

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Brooke Zwerling	:	
	:	
v.	:	F-2018-3000855
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Christopher P. Pell
Deputy Chief Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the formal Complaint of Brooke Zwerling against PECO Energy Company because she failed to prosecute her Complaint.

HISTORY OF THE PROCEEDING

On March 28, 2018, Brooke Zwerling (Complainant) filed a formal Complaint (Complaint) against PECO Energy Company (PECO or Respondent) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, the Complainant placed checkmarks in the boxes marked “[t]he utility is threatening to shut off my service or has already shut off my service,” “I would like a payment agreement” and “[i]ncorrect charges are on my bill.” The Complainant indicated that she wants PECO to apply a missing payment toward her account and also that she wants a reasonable payment agreement.

On April 23, 2018, the Respondent filed an Answer denying all material allegations of fact in the Complaint. The Respondent answered that the Complainant must submit proof of

payment to receive credit for the \$248.00 payment she claims she made. The Respondent further answered that the Complainant is an active participant in PECO's Customer Assistance Program (CAP) and is therefore not entitled to a Commission-issued payment agreement pursuant to 66 Pa.C.S. § 1405(c) since her balance is comprised of CAP arrears.

By Hearing Notice dated April 23, 2018, a hearing was scheduled for May 15, 2018 at 9:00 a.m., and the matter was assigned to me. The Hearing Notice advised the parties of the location, date and time of the scheduled hearing and warned in bold and underlined type:

“Attention: You must be available in the hearing room when your case is called by the presiding Administrative Law Judge. If you are not present and prepared to go forward with your case when it is called, your case will be dismissed by the Administrative Law Judge.”

I issued a Prehearing Order on April 27, 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 at least five days 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 attend the hearing. 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.

On May 14, 2018, the Complainant faxed to my attention a request for a continuance of the May 15, 2018, hearing. As the basis for her request, the Complainant indicated that her husband was in the hospital, and as a result, she would not be able to attend the hearing. PECO objected to the Complainant's continuance request.

By Interim Order dated May 15, 2018, I granted the Complainant's request for a continuance.

By Hearing Cancellation/Reschedule Notice dated May 24, 2018, the hearing was rescheduled for July 23, 2018, at 9:30 a.m. The Hearing Cancellation/Reschedule Notice advised the parties of the location, date and time of the scheduled hearing and again warned in bold and underlined type: “**Attention: You must be available in the hearing room when your case is called by the presiding Administrative Law Judge. If you are not present and prepared to go forward with your case when it is called, your case will be dismissed by the Administrative Law Judge.**”

On the morning of July 23, 2018, Shawane L. Lee, Esq., counsel for PECO, forwarded to me PECO’s response to a continuance request she received from Barry Zwerling, the Complainant’s husband. Ms. Lee also attached a copy of the continuance request¹ in which Mr. Zwerling requested a continuance on the Complainant’s behalf, claiming that she was at a hospital emergency room and might be admitted to the hospital. Ms. Lee requested that the Complainant be required to provide documentation of her emergency room visit, and that in the absence of medical documentation, her continuance request be denied.

Since neither the Complainant nor her husband contacted me regarding this request, I instructed my legal assistant to contact the Complainant by phone to advise her that the hearing would proceed as scheduled. No one answered at the telephone number provided in the Complaint, and my legal assistant was unable to leave a message for the Complainant.

The hearing convened as scheduled on July 23, 2018. Ms. Lee appeared on behalf of PECO with a witness and was prepared to proceed. Ms. Zwerling was not present. No witnesses were presented and no exhibits were introduced into the record. Ms. Lee moved that the Complaint be dismissed with prejudice for lack of prosecution pursuant to 52 Pa. Code § 5.245. I advised Ms. Lee that I would take her Motion into consideration. I also advised Ms. Lee that if the Complainant subsequently provided medical documentation to substantiate the continuance request, I would reschedule the matter for another date. Tr. 5.

¹ Although this continuance request was provided to Ms. Lee on July 22, 2018, at 8:50 p.m. per the fax banner at the top of the page, I will note that to date, I have not received a copy of this continuance request from the Complainant.

