

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tiffany White	:	
	:	
v.	:	C-2018-3003213
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Gail M. Chiodo
Special Agent

INTRODUCTION

This decision denies the utility’s oral motion for a judgment on the pleadings, and grants the utility’s motion to dismiss for the failure to prosecute the complaint.

HISTORY OF THE PROCEEDING

On July 6, 2018, Tiffany White (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO or Respondent) in which she requested a payment arrangement (PAR) she could afford.

On July 25, 2018, PECO filed an Answer in which it requested that Ms. White’s complaint be dismissed, arguing that Complainant is not eligible for a Commission-issued PAR, as Ms. White is actively enrolled in PECO’s customer assistance program (CAP) and that Ms. White’s outstanding balance of \$2,143.72 is comprised entirely of CAP arrears.¹

¹ The Answer also noted that the complaint is an untimely appeal from the decision of the Commission’s Bureau of Consumer Services (BCS) at Case Number 3612933, dated May 23, 2018, which denied Complainant’s request for a PAR.

On July 31, 2018, the Commission issued a hearing notice setting an initial telephonic hearing for October 3, 2018 at 10:00 a.m. The case was assigned to me pursuant to 52 Pa. Code § 56.174.² On August 10, 2018, a corrected hearing notice was issued which corrected the toll-free bridge number for the parties to call to participate in the hearing. On August 14, 2018, a prehearing order was issued which again advised the parties of the date and time of the scheduled hearing, the correct conference number, and informed them of the procedures applicable to this proceeding including the procedure for requesting a continuance, if necessary.

Both hearing notices and the prehearing order advised the parties of the consequences of the failure to appear and participate in the hearing, including losing their case.

The hearing convened as scheduled on October 3, 2018 at 10:00 a.m. Ms. Shawane L. Lee, Esquire, appeared on behalf of PECO and Ms. White appeared *pro se*. After the parties indicated that they were unable to settle this matter, the hearing commenced. However, before any testimony was taken, the undersigned noted for the record that the Office of Administrative Law Judge (OALJ) received three pre-marked exhibits from PECO, at which time Ms. White stated she did not receive any exhibits from PECO.

Attorney Lee stated that PECO's records showed that PECO served the exhibits on Ms. White on September 20, 2018 by Federal Express (Fed Ex) and first-class mail to the address provided by Ms. White on her Complaint, which was consistent with the address in PECO's customer records; further, PECO's records indicated that the Fed Ex delivery was successful on September 21, 2018. Ms. White responded that she moved sometime at the end of July or beginning of August of 2018 and that she provided her new address to PECO after she moved but that she did not provide her new address to the Commission. Attorney Lee stated that PECO had no record of this new address.

² 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).

Next, Ms. White moved to continue the hearing because she did not receive the exhibits. Attorney Lee did not object to the continuance but asked that the matter be rescheduled as soon as possible and stated that she would have the exhibits again served on Ms. White by overnight delivery via Fed Ex at the new address provided.

Before adjourning this matter, by agreement of both parties, I rescheduled the initial hearing for October 9, 2018 at 2:00 p.m. I also instructed the parties that they needed to call the same conference number and enter the same PIN number as provided previously.

Shortly after the adjournment, on October 3, 2018, the Commission issued a hearing notice rescheduling the initial hearing for October 9, 2018 at 2:00 p.m., as agreed upon by the parties. The Commission mailed this hearing notice to Ms. White at the new address provided by her earlier that day. Similar to the prior hearing notices, the parties were warned of the consequences for the failure to participate in the hearing including losing their case.

On October 9, 2018 at 2:00 p.m., the hearing convened as scheduled. Attorney Lee appeared on behalf of PECO, along with a potential witness, and was prepared to proceed. Ms. White did not appear. After waiting for approximately fifteen minutes for Ms. White to appear, which she did not, Attorney Lee made two oral motions. First, Attorney Lee moved for a judgment on the pleadings on the grounds that, pursuant to 66 Pa.C.S. § 1405(c), the Commission lacks authority to provide Complainant any payment relief since her outstanding account balance consists solely of CAP arrears.

Second, Attorney Lee moved to dismiss the complaint with prejudice for the failure of Complainant to appear and prosecute her complaint. Further, Attorney Lee noted that PECO served Complainant with its proposed exhibits by Fed Ex on October 3, 2018. I took these motions under advisement. No witnesses were presented and no exhibits were introduced for the record.³

³ Pursuant to 52 Pa. Code § 56.174(3), the hearing was tape recorded. No court reporter was present. Further, the preliminary matter on October 3, 2018 was also recorded in which Complainant's continuance request was granted and Complainant verbally agreed to reschedule the initial hearing for October 9, 2018 at 2:00 p.m.

