

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jameeah Cherry	:	
	:	
v.	:	C-2018-3004547
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Angela T. Jones
Administrative Law Judge

INTRODUCTION

The undersigned through this decision dismisses the formal Complaint (Complaint) filed in this matter for failure of the Complainant to appear at the hearing and prosecute the Complaint.

HISTORY OF THE PROCEEDING

On September 10, 2018, the Complainant, Jameeah Cherry, filed a Complaint with the Pennsylvania Public Utility Commission (Commission or PUC) against PECO Energy Company (PECO or Company or Respondent). The Complainant indicated that the utility threatened to terminate or has already terminated the Complainant's electric service and that the Complainant would like a payment agreement.

The Complaint was served on PECO electronically (eService) by the Commission's Secretary on September 10, 2018, according to the audit history of the docket.

The eService is pursuant to the waiver of Section 702 program, under which the Respondent waives the service requirements in 66 Pa.C.S. § 702.

On September 13, 2018, Shawane Lee, Esquire, counsel for the Respondent, filed an Answer to the Complaint. The Answer denied all material facts of the Complaint. The Respondent averred that the Complainant is actively enrolled in the Respondent's Customer Assistance Program (CAP) and recertified in CAP on May 26, 2017. The Answer also averred that the Complainant's entire balance of \$428.33 is comprised of CAP arrears. The Respondent contended that pursuant to the statute at 66 Pa.C.S. § 1405(c),¹ the Commission has no authority to grant the Complainant a payment arrangement on her CAP arrearage.

The Respondent requested that the Commission dismiss the Complaint.

A Hearing Notice dated September 24, 2018, notified the parties that an initial in-person hearing was scheduled for Thursday, October 25, 2018, at 1:30 p.m. This Notice indicated that the case was assigned to the undersigned Administrative Law Judge (ALJ) as the presiding officer. This matter was scheduled in call-of-the-docket fashion where multiple cases are scheduled for the same date and time and the presiding officer calls each case and hears the Complaints in succession.

A Prehearing Order dated October 1, 2018, provided procedural rules and guidelines for the proceeding and emphasized the following:

- (1) a request to change the scheduled hearing should be sent at least five days prior to the hearing date;
- (2) the request for a hearing change is to be in writing and sent to all parties of record; and
- (3) a caution that Complainant may lose the case if she does not take part in the hearing and present evidence on the issues raised.

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

The evidentiary hearing convened at 1:30 p.m. on October 25, 2018. The Complainant was not present and did not communicate a reasonable excuse as to why she was unable to appear timely. Attorney Lee was present with one potential witness. Consistent with the practice of the undersigned, the hearing recessed for approximately 15 minutes to provide the Complainant time to communicate a reasonable excuse as to why she would be late or was not going to appear. The hearing reconvened at approximately 1:55 p.m. and the Complainant was still absent. Attorney Lee made two Motions: (1) a Motion for judgment on the pleadings that the Commission does not have the authority to grant the relief requested (Motion I); and (2) a Motion to dismiss the Complaint with prejudice for failure to prosecute the Complaint (Motion II). I stated that I would rule on the Motions in writing and adjourned.

The transcript of this Complaint consists of eight pages of what was stated on the record. The record closed on November 5, 2018, when the undersigned received the transcript.

To date, there has been no further communication from the Complainant. This matter is ripe for decision.

FINDINGS OF FACT

1. The Complainant is Jameeah Cherry, who receives electric service from the Respondent at 967 S. 5th Street, Philadelphia, Pennsylvania (service address).
2. The Respondent is PECO Energy Company, a jurisdictional public utility that provides electric distribution service in the Commonwealth of Pennsylvania.
3. On September 10, 2018, the Complainant filed a Complaint with the Commission against the Respondent.
4. The Respondent filed its Answer on September 13, 2018, which denied any wrongdoing.

5. A Hearing Notice dated September 24, 2018, was sent by regular first-class mail to the Complainant and scheduled an initial hearing for Thursday, October 25, 2018, at 1:30 p.m.

6. A Prehearing Order, dated October 1, 2018, provided the Complainant with the proper procedure to participate in the initial hearing and to obtain a continuance to reschedule the hearing date.

7. None of the documents mailed to the Complainant were returned to the Commission by the United States post office as undeliverable.

8. Neither the Complainant nor any counsel representing the Complainant appeared at the scheduled hearing on October 25, 2018.

9. The Complainant did not settle or withdraw the Complaint.

DISCUSSION

The Respondent contended in the oral Motion I that the Commission by statute lacked authority to grant the relief sought. The Complainant requested a payment arrangement. The Respondent contended that the Complainant's entire balance was comprised of CAP arrears, and therefore, 66 Pa.C.S. § 1405(c), *supra* at 2, note 1, is applicable which prohibits the Commission from granting a payment arrangement.

52 Pa.Code § 5.102 states,

§ 5.102. Motions for summary judgment and judgment on the pleadings.

