

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Stacie Burgin	:	
	:	
v.	:	C-2018-3003319
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Gail M. Chiodo
Special Agent

INTRODUCTION

This decision grants a motion to dismiss for the failure to prosecute because the Complainant failed to appear for the hearing despite being given notice of the hearing.

HISTORY OF THE PROCEEDING

On July 2, 2018, Stacie Burgin (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO or Respondent) in which she requested a new payment arrangement (PAR). The complaint is an untimely appeal from the decision of the Commission’s Bureau of Consumer Services (BCS) at Case Number 3598143, dated May 22, 2018, which denied Complainant’s request for a PAR.

On July 31, 2018, PECO filed an answer to the complaint in which it requested that Ms. Burgin’s complaint be dismissed noting that Complainant is not eligible for a new Commission-issued PAR, as she was already provided one, on which she defaulted.

On August 14, 2018, the Commission issued a Call-In Telephonic Hearing Notice (Hearing Notice) setting an initial telephonic hearing for October 1, 2018 at 10:00 a.m. The case was assigned to me pursuant to 52 Pa. Code § 56.174.¹ On August 16, 2018, a Prehearing Order was issued which again advised the parties of the date and time of the scheduled hearing and informed them of the procedures applicable to this proceeding including the procedure for requesting a continuance, if necessary.

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 in bold print and underlining in original). Similarly, the Prehearing Order stated, *inter alia*, that: “**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.**” (emphasis in bold print and underlining in original).

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

The hearing convened as scheduled on October 1, 2018 at 10:00 a.m. Ms. Shawane Lee, Esquire, appeared on behalf of PECO, along with a potential witness, and was prepared to proceed. Ms. Burgin did not appear. After waiting for approximately fifteen minutes for Ms. Burgin to appear, which she did not, Attorney Lee made an oral motion to dismiss the complaint with prejudice 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 following the conclusion of the hearing. No communication has been made to the Office of Administrative Law Judge by, or on 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 her absence. For the reasons discussed below, the motion of PECO will be granted and the complaint will be dismissed with prejudice.

FINDINGS OF FACT

1. The Complainant is Stacie Burgin.
2. The Respondent is PECO Energy Company.
3. By Call-In Telephonic Hearing Notice issued August 14, 2018, an initial telephonic hearing was scheduled for October 1, 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 in bold print and underlining in original).
5. By Prehearing Order issued August 16, 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*, “**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.**” (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 her 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. The hearing convened as scheduled on October 1, 2018 at 10:00 a.m.

10. Ms. Shawane Lee, Esquire, appeared on behalf of PECO, along with one potential witness, and was prepared to proceed.

11. The Complainant did not appear for the October 1, 2018 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). As the party seeking relief, Ms. Burgin bears the burden of proof.

In her complaint, Ms. Burgin seeks relief in the form of a more favorable Commission-issued payment arrangement (PAR). The complaint is an untimely appeal from the decision of the Commission's Bureau of Consumer Services (BCS) at Case Number 3598143, dated May 22, 2018, which denied Complainant's request for another Commission-issued PAR, having been granted one previously.

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.*

Ms. Burgin did not appear at the date and time set for the hearing in her case despite receiving 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).

The Hearing Notice and Prehearing Order were sent separately to Ms. Burgin by regular first-class mail and neither of them were returned to the Commission as undeliverable. Accordingly, it must be presumed that these documents, which were sent to Ms. Burgin in the ordinary course of business, were received by her. *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).

Consequently, Complainant had sufficient notice of the day, date and time of the scheduled hearing. *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016); *Zirkel v. PECO Utilities, Inc.*, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017). Further, both the Hearing Notice and Prehearing Order warned Ms. Burgin of the potential consequences that could result from choosing not to participate in the scheduled hearing, including dismissal of her complaint.

Further, attorney Lee noted for the record that about a week prior to the hearing, Respondent called Ms. Burgin in an effort to resolve this matter. During this conversation, Ms. Burgin was advised, as a low-income customer, of how to apply for PECO's customer assistance program (CAP) and PECO expected her to do so. Further, attorney Lee represented that Ms. Burgin was again advised of the date and time of the hearing.

Ms. Burgin did not appear at the time of the hearing, nor did she or anyone on her behalf request a continuance of the hearing. As such, Ms. Burgin had notice and an opportunity to be heard in this proceeding but chose not to appear. Therefore, Ms. Burgin's due process rights have been fully protected. *Sentner v. Bell Telephone Co. of Pa.*, 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. Burgin has failed to carry her burden. Thus, it is appropriate to dismiss the complaint with prejudice. *Jefferson v. PECO 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. Ms. Burgin's due process rights have been fully protected. *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161106 (Order entered October 25, 1993); 52 Pa. Code § 5.245(a).

7. By failing to appear and proffer any evidence in support of her claim, the Complainant has failed to carry her burden of proof.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of PECO Energy Company to dismiss the formal complaint of Stacie Burgin with prejudice at Docket Number C-2018-3003319 for the failure to prosecute is granted.

