

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Stephanie Mobley	:	
	:	
v.	:	C-2018-3002597
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Alphonso Arnold III
Special Agent

INTRODUCTION

This Initial Decision dismisses the Complaint because the Complainant failed to appear for the hearing to prosecute her Complaint.

HISTORY OF THE PROCEEDING

On June 8, 2018, Stephanie Mobley (Complainant or Ms. Mobley) filed a Complaint with the Commission against PECO Energy Company (Respondent or PECO). In her Complaint, Ms. Mobley requested an affordable payment arrangement.

On June 26, 2018, the Respondent filed an Answer with New Matter to the Complaint, properly endorsed with a Notice to Plead. The Answer alleges that the Complainant was enrolled in PECO's Customer Assistance Program (CAP) on October 11, 2010. The Complainant was transitioned to PECO's CAP-Fixed-Credit Option on October 17, 2016. The Complainant was scheduled to recertify in the program on April 25, 2018 and her income verification information remained due as of the date of the Answer. The Answer lastly alleges

that the Complainant is actively enrolled in CAP and that her entire balance is comprised of CAP arrears.

The New Matter reiterates that the Complainant is currently enrolled in CAP and that her entire balance consists of CAP arrears. The New Matter requests that the Commission dismiss the Complaint pursuant to 66 Pa.C.S. § 1405(c)¹ as the Commission cannot issue a payment arrangement on CAP arrears. The Complainant did not file a Response to the Respondent's New Matter.

Both parties in this matter have selected to accept electronic service in this Commission proceeding. By selecting electronic service (eService), the parties have agreed that being provided a notification of the filings as well as a link to the filings in this proceeding via electronic mail shall constitute valid legal service in lieu of service through first class mail. Therefore, all documents in this proceeding were served electronically instead of by first class mail.²

By Hearing Notice served upon the parties on August 6, 2018, the Commission scheduled this matter for a call-in telephonic hearing on Tuesday, September 11, 2018, at 10:00 a.m., and assigned the case to me. Furthermore, the Hearing Notice stated the following, in bold and underline type: **“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.”**

A Prehearing Order, served upon the parties on August 2, 2018, addressed, inter alia, the method by which the parties could call-in to participate in the hearing, the procedures applicable to the hearing, and the method by which a party could request a change of the scheduled hearing date if the date was not convenient for them. Furthermore, the Prehearing

¹ (c) Customer assistance programs - Customer assistance program rates shall be timely paid and shall not be the subject of payment arrangements negotiated or approved by the commission. 66 Pa.C.S. § 1405(c).

² Service may be made electronically to filing users who have agreed to receive electronic service. Filing users will be sent an electronic mail notice informing them that a document was posted on the Commission's electronic filing system and providing a link to the document on the same day the document is posted. 52 Pa. Code § 1.53(b)(3).

Order stated the following, in bold and underline type: “**You must call into the hearing on the scheduled day and time. If you fail to do so, your case will be dismissed. You will not be called by the Special Agent.**”

I conducted the September 11, 2018, telephonic hearing as scheduled. The Complainant was not present on the telephone conference line at 10:00 a.m. The start of the hearing was delayed until approximately 10:15 a.m. to provide the Complainant with additional time to call-in to participate. The Complainant did not call-in to the hearing to participate. No communication was made to the Office of Administrative Law Judge on the Complainant’s behalf to explain her absence. Attorney Shawane L. Lee was present at the hearing on behalf of the Respondent.

No witnesses were presented, and no exhibits were introduced for the record. PECO moved to have the Complaint dismissed through a Motion for Judgment on the Pleadings (Motion). PECO was informed that the Motion would be taken under advisement.

The record³ closed on September 11, 2018, following the conclusion of the telephonic hearing. For the reasons discussed below, the Respondent’s Motion will be treated as a Motion to Dismiss for Lack of Prosecution, and the Complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant is Stephanie Mobley.
2. The Respondent is PECO Energy Company.
3. On June 8, 2018, the Complainant filed a Complaint with the Public Utility Commission.

³ The telephonic hearing was recorded by means of a tape recorder. No Court Reporter was present.

