

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Paul Fuller	:	
	:	
v.	:	C-2018-3001396
	:	
Pennsylvania-American Water Company	:	

INITIAL DECISION

Before
Gail M. Chiodo
Special Agent

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 April 11, 2018, Paul Fuller filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Pennsylvania-American Water Company (PAWC) in which he requested a payment arrangement. The complaint is an untimely appeal from the decision of the Commission's Bureau of Consumer Services (BCS) at case number 3588367. On February 20, 2018, BCS granted Mr. Fuller a payment arrangement.

On May 14, 2018, PAWC filed an answer to the complaint in which it contended that Mr. Fuller was not entitled to a new payment arrangement. PAWC requested that the complaint be dismissed.

On May 16, 2018, the Commission issued a Call-In Telephonic Hearing Notice (Hearing Notice) setting an initial telephonic hearing for July 23, 2018 at 10:00 a.m. The case was assigned to me pursuant to 52 Pa. Code § 56.174.¹ A Prehearing Order was issued on May 22, 2018 which again advised the parties of the date and time of the scheduled hearing and informed them of the procedures applicable to this proceeding.

Of note, the Hearing Notice stated: “At the above date and time, you must call into the hearing. If you fail to do so, your case will be dismissed. You will not be called by the Special Agent.” (emphasis using underlining in original). Similarly, the Prehearing Order stated, *inter alia*, that: “**All parties and witnesses must call into the telephonic hearing at the toll free number . . . and enter PIN Number . . . Complainant’s failure to participate by phone using this method will result in the case being dismissed for failure to appear.**” (emphasis in bold print and underlining in original).

Both the Hearing Notice and the Prehearing Order were sent to Mr. Fuller at the address provided on his complaint by first-class mail. Neither of these documents were returned as undeliverable.

The hearing convened as scheduled on July 23, 2018 at 10:00 a.m. Ms. Tamara L. Fox, Esquire, appeared on behalf of PAWC, along with a potential witness, and was prepared to proceed. No one appeared on behalf of Mr. Fuller. After waiting for approximately fifteen minutes for Mr. Fuller to appear, which he did not, Attorney Fox made an oral motion to dismiss the complaint for the failure to prosecute. I took this motion under advisement. No witnesses were presented and no exhibits were introduced for the record.²

The record closed at the end of the day of the hearing. No communication has been made to the Office of Administrative Law Judge by, or on the behalf of, Complainant

¹ 52 Pa. Code § 56.174 (providing for review by a special agent of decisions of the BCS and any other case in which the issue is solely the ability to pay).

² Pursuant to 52 Pa. Code § 56.174(3), the hearing was tape recorded. No court reporter was present.

explaining his absence. For the reasons discussed below, the motion of PAWC will be granted and the complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant is Paul Fuller.
2. The Respondent is Pennsylvania-American Water Company.
3. By Call-In Telephonic Hearing Notice dated May 16, 2018, an initial telephonic hearing was scheduled for July 23, 2018 at 10:00 a.m.
4. The Call-In Telephonic Hearing Notice provided, *inter alia*, “At the above date and time, you must call into the hearing. If you fail to do so, your case will be dismissed. You will not be called by the Special Agent.” (emphasis using underlining in original).
5. By Prehearing Order dated May 21, 2018, the parties again were advised of the date and time of the scheduled hearing and informed of the procedures applicable to this proceeding, including the method by which a party could request a continuance of the hearing date, if needed.
6. The Prehearing Order provided, *inter alia*, “**All parties and witnesses must call into the telephonic hearing at the toll free number . . . and enter PIN Number . . . Complainant’s failure to participate by phone using this method will result in the case being dismissed for failure to appear.**” (emphasis in bold print and underlining in original).
7. Both the Call-In Telephonic Hearing Notice and Prehearing Order were sent to the Complainant by first-class mail to the address provided on his Complaint.
8. Neither the Call-In Telephonic Hearing Notice nor the Prehearing Order were returned to the Commission by the United States Postal Service as undeliverable.

9. Ms. Tamara L. Fox, Esquire, appeared on behalf of PAWC with one potential witness and was prepared to proceed.

10. In an effort to resolve the matter prior to the hearing, Attorney Fox made several attempts to reach Complainant by telephone and left several voicemails for Complainant to return her call; however, Complainant did not respond to her calls or voicemails.

11. The Complainant did not appear for the July 23, 2018 hearing.

12. The Complainant did not withdraw or settle his complaint against PAWC, nor did he request a continuance of the hearing.

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 his complaint, Mr. Fuller seeks a Commission-issued payment arrangement. Therefore, Mr. Fuller has the burden of proof.

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. Fuller 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. Specifically, 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).

Both the Hearing Notice and Prehearing Order were sent separately to Mr. Fuller by regular first-class mail and neither were returned to the Commission as undeliverable. Accordingly, it must be presumed that these documents, which were sent to Mr. Fuller in the ordinary course of business, were received by him. *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). Further, both the Hearing Notice and Prehearing Order warned Mr. Fuller of the potential consequences that could result from choosing not to participate in the scheduled hearing, including dismissal of his complaint. Additionally, counsel for PAWC made several attempts to reach Mr. Fuller prior to the hearing; however, Mr. Fuller did not respond to counsel's phone calls or voicemails.

No one appeared on behalf of Mr. Fuller at the time of the hearing, nor did anyone request a continuance of the hearing. As such, Mr. Fuller had notice and an opportunity to be heard in this proceeding but chose not to appear. Therefore, Mr. Fuller's due process rights have been fully protected. *Sentner v. Bell Telephone Company of Pa.*, Docket No. F-00161106 (Order entered October 25, 1993); *see also*, 52 Pa.Code § 5.245(a).

During the hearing, counsel for PAWC moved to have the complaint dismissed for lack of prosecution. By failing to appear and present any evidence in support of his complaint, Mr. Fuller has failed to carry his burden. Thus, it is appropriate to dismiss the complaint. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995). 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 thereafter 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. Mr. Fuller's due process rights have been fully protected. *Sentner v. Bell Telephone Company of Pa.*, Docket No. F-00161106 (Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

7. Mr. Fuller has failed to carry his burden of proof.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Pennsylvania-American Water Company to dismiss the formal complaint of Paul Fuller at Docket Number C-2018-3001396 for failure to prosecute is granted.

2. That the formal complaint filed by Paul Fuller at Docket Number C-2018-3001396 is hereby dismissed.

3. That this matter be marked closed.

Date: July 24, 2018

_____/s/
Gail M. Chiodo
Special Agent