On July 24, 2018, my legal assistant contacted Barry Zwerling, the Complainant's husband, by phone at the telephone number provided in the Complaint. My assistant informed Mr. Zwerling that the July 23, 2018, hearing had taken place as scheduled. My assistant further informed Mr. Zwerling that if my office received, by July 25, 2018, medical documentation to substantiate the Complainant's second continuance request, I would reschedule the hearing. Lastly, my assistant provided Mr. Zwerling with the fax number for the Philadelphia Office of Administrative Law Judge.

To date, I have not received any documentation from the Complainant regarding a hospital visit on July 22-23, 2018. Moreover, I have not received any communications from the Complainant explaining her failure to attend the July 23, 2018 hearing.

Because a customer who files a complaint before the Commission has an affirmative duty to make himself or herself available to participate in hearings on the complaint, I must deem Ms. Zwerling's failure to appear at the location, date and time of the scheduled hearing, or to provide any medical documentation to substantiate the late request for postponement of the July 23, 2018, hearing, as evidence that she did not wish to participate in the hearing. Accordingly, I am granting PECO's Motion to Dismiss.

The record closed on August 14, 2018, when I received a copy of the transcript of the July 23, 2018, hearing.

FINDINGS OF FACT

1. The Complainant in this case is Brooke Zwerling.
2. The Respondent in this case is PECO Energy Company.
3. On March 28, 2018, the Complainant filed a Complaint with the Commission against the Respondent.

4. The Respondent filed an Answer on April 23, 2018.
5. By Hearing Notice dated April 23, 2018, the Commission scheduled this matter for a hearing on May 15, 2018 at 9:00 a.m.
6. By Interim Order dated May 15, 2018, I granted the Complainant's request for a continuance of the May 15, 2018 hearing.
7. By Hearing Cancellation/Reschedule Notice dated May 24, 2018, the hearing was rescheduled for July 23, 2018 at 9:30 a.m.
8. The Commission's Hearing Cancellation/Reschedule Notice was never returned to the sender.
9. On the morning of July 23, 2018, the Respondent forwarded to me PECO's response to a continuance request it received from Barry Zwerling, the Complainant's husband, on the evening of July 22, 2018.
10. The Complainant never submitted a continuance request for the July 23, 2018, hearing to me.
11. The July 23, 2018, hearing proceeded as scheduled.
12. The Complainant failed to appear for the July 23, 2018, hearing.
13. On July 24, 2018, a legal assistant with the Philadelphia Office of Administrative Law Judge informed the Complainant's husband that the hearing proceeded in the Complainant's absence, and that the hearing would be rescheduled if she provided medical documentation to substantiate her continuance request by July 25, 2018.

14. The Complainant never submitted any medical documentation to substantiate her continuance request.

15. The Complainant has not settled or withdrawn her Complaint.

DISCUSSION

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 rescheduled hearing in this case to the Complainant on May 24, 2018, by regular first-class mail to the address stated on the Complaint. To my knowledge this piece of mail was never returned to the sender, the scheduling staff for the Office of Administrative Law Judge (OALJ) in Harrisburg.

In addition, I issued a prehearing order on April 27, 2018, which, *inter alia*, warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to appear and participate in the hearing. The prehearing order, which was mailed to the Complainant at the address shown on the Complaint, was never returned. Accordingly, I must presume that this mail, which was sent in the ordinary course of business, was received by the Complainant. *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).

I will note that the Complainant's husband attempted to secure a continuance of the July 23, 2018 hearing on her behalf by submitting a continuance request to PECO on July 22, 2018. The Complainant's husband advised PECO that the Complainant would not be able to attend the hearing due to medical reasons. However, neither the Complainant nor her husband submitted a copy of this request to me. Although this request did not comply with my April 27,

2018, Prehearing Order, I gave the Complainant an opportunity to correct this error. Accordingly, the Complainant was given until the close of business on July 25, 2018, to submit documentation to demonstrate that she missed the July 23, 2018, hearing due to medical reasons. To date, the Complainant has not provided any medical documentation to substantiate her request. Moreover, the Complainant has not contacted my office in any way to explain her failure to attend the July 23, 2018 hearing.

The Complainant did not appear for the scheduled hearing. Under the circumstances, it appears the Complainant 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 Complainant 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 Complainant bears the burden of proving by a preponderance of the evidence that she is entitled to the requested relief. By failing to participate and proffer any evidence to support her Complaint, the Complainant has failed to meet her burden. Under these circumstances, 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.

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 Complainant 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).

