars R Us and Torino, the Commission cautioned parties that the general rule requiring attorney representation of corporate complainants in adversarial proceedings would control on a going forward basis. The Commission held that, absent exigent circumstances, it would not allow individuals to offer testimony on a corporation's behalf if the corporation was not represented by an attorney.

By order dated April 25, 2018, Complainant was directed to secure attorney representation in order to continue the prosecution of its complaint. Complainant was ordered to have its retained counsel enter his or her appearance in this matter on or before May 25, 2018, with a copy of the notice of appearance provided to OALJ and the Respondent by that date. The counsel retained by Complainant was required to be licensed to practice law in the Commonwealth of Pennsylvania, or be admitted *pro hac vice*, and required to ensure that his or her appearance is entered in accordance with the provisions of 52 Pa. Code § 1.24(b).

The Complainant was further advised that if it failed to provide a notice of appearance of counsel on or before May 25, 2018, its complaint would be subject to dismissal for failure to comply with the April 25, 2018 order. Snyderville Community Development Corporation v. Philadelphia Gas Works, Docket No. C-20055032 (Opinion and Order entered July 31, 2006), Application of “The Van”, LLC, Docket No. A-2015-2508379 (Final Order entered December 28, 2016).

As of the date of this decision, no counsel has entered an appearance on the behalf of the Complainant and as such the complaint in this matter is therefore dismissed.

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. Persons in adversarial proceedings, except for individuals representing themselves, shall be represented by an attorney admitted to practice in the Commonwealth of Pennsylvania. 52 Pa. Code § 1.21(b).
3. An adversarial proceeding is one that is contested and which will be decided on the basis of a formal record. 52 Pa. Code § 1.8.
4. This proceeding became an adversarial proceeding when the Respondent filed its answer to the Complaint. 52 Pa. Code § 1.8.
5. Failure to comply with an ALJ order directing the entry of appearance of an attorney serves as a basis for the dismissal of a proceeding. Snyderville Community Development Corporation v. Philadelphia Gas Works, Docket No. C-20055032 (Opinion and Order entered July 31, 2006), Application of “The Van”, LLC, Docket No. A-2015-2508379 (Final Order entered December 28, 2016).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the initial telephonic hearing scheduled for June 4, 2018 is hereby cancelled.
2. That the complaint of Caravan II, LLC, filed at Docket No. C-2018-2647292, is dismissed.
3. That the docket at Docket No. C-2018-2647292, is marked closed.

Date: May 29, 2018

_____/s/
Benjamin J. Myers
Administrative Law Judge