The record closed following the conclusion of the hearing. To date, no communication has been made to the OALJ by, or on behalf of, Complainant explaining her absence. For the reasons discussed below, PECO's motion for a judgment on the pleadings is denied and PECO's motion to dismiss with prejudice for the failure to prosecute is granted.

FINDINGS OF FACT

1. The Complainant is Tiffany White.
2. The Respondent is PECO Energy Company.
3. On July 31, 2018, a hearing notice was issued scheduling an initial telephonic hearing for October 3, 2018 at 10:00 a.m.
4. On August 10, 2018, a corrected hearing notice was issued which corrected the toll-free bridge number for the parties to call to participate in the hearing.
5. On August 14, 2018, a prehearing order was issued which advised the parties of the date and time of the scheduled hearing and informed them 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. Both hearing notices and the prehearing order advised the parties of the consequences of the failure to appear and participate in the hearing, including losing their case.
7. Both hearing notices and the prehearing order were mailed to the Complainant by first-class mail to the address provided on her Complaint—i.e, 7310 Ruskin Road, Philadelphia, Pennsylvania (Ruskin address).
8. On October 3, 2018, the hearing convened as scheduled.

9. On October 3, 2018, Ms. Shawane L. Lee, Esquire, appeared on behalf of PECO, and the Complainant appeared *pro se*.

10. On October 3, 2018, prior to taking testimony, the undersigned presiding officer noted that the OALJ received three pre-marked exhibits from PECO.

11. Ms. White moved to continue the hearing stating that she did not receive any exhibits from PECO.

12. PECO served the exhibits on Complainant by Fed Ex and first-class mail on September 20, 2018 at the Ruskin address.

13. On October 3, 2018, Ms. White provided an address which was different than the one on her complaint—i.e., 127 Redfield Street, Philadelphia, Pennsylvania (Redfield address).

14. Attorney Lee did not object to Complainant's continuance request, but asked that the matter be rescheduled as soon as possible.

15. On October 3, 2018, before adjourning this matter, by agreement of both parties, the initial hearing was rescheduled for October 9, 2018 at 2:00 p.m.

16. On October 3, 2018, after the parties agreed to reschedule the hearing for October 9, 2018 at 2:00 p.m., the undersigned instructed both parties to call the same conference number and enter the same PIN number as instructed previously.

17. On October 3, 2018, a hearing notice was issued rescheduling the initial telephonic hearing for October 9, 2018 at 2:00 p.m., as agreed upon by the parties.

18. The October 3, 2018 hearing notice was mailed to Ms. White at the Redfield address provided by her earlier that same day.

19. On October 9, 2018 at 2:00 p.m., the hearing convened as scheduled.

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

21. The Complainant did not appear at the October 9, 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). In her complaint, Ms. White seeks relief in the form of a payment arrangement (PAR) that she can afford. As the party seeking relief, Ms. White bears the burden of proof.

Motion for judgment on the pleadings.

First, during the hearing, counsel for PECO made an oral motion for a judgment on the pleadings on the grounds that, pursuant to 66 Pa.C.S. § 1405(c), the Commission lacks authority to provide Complainant any payment relief since her outstanding account balance consists solely of CAP arrears. This section provides that CAP rates "shall not be the subject of payment arrangements negotiated or approved by the [C]ommission." 66 Pa.C.S. § 1405(c). Further, the Commission has made clear that a complainant is not eligible for a Commission-issued PAR when the outstanding balance is entirely comprised of CAP arrears. *Boggess v. PECO Energy Co.*, No. C-2015-2483633 (Opinion and Order entered November 5, 2015).

However, a motion for judgment on the pleadings is available only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1). Further, this motion should be granted only when the right to relief is clear and free from doubt. *Id.* In determining the absence of a genuine issue of material fact,

the Commission must view the record in the light most favorable to the non-moving party and resolve any doubts against the entry of the judgment. *Boggess, supra*. Therefore, in this proceeding, PECO bears the burden of demonstrating clearly that there is no genuine issue of material fact.

PECO has not met its burden of demonstrating clearly that Ms. White's outstanding balance is comprised entirely of CAP arrears. Since no exhibits were admitted into the record, no exhibit supports this finding.

Further, PECO did not raise this affirmative defense in its Answer by asserting any allegations under "New Matter", along with a notice to plead, in conformance with 52 Pa.Code § 5.62. Section 5.62 provides that, "An affirmative defense shall be pleaded in an answer or other responsive pleading under the heading of 'New Matter.'" 52 Pa. Code § 5.62(b). Had PECO raised the allegation to support this affirmative defense under new matter in its answer, Ms. White would have had an opportunity to respond in writing whether she disputed this allegation. *See*, 52 Pa.Code § 5.63(a) (providing that replies to new matter shall be filed with the Commission and served within twenty days after service of the new matter). In the alternative, had Ms. White failed to reply to the new matter, her failure may have been deemed an admission that her entire balance is comprised of CAP arrears. *See* 52 Pa.Code § 5.63(b) (providing that the "[f]ailure 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.").

