

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Theresa K. Gallo	:	
	:	
v.	:	F-2018-2646146
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Marta Guhl
Administrative Law Judge

INTRODUCTION

This initial decision grants the Respondent’s Motion to Dismiss the Complainant’s formal Complaint (Complaint) for lack of prosecution because the Complainant failed to appear for the scheduled hearing in this matter.

HISTORY OF THE PROCEEDING

On February 1, 2018, Theresa K. Gallo (Complainant) filed a Complaint against PECO Energy Company (PECO or Respondent) alleging that her service had been shut off and requesting a payment arrangement.

On February 20, 2018, PECO filed an Answer to the Complaint.

This Complaint is an appeal of an informal Complaint at the Bureau of Consumer Services (BCS).

By Hearing Notice dated March 13, 2018, an initial hearing was scheduled for May 9, 2018, at 10:00 a.m., and the matter was assigned to me. The Hearing Notice advised the parties of the procedure for the hearing, as well as the date, time and location of the scheduled hearing and warned in italicized and underlined type: “*Attention: You may lose the case if you do not come to this hearing and present facts on the issues raised.*” The notice was mailed to the Complainant at the address listed on her Formal Complaint.

A Prehearing Order was issued on March 13, 2018. The Prehearing Order directed the parties to comply with various procedural requirements and directed that a request to change the scheduled hearing should be sent to me prior to the hearing date, be in writing and state the agreement or opposition of the other party. It warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to participate in the hearing, including the dismissal of the Complaint. It also explained that the Complainant bears the burden of proof to establish that the Respondent violated its tariff, the Public Utility Code, or a Commission Order or regulation, and that she is entitled to the relief requested in the Complaint. The Prehearing Order was not returned by the U.S. Postal Service as being undeliverable.

On March 27, 2018, a Cancellation/Reschedule Notice was mailed to the parties rescheduling the hearing to May 16, 2018, at 10:00 a.m., due to a conflict in the presiding officer’s schedule. The Notice was mailed to the Complainant at the address listed on her Formal Complaint.

On April 3, 2018, the Harrisburg Office of Administrative Law Judge received returned mail from the U.S. Postal Service. The returned mail contained the Complainant’s March 27, 2018 Cancellation/Reschedule Notice. The envelope of the returned mail also included a new address for the Complainant of 648 Lincoln Hwy, Fairless Hills, PA 19030-1410.¹ The Cancellation/Reschedule Notice was mailed to the new address on April 3, 2018.

¹ The Complainant had not contacted the Commission or the presiding officer to update her contact information in any way. See, 52 Pa. Code § 1.53(d) (providing that it is the duty of a party to apprise the Commission promptly of changes to the party’s current address).

The Notice mailed to the new address on April 3, 2018 was not returned by the U.S. Postal Service as undeliverable.

The hearing convened as scheduled on May 16, 2018. Counsel for PECO was present with one potential witness and was prepared to proceed. The Complainant was not present and had not contacted this office to indicate that she would or would not participate.

No witnesses were presented, and no exhibits were introduced into the record. Respondent's counsel moved that the Complaint be dismissed with prejudice for lack of prosecution (Motion) pursuant to 52 Pa.Code § 5.245. In accordance with Commission policy, I am granting the Motion.

The record was closed on June 8, 2018, when I received a copy of the hearing transcript.

FINDINGS OF FACT

1. The Complainant in this case is Theresa K. Gallo who resided at 517 3rd Avenue, Croydon, Pennsylvania 19021.
2. The Respondent in this proceeding is PECO Energy Company.
3. By Hearing Notice dated March 13, 2018, a hearing was scheduled for May 9, 2018, at 10:00 a.m., with both parties given notice.
4. Both parties were advised of the procedures for requesting a continuance of a scheduled hearing by Prehearing Order dated March 13, 2018.
5. The Prehearing Order was never returned by the U.S. Postal Service.

6. The Complainant was advised that the Complaint would be dismissed if she failed to appear for the scheduled hearing by the March 13, 2018, Hearing Notice and the March 13, 2018, Prehearing Order.

7. The March 27, 2018 Cancellation/Reschedule Notice was mailed to the Complainant at 517 3rd Avenue, Croydon, Pennsylvania, which indicated that the hearing was rescheduled for May 16, 2018 at 10:00 a.m.