4. On June 26, 2018, the Respondent filed an Answer with New Matter, properly endorsed with a Notice to Plead.

5. The Complainant did not file a Response to the Respondent's New Matter.

6. Both parties in this matter have selected to accept electronic service in this Commission proceeding. By selecting electronic service (eService), the parties have agreed that being provided a notification of the filings as well as a link to the filings in this proceeding via electronic mail shall constitute valid legal service in lieu of service through first class mail. Therefore, all documents in this proceeding were served electronically instead of by first class mail.

7. By Hearing Notice, a hearing in this matter was scheduled for September 11, 2018.

8. The Audit History of the Commission's docketing system for this case indicates that the Commission served the Hearing Notice on the parties electronically on August 6, 2018.

9. By Prehearing Order, the parties were provided with the method by which a party could request a continuance of the hearing date, if needed.

10. The Audit History of the Commission's docketing system for this case indicates that the Commission served the Prehearing Order on the parties electronically on August 2, 2018.

11. Both the Hearing Notice and Prehearing Order warn the Complainant, in bold and underline type, that her case will be dismissed if she fails to call-in to the hearing on the scheduled day and time.

12. The Audit History of the Commission's docketing system contains no notification that either the Hearing Notice or the Prehearing Order failed to be delivered electronically at the e-mail address provided by the Complainant.

13. The Complainant did not appear for the September 11, 2018 hearing.

14. The Complainant did not withdraw or settle her Complaint with PECO, nor did she request a continuance of the hearing date.

15. At the hearing, the Respondent moved to dismiss the Complainant's Complaint through an oral Motion for Judgment on the Pleadings.

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). To satisfy this burden, the Complainant must show that the named 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). This must be shown by a preponderance of the evidence, that is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600 (Pa.Cmwlt. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992); Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980).

In this proceeding, Ms. Mobley filed a Complaint against PECO seeking legal relief in the form of a payment arrangement. As a result, the burden of proof is on Ms. Mobley to show that she is eligible for a payment arrangement.

If the Complainant presents evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied her burden of proof. The Complainant would be required to provide additional evidence to rebut the evidence of the Respondent. Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa. Cmwlth. 2001).

PECO, during the hearing for this matter, made an oral⁴ Motion for Judgment on the Pleadings to dismiss the Complaint. A Motion for Judgment on the Pleadings is governed by Section 5.102 of the Commission's regulations, which states in pertinent part, the following:

- (a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.
- (b) *Answers.* An answer to a motion for judgment on the pleadings or summary judgment, including an opposing affidavit or verification to a motion for summary judgment, may be filed within 20 days of the date of service of the motion. The answer to a motion for summary judgment may be supplemented by depositions, answers to interrogatories or further affidavits and admissions.

* * *

- (d) *Decisions on motions.*

- (1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as

⁴ (b) *Presentation of motions.* A motion may be made in writing at any time, and a motion made during a hearing may be stated orally upon the record, or the presiding officer may require that an oral motion be reduced to writing and filed separately. Written motions must contain a notice which states that a responsive pleading shall be filed within 20 days of the date of service of the motion. 52 Pa. Code § 5.103(b).

appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

52 Pa. Code § 5.102.

PECO's Motion for Judgment on the Pleadings contends, as asserted in the New Matter, that there is no genuine dispute over the fact that the Complainant's entire balance consists of CAP arrears. The Complainant admits that her entire balance consists of CAP arrears through her failure to file a Response to the Respondent's New Matter.⁵ Thus, PECO argues it is entitled to judgment as a matter of law pursuant to 66 Pa.C.S. § 1405(c). Although I agree that the Complaint in this matter should be dismissed, a Motion for Judgment on the Pleadings, made orally during the hearing, is not the appropriate vehicle for dismissal of the Complainant's Complaint.

As stated above, a Motion for Judgment on the Pleadings is to be made after the pleadings are closed, but within a time so that the hearing is not delayed. 52 Pa. Code § 5.102(a). The opposing party is then to be given notice that they have twenty days to respond to said Motion. The instant Motion for Judgment on Pleadings does not comply with the Commission's regulations as the Motion was made orally during the hearing, instead of prior to the hearing as the regulations dictate. Furthermore, the Complainant's absence at the hearing means that she is not on notice of the existence of the Motion, and the need for her to respond to the Motion within twenty days.

