

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Vilma Mary DeMarco	:	
	:	
v.	:	C-2017-2613087
	:	
PECO Energy Company	:	

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 July 3, 2017, Vilma Mary DeMarco (Ms. DeMarco) filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO), at Docket Number C-2017-2613087. In her Complaint, Ms. DeMarco averred that she was being incorrectly charged for electric bills that were the responsibility of her tenant. The formal Complaint was served on PECO electronically by the Commission's Secretary on July 7, 2017.¹

¹ PECO has signed a waiver of the Section 702 requirements for service of formal complaints, 66 Pa.C.S. § 702, and has agreed to electronic service instead under the Commission's Waiver of 702 program.

On July 27, 2017, PECO filed an Answer in response to Ms. DeMarco's Complaint, along with Preliminary Objections to Ms. DeMarco's Complaint. In its Answer, PECO admitted or denied the various averments made in the Complaint. Specifically, PECO denied that it had incorrectly billed Ms. DeMarco and stated that it was required to bill Ms. DeMarco for the tenant's electric usage once a foreign load was discovered. PECO then requested that Ms. DeMarco's Complaint be dismissed.

In its Preliminary Objections to the Complaint, PECO reiterated its position that it was legally required to bill Ms. DeMarco for the tenant's electric usage once the foreign load situation was discovered at Ms. DeMarco's premises. PECO again requested dismissal of the Complaint.

Ms. DeMarco's response to the Preliminary Objections was due on August 21, 2017, pursuant to the Commission's Regulations at 52 Pa. Code § 5.102. Ms. DeMarco did not file any response to PECO's Preliminary Objections.

By Motion Judge Assignment Notice dated September 13, 2017, the parties were advised that PECO's Preliminary Objections had been assigned to me for a ruling. By Order dated October 13, 2017, I denied PECO's Preliminary Objections.

On January 24, 2018, a Telephonic Hearing Notice was issued establishing an Initial Telephonic Hearing for Wednesday, March 28, 2018 at 10:00 a.m. and assigning me as the Presiding Officer. The Hearing Notice indicated to the parties that: "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 via first-class mail to Ms. DeMarco at the address provided on her Complaint. The postal authorities did not return the Hearing Notice to the Commission as being undeliverable to Ms. DeMarco.

On February 8, 2018, a second Telephonic Hearing Notice was issued changing the date for the Initial Telephonic Hearing to Tuesday, April 3, 2018 at 10:00 a.m. and assigning me as the Presiding Officer. The second Hearing Notice also indicated to the parties that: "You

may lose this case if you do not take part in this hearing and present facts on the issues raised.” The second Hearing Notice was sent via first-class mail to Ms. DeMarco at the address provided on her Complaint. The postal authorities did not return the Hearing Notice to the Commission as being undeliverable to Ms. DeMarco.

The hearing convened on April 3, 2018 as scheduled. The Presiding Officer called Ms. DeMarco at 9:59 a.m. and Ms. DeMarco answered the phone. Tr. 4. Ms. DeMarco told the Presiding Officer that she was not going to take part in the hearing and that the Presiding Officer would need to talk to her realtor about the case. Id. The Presiding Officer told Ms. DeMarco that if she was not going to represent herself in this proceeding she would need an attorney to represent her since the realtor could not legally represent her. Id. Ms. DeMarco gave the name and number of the realtor and then hung up on the Presiding Officer. Tr. 4-5.

The Presiding Officer made a second phone call to Ms. DeMarco to again try to explain that he could not deal with her realtor and that she would need an attorney to represent her if she did not wish to take part in her hearing. Tr. 5. Ms. DeMarco again answered the phone, but hung up almost as soon as she answered the phone once she realized it was the Presiding Officer calling again. Id. She said she could not talk to the Presiding Officer and reiterated the phone number for the realtor. Id. The Presiding Officer told Ms. DeMarco that her case would be dismissed if she hung up again, but Ms. DeMarco hung up nonetheless. Id.