(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.

(c) *Motion for summary judgment.* A motion for summary judgment must be based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits. Documents not already filed with the Commission shall be filed with the motion.

(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 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.

(2) *Standard for grant or denial in part.* The presiding officer may grant a partial summary judgment if the 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 on one or more but not all outstanding issues.

(3) *Form of decision.* The presiding officer will grant, in whole or in part, the motion in the form of an initial or recommended decision which shall be subject to exceptions as set forth in § 5.533 (relating to exceptions). Denial of a motion will be in the form of a written order.

52 Pa.Code § 5.102 (emphasis added).

The Respondent orally moved for judgment on the pleadings by Motion I. There is no record evidence that Respondent filed a Notice to Plead that was served on the Complainant. Thus, Motion I is not in compliance with the Commission's regulation.

Motion I is denied because it is not in compliance with the Commission's regulation. The undersigned will now consider Motion II.

The party seeking affirmative relief from the Commission bears the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the Complaint to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976). This responsibility or accountability to the named utility must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). A preponderance of the evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

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). Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944 (Pa.Cmwlth. 1994).

The Commission sent a Hearing Notice dated September 24, 2018, to the Complainant by regular first-class mail to the address listed on the Complaint. This document was never returned to the sender, the scheduling staff of the Office of Administrative Law Judge (OALJ) in Harrisburg.

The undersigned issued a Prehearing Order dated October 1, 2018, which *inter alia*, instructed the parties that any request to change the scheduled hearing date should state the agreement or opposition of the other party and be submitted in writing no later than five days prior to the hearing. The Prehearing Order also stated the day, date and time for the scheduled initial hearing. The Prehearing Order, which was mailed to the Complainant at the address

shown in the Complaint, was never returned by the U.S. post office as undeliverable. Accordingly, it is presumed that this mailing, which was done through the ordinary course of business, was received by the Complainant. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meirerdierck 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).

The Complainant is deemed to have received these documents and had sufficient notice of the day, date and time of the scheduled hearing. The Complainant was notified of the scheduled hearing date and time, as well as how to contact the OALJ. The Complainant made no attempt whatsoever to notify the presiding officer that she did not plan to participate in the scheduled October 25, 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 has 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); 52 Pa.Code § 5.245(a).

Section 332(a) of the Public Utility Code (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 relief. By choosing not to appear and proffer any evidence to support the Complaint, the Complainant has failed to meet this burden.

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.Cmwlt. 2008).

The Respondent’s counsel moved that the Complaint be dismissed with prejudice for failure to prosecute. 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. The failure of the Complainant to appear at this scheduled hearing is unexcused. By her failure to attend the hearing and present evidence on the issue raised, the Complainant failed to sustain her burden of proof.

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 Corp.*, Docket No. C-20042399 (Final Order entered October 13, 2004); *Jones v. The Peoples Natural Gas Co.*, Docket No. C-20054885 (Opinion and Order entered February 14, 2006); *El-Ayazra v. West Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); *Hack v. Pa. American Water Co.*, Docket No. F-2017-2618548 (Opinion and Order entered August 23, 2018); *Whaumbush v. PECO Energy Co.*, C-2017-262269 (Opinion and Order entered August 23, 2018).

The Complainant waived the opportunity to participate in the hearing by failing to appear. This case will be dismissed. 52 Pa.Code § 5.245(a); *Jefferson v. UGI Utilities, Inc.*, 1995 Pa. PUC LEXIS 159. Motion II is granted by the ordering paragraphs below.

CONCLUSIONS OF LAW

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

2. Notice properly mailed to a party's last known address and not returned by the post office is presumed to have been received. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meirerdierck 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).

3. By Hearing Notice dated September 24, 2018, the Complainant had notice of the day, date and time of the scheduled hearing. 52 Pa.Code § 5.201(a).

4. 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 (Order entered October 25, 1993).

5. As the party seeking affirmative relief from the Commission, the Complainant bears the burden of proof. 66 Pa.C.S. § 332(a).

6. The due process rights of the Complainant have been fully protected because the Complainant was afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlt. 1984).

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

8. The Complainant, Jameeah Cherry, failed to sustain her burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion by Shawane Lee, Esquire, on behalf of PECO Energy Company to dismiss the formal Complaint of Jameeah Cherry at Docket No. C-2018-3004547 for lack of prosecution is granted.

2. That the Motion by Shawane Lee, Esquire, on behalf of PECO Energy Company to dismiss the formal Complaint of Jameeah Cherry at Docket No. C-2018-3004547 for lack of authority to grant the relief sought is denied.

3. That the formal Complaint filed by Jameeah Cherry against PECO Energy Company at Docket No. C-2018-3004547, is dismissed in its entirety with prejudice.

4. That the Secretary's Bureau mark Docket No. C-2018-3004547 closed.

Dated: November 6, 2018

/s/
Angela T. Jones
Administrative Law Judge