Therefore, the record does not clearly support a finding that Ms. White's outstanding balance is comprised entirely of CAP arrears. Consequently, PECO's oral motion for a judgment on the pleadings is denied.

Failure to appear and prosecute

Second, Attorney Lee moved to dismiss the complaint with prejudice for the failure of Complainant to appear and prosecute her complaint.

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.*

The hearing convened as scheduled on October 3, 2018 at 10:00 a.m. and both parties were present. However, before any testimony was taken, as an administrative matter, the undersigned noted that the Office of Administrative Law Judge (OALJ) received three pre-marked exhibits from PECO, at which time Ms. White responded that she did not receive any exhibits from PECO.

Next, Ms. White moved to continue the hearing because she did not receive the exhibits. After Attorney Lee verified that PECO's customer records showed that there was a successful service of the exhibits to Ms. White by Fed Ex at the Ruskin address, Ms. White explained that she moved sometime after PECO had served these exhibits. After further discussion concerning Ms. White's address, Attorney Lee did not object to the continuance but asked that the matter be rescheduled as soon as possible and stated that she would have the exhibits served to Ms. White again by Fed Ex overnight at the new address provided.

Before adjourning this matter, while both parties were present, they agreed to a date and time that was convenient for each of them and the undersigned was available. Therefore, by agreement of both parties, I rescheduled the initial hearing for October 9, 2018 at 2:00 p.m., and instructed the parties that they needed to call the same conference number and enter the same PIN number as provided previously.

Shortly after the adjournment, on October 3, 2018, the Commission issued a hearing notice rescheduling the initial hearing for October 9, 2018 at 2:00 p.m., as agreed upon by the parties. Like the prior hearing notices, the parties were warned of the consequences for the failure to participate in the hearing including losing their case.

On October 9, 2018 at 2:00 p.m., the hearing convened as scheduled. Attorney Lee appeared on behalf of PECO, along with a potential witness, and was prepared to proceed.

Ms. White did not appear. After waiting for approximately fifteen minutes for Ms. White to appear, which she did not, the hearing proceeded in Ms. White's absence.

The record closed following the conclusion of the hearing. To date, no communication has been made to the OALJ by, or on behalf of, Complainant explaining her absence. For the reasons discussed below, the motion of PECO to dismiss with prejudice for the failure of Complainant to appear and prosecute the complaint is granted.

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).

On October 9, 2018, Ms. White did not appear at the date and time set for the hearing in her case despite verbally agreeing to this date and time, as well as receiving written notice of the hearing. Ms. White appeared at the October 3, 2018 hearing, was granted a continuance, and agreed to the October 9, 2018 hearing at 2:00 p.m., stating that such date and time was convenient for her. The oral agreement of the parties was followed by a written hearing notice again advising of the date and time for the hearing as agreed upon. This written notice was sent to Ms. White by regular first-class mail at the address provided by her at the October 3, 2018 hearing and was not returned to the Commission as undeliverable. Accordingly, it must be presumed that this document, which was sent to Ms. White in the ordinary course of

business, was 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, the hearing notices and prehearing order warned Ms. White of the potential consequences that could result from choosing not to participate in the scheduled hearing, including dismissal of her complaint.

Ms. White 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. White had notice and an opportunity to be heard in this proceeding but chose not to appear. Therefore, Ms. White'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).

By failing to appear and present any evidence in support of her complaint, Ms. White 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. A motion for judgment on the pleadings is available only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, and should only be granted when the right to relief is clear and free from doubt. 52 Pa. Code § 5.102(d)(1).

5. In determining the absence of a genuine issue of material fact, the Commission must view the record in the light most favorable to the non-moving party and resolve any doubts against the entry of the judgment. *Boggess v. PECO Energy Co.*, No. C-2015-2483633 (Opinion and Order entered November 5, 2015).

6. An affirmative defense shall be pleaded in an answer or other responsive pleading under the heading of "New Matter", and replies to New Matter shall be filed with the Commission and served within twenty days after service of the New Matter. 52 Pa. Code §§ 5.62(b), 5.63(a).

7. PECO did not plead any affirmative defense in its Answer under "New Matter".

8. PECO did not meet its burden of proof in establishing it is entitled to a judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

9. 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.*

10. 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).

11. Ms. White'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).

12. 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 oral motion of PECO Energy Company for a judgment on the pleadings at Docket Number C-2018-3003213 is denied.
2. That the motion of PECO Energy Company to dismiss the formal complaint of Tiffany White with prejudice at Docket Number C-2018-3003213 for the failure to prosecute is granted.
3. That the formal complaint filed by Tiffany White at Docket Number C-2018-3003213 is hereby dismissed with prejudice.
4. That this matter be marked closed.

Date: October 23, 2018

_____/s/
Gail M. Chiodo
Special Agent