The Presiding Officer then called counsel for PECO (Shawane Lee, Esquire) and explained what had transpired with Ms. DeMarco. Tr. 6-7. Counsel then made an oral on the record motion to dismiss the Complaint due to Ms. DeMarco’s failure to appear and prosecute her case. Tr. 7. The Presiding Officer stated that he would take the motion under advisement in order to give Ms. DeMarco a chance to rethink her position and perhaps contact the Presiding Officer to indicate that she would like to actively participate in her case. Tr. 9. That phone call was never made by Ms. DeMarco, however.

The record in this case consists of the hearing transcript of 10 pages. The record closed in this proceeding when the transcript was filed with the Commission on April 23, 2018.

FINDINGS OF FACT

1. The Complainant in this case is Vilma Mary DeMarco.
2. The Respondent in this case is PECO Energy Company.
3. No one appeared at the hearing on behalf of Ms. DeMarco. Tr. 4-7.
4. On January 24, 2018, Ms. DeMarco received notice of the hearing when the Commission mailed a Hearing Notice to the address she provided on her Complaint.
5. On February 8, 2018, Ms. DeMarco again received notice of the hearing when the Commission mailed a second Hearing Notice (indicating the changed hearing date) to the address she provided on her Complaint.
6. The Hearing Notices indicated that a party could lose the case by failing to appear at the hearing to present evidence.
7. The Presiding Officer telephoned Ms. DeMarco twice on the morning of the hearing, but Ms. DeMarco refused to participate in her hearing both times, stating instead that the Presiding Officer would have to call her realtor to discuss the case. Tr. 4-7.
8. During the second phone call the Presiding Officer told Ms. DeMarco that her case would be dismissed if she hung up on the Presiding Officer again, but Ms. DeMarco again hung up the phone on the Presiding Officer. Tr. 5.
9. During the hearing, counsel for PECO made a Motion to Dismiss the Complaint with prejudice, due to Ms. DeMarco's failure to appear and prosecute her case. Tr. 7.

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, Ms. DeMarco has filed a Complaint against PECO Energy Company. Ms. DeMarco, 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 Ms. DeMarco at the date and time set for the hearing in her 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 thereafter 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.

52 Pa. Code § 5.245(a).

Hearing Notices were sent to Ms. DeMarco by regular first class mail. The Hearing Notices were not returned to the Commission by the postal authorities as being undeliverable to Ms. DeMarco. Accordingly, it must be presumed that the documents sent to Ms. DeMarco in the ordinary course of business were received by Ms. DeMarco. 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. 221, 444 A.2d 658 (1982). Of note, the Hearing Notices 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.

The Presiding Officer was able to reach Ms. DeMarco twice on the morning of the hearing, but Ms. DeMarco made it clear that she had no intention of participating in her hearing and hung up twice on the Presiding Officer. Tr. 4-7. Ms. DeMarco hung up the second time despite the fact that the Presiding Officer warned her that her case would be dismissed if she did so. Tr. 5.

No one appeared on behalf of Ms. DeMarco at the time of the hearing. Nor did anyone ever request a postponement or continuance of the hearing. As such, Ms. DeMarco had notice and an opportunity to be heard in this proceeding, but chose not to appear. Therefore, Ms. DeMarco'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 PECO moved to have the Complaint dismissed with prejudice for lack of prosecution. By failing to appear and present any evidence in support of her Complaint, Ms. DeMarco has failed to carry her burden of proof. Thus, it is appropriate to dismiss the Complaint with prejudice. 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).

3. "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).

4. 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.

5. 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).

6. Ms. DeMarco'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).

7. Ms. DeMarco has failed to carry her burden of proof in this proceeding because she failed to appear at the hearing in order to present her case to the Commission.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss the formal Complaint of Vilma Mary DeMarco at Docket Number C-2017-2613087 for failure to prosecute is granted.
2. That the formal Complaint filed by Vilma Mary DeMarco against PECO Energy Company at Docket Number C-2017-2613087 is hereby dismissed with prejudice.
3. That this matter shall be marked as closed by the Secretary's Bureau.

Date: July 17, 2018

/s/

Andrew M. Calvelli
Administrative Law Judge