A discussion of Section 1.2 of the Commission's regulations is necessary to resolve the issues highlighted above presented by the Respondent's oral Motion for Judgment on the Pleadings. Section 1.2 of the Commission's regulations allows me to disregard errors or defects of procedure.

⁵ (b) Failure to file a timely reply to new matter may be deemed in default, and relevant facts stated in the new matter may be deemed to be admitted. 52 Pa. Code § 5.63(b).

(a) This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.

* * *

(c) The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party.

(d) These liberal construction provisions apply with particularity in proceedings involving pro se litigants.

52 Pa. Code § 1.2.

Applying Section 1.2 of the Commission's regulations to this present case, I can disregard errors made with respect to the Respondent's Motion if the errors do not substantially affect the rights of the Complainant. If I were to disregard the procedural requirement that a Motion for Judgment on the Pleadings be made prior to a hearing, the Complainant in this case would still be given the opportunity to respond to the Motion within twenty days. By not appearing at the hearing, the Complainant has not been put on notice that a Motion for Judgment on the Pleadings has been made against her and that she may respond to said Motion within twenty days. The Complainant's due process rights would be substantially affected if she did not have notice of the Motion for Judgment on the Pleadings made against her, nor the opportunity to respond to it. The best way to resolve this lack of notice issue would be to require the Respondent to submit its Motion for Judgment on the Pleadings, properly endorsed with a Notice to Plead, to the Complainant through writing.

Given the fact that the Complainant did not appear at the hearing to prosecute her Complaint, instead of requiring the Respondent to submit its Motion for Judgment on the Pleadings to the Complainant through writing, I will instead treat the Respondent's oral Motion for Judgment on the Pleadings as an oral Motion to Dismiss for Lack of Prosecution, pursuant to 66 Pa.C.S.A. § 332(f) and 52 Pa. Code § 5.245(a). Treating the Respondent's Motion as a Motion to Dismiss for Lack of Prosecution is the most effective way to secure the just, speedy,

and inexpensive determination of this action pursuant to 52 Pa. Code § 1.2(a). This treatment will not substantively affect the rights of the Complainant because, as will be discussed in more detail below, both the Hearing Notice and Prehearing Order served on the Complainant warned the Complainant that her Complaint would be dismissed if she failed to appear at the hearing to prosecute her Complaint. Thus, the Complainant had notice that failure to appear for the hearing would lead to the dismissal of her Complaint, and still she chose not to appear to prosecute her Complaint.

Now that I have decided to treat the Respondent's Motion for Judgment on the Pleadings as a Motion to Dismiss for Lack of Prosecution, I will now discuss the law concerning a Complainant who fails to appear for their hearing to prosecute their Complaint.

Administrative agencies, like the Public Utility Commission, are required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard. Schneider v. Pa. Pub. Util. Comm'n, 479 A.2d 10 (Pa.Cmwlth. 1984).

Ms. Mobley did not participate in the September 11, 2018 hearing. The date and time of the hearing were provided in the Hearing Notice and the Prehearing Order. The method by which Ms. Mobley could call-in to the hearing to participate in the hearing was provided in the Notice and Order. Furthermore, both the Notice and Order warned Ms. Mobley of the potential consequences that could result from choosing to not participate in the scheduled hearing, including dismissal of the Complaint.

The Hearing Notice and the Prehearing Order were served electronically on the Complainant in accordance with her selection to receive electronic service of all documents instead of receiving a paper copy in the mail. Eservice, in lieu of paper service, constitutes valid legal service. 52 Pa. Code § 1.53(b)(3). According to the Audit History of the Commission's docketing system for this case, the Commission served the Hearing Notice on the Complainant on August 6, 2018. According to the Audit History of the Commission's docketing system for this case the Commission served the Prehearing Order on the Complainant on August 2, 2018.