8. On April 3, 2018, the Complainant's Cancellation/Reschedule Notice was returned to the Harrisburg Office of Administrative Law Judge by the U.S. Postal Service.

9. The envelope of the returned mail also included a new address for the Complainant of 648 Lincoln Hwy, Fairless Hills, PA 19030-1410.

10. The Cancellation/Reschedule Notice was resent to the Complainant at the new address on April 3, 2018. (April 3, 2018 Memo to the Secretary).

11. The resent Notice was not returned by the U.S. Postal Service as undeliverable.

12. Respondent appeared for the hearing at the scheduled date and time by legal counsel and a potential witness and was prepared to proceed.

13. Complainant failed to appear for the scheduled hearing.

14. Complainant did not settle or withdraw the Complaint nor obtain a continuance prior to the scheduled hearing.

DISCUSSION

The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, Complainant has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a).

To establish a sufficient case and satisfy the burden of proof, Complainant must show that the Respondent public utility is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Dep't of Public Welfare*, 480 A.2d 382 (Pa. Cmwlth. 1984).

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). However, this due process requirement is satisfied when the parties are provided notice and the opportunity to appear and be heard. *Id.*

The Cancellation/Reschedule Notice for the May 16, 2018, hearing in this case was sent to the Complainant on March 27, 2018, by regular first-class mail to the address stated on the Complaint. However, this Notice was returned by the U.S. Postal Service to the Harrisburg Office of Administrative Law Judge. A new address was provided on the returned Notice. The scheduling

staff for the Office of Administrative Law Judge in Harrisburg re-sent the Notice to the Complainant at the new address on April 3, 2018. The re-sent Notice was not returned to the Harrisburg Office of Administrative Law Judge by the U.S. Postal Service. The Prehearing Order was also never returned to the sender. Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406 (1959); *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974). Therefore, the Complainant is deemed to have received this document and had sufficient notice of the location, date and time of the scheduled hearing.

The Complainant was notified of the scheduled hearing date, time, and location for the hearing. Despite this, she made no attempt whatsoever to notify me that she did not plan to appear for the hearing. Under these circumstances, it appears Complainant had ample opportunity to be heard in this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of the Complainant have been fully protected.

By not appearing for the scheduled hearing, the Complainant failed to bear her burden of proof. Consequently, the Complaint must be dismissed.

Under Section 5.245 of the Pennsylvania Code, if the presiding officer finds, after notice and opportunity for hearing, that the actions of a party, in a proceeding obstruct the orderly conduct of the proceeding and are inimical to the public interest, the Commission or the presiding officer may take appropriate action, including dismissal of the complaint, if the action is that of complainant. 52 Pa.Code § 5.245(c). 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).

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 she 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 Corporation*, Docket No. C 20042399 (Final Order entered October 13, 2004); *Jones v. Peoples Natural Gas Company*, Docket No. C-20054885 (Opinion and Order entered February 14, 2006); *El-Ayazra v. West Penn Power Company*, Docket No. F-2509292 (Opinion and Order entered June 30, 2016).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to and subject matter of this proceeding. 66 Pa.C.S. § 701.

2. Pursuant to 66 Pa.C.S. § 332(a), the burden of proof in this proceeding is upon the Complainant.

3. By failing to appear at the scheduled hearing and failing to present any evidence, the Complainant has failed to satisfy the burden of proof.

4. Notice properly mailed to a party’s last known address and not returned is presumed to have been received. *Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406 (1959); *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974).

5. The Complainant had notice of the date, location and time of the scheduled hearing.

6. The due process rights of Complainant have been fully protected in this proceeding. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

7. A formal Complaint may be dismissed if, after notice and opportunity to be heard, a Complainant fails to appear and prosecute the Complaint. 52 Pa.Code § 5.245(c). *See also Mumma v. PPL Electric Utilities Corp.*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002).

8. The failure of the Complainant to appear for a scheduled hearing of which she had notice warrants dismissal of the Complaint with prejudice. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of PECO Energy Company to dismiss the Complaint filed at Docket No. F-2018-2646146 is granted;

2. That the Complaint of Theresa K. Gallo against PECO Energy Company at Docket No. F-2018-2646146 is dismissed with prejudice; and

3. That Docket No. F-2018-2646146 be marked closed.

Date: August 30, 2018

/s/
Marta Guhl
Administrative Law Judge