The Audit History of the Commission's docketing system for this case contains no notification that either the Hearing Notice or the Prehearing Order failed to be delivered electronically at the e-mail address provided by the Complainant. Therefore, the Complainant is deemed to have received these documents and had sufficient notice of the day, date and time of the scheduled hearing. Andrea Morella v. PECO Energy Company, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016); Bruce Zirkel v. Philadelphia Gas Works, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017). The Complainant's failure to appear is unexcused. The Complainant made no attempt to notify the presiding officer that she did not plan to participate in the scheduled September 11, 2018, hearing.

Under these circumstances, the Complainant had ample opportunity to appear and be heard in this proceeding but chose not to do so. Once notice of a hearing and the opportunity to be heard have been provided to the parties, it is the responsibility of both parties to appear and participate in the hearing. The due process rights of the Complainant have been fully protected. Sentner v. Bell Tel. Co. of Pa., Docket No. F-00161106 (Opinion and Order entered October 25, 1993). The Complainant did not appear, and the hearing proceeded in her absence. 66 Pa.C.S.A. § 332(f) and 52 Pa.Code § 5.245(a) provide that a party that fails to be represented at a scheduled hearing shall waive the opportunity to participate in the hearing.

(f) Actions of parties and counsel.--Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat, or to recall for further examination of witnesses who were excused, unless the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting such reopening or further examination. . . .

66 Pa.C.S.A. § 332(f).

(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.

. . .

52 Pa. Code § 5.245(a).

As stated, the Complainant bears the burden of proving by a preponderance of the evidence that she is entitled to relief. By choosing not to participate in the hearing and proffer any evidence to support the Complaint, the Complainant has failed to meet this burden.

The due process rights of the Complainant have been protected. The Complainant had notice of the scheduled hearing and failed to appear to prosecute her Complaint. Therefore, the Respondent's Motion to Dismiss the Complaint for Lack of Prosecution is granted. Accordingly, the Complaint in this matter will be dismissed in its entirety with prejudice. El-Ayazra v. West Penn Power Company, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); Volgstadt v. UGI Penn Natural Gas, Inc., Docket No. F-02266429 (Opinion and Order entered September 12, 2008) and Martin Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (Opinion and Order entered December 26, 1995).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa.C.S. § 701.
2. The burden of proof in this proceeding is on the Complainant. 66 Pa.C.S. § 332(a).
3. After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion. 52 Pa. Code § 5.102(a).

4. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties. 52 Pa. Code § 1.2(a).

5. Administrative agencies are required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard. Schneider v. Pa. Pub. Util. Comm'n, 479 A.2d 10 (Pa.Cmwlth. 1984).

6. Once notice of a hearing and the opportunity to be heard has been provided, it is the responsibility of the parties to appear and participate in the hearing. Sentner v. Bell Telephone Co. of Pennsylvania, Docket No. F-00161106, (Opinion and Order entered October 25, 1993).

7. Service may be made electronically to filing users who have agreed to receive electronic service. Filing users will be sent an electronic mail notice informing them that a document was posted on the Commission's electronic filing system and providing a link to the document on the same day the document is posted. 52 Pa. Code § 1.53(b)(3).

8. Absent notification from the Audit History of the Commission's docketing system indicating that notice has failed to be delivered electronically at the e-mail address provided by the Complainant, the Complainant is deemed to have received notice and had sufficient notice of the day, date and time of the scheduled hearing. Andrea Morella v. PECO Energy Company, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016); Bruce Zirkel v. Philadelphia Gas Works, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017).

9. By failing to appear at her scheduled hearing, the Complainant waived her opportunity to participate in the hearing. 66 Pa.C.S.A. § 332(f); 52 Pa. Code § 5.245(a).

10. By failing to appear and proffer any evidence in support of the Complaint, the Complainant has failed to meet her burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That PECO Energy Company's oral Motion to Dismiss the Complaint for Lack of Prosecution is granted.

2. That the Complaint filed by Stephanie Mobley against PECO Energy Company on June 8, 2018, at Pennsylvania Public Utility Commission Docket Number C-2018-3002597 is hereby dismissed with prejudice.

3. That the docket at Docket No. C-2018-3002597 shall be marked closed.

Date: September 12, 2018

/s/
Alphonso Arnold III
Special Agent