

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Waylon Fabian	:	
	:	
v.	:	C-2018-3003088
	:	
West Penn Power Company	:	

**INITIAL DECISION**

Before  
Andrew M. Calvelli  
Administrative Law Judge

**INTRODUCTION**

This Decision grants a Motion to Dismiss for Failure to Prosecute because the Complainant failed to appear for the hearing at the designated date and time despite being given notice of the hearing.

**HISTORY OF THE PROCEEDING**

On June 27, 2018, Waylon Fabian (Mr. Fabian) filed a formal Complaint with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn) at Docket Number C-2018-3003088. In the Complaint, Mr. Fabian contended that West Penn was threatening to shut off his service and that his meter was inaccurate. Mr. Fabian also requested a payment arrangement on his account balance. The Complaint was served on West Penn electronically by the Commission’s Secretary on June 29, 2018.<sup>1</sup>

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<sup>1</sup> West Penn has signed a waiver of the Section 702 requirements for service of formal complaints, 66 Pa.C.S. § 702, and has agreed to electronic service instead under the Commission’s Waiver of 702 program.

On July 18, 2018, West Penn filed an Answer in response to Mr. Fabian's Complaint. In its Answer, West Penn admitted or denied the various averments Mr. Fabian made in his Complaint. West Penn concluded its Answer by requesting dismissal of the Complaint.

On July 23, 2018, a Telephonic Hearing Notice was issued establishing an Initial Telephonic Hearing for Thursday, September 27, 2018 at 10:00 a.m. and assigning me as the Presiding Officer. The Hearing Notice indicated to the parties: "You may lose this case if you do not take part in this hearing and present facts on the issues raised." The Hearing Notice was sent to Mr. Fabian at the address provided on his Complaint via first-class mail. The postal authorities did not return the Hearing Notice to the Commission as being undeliverable to Mr. Fabian.

A Prehearing Order was sent to the parties on September 5, 2018. The Prehearing Order also advised the parties that they must be available for the hearing or they would risk losing the case. The Prehearing Order sent to Mr. Fabian was not returned to the Commission by the postal authorities as being undeliverable to Mr. Fabian.

The hearing convened on September 27, 2018 as scheduled. John Munsch, Esquire, appeared on behalf of West Penn. No one appeared on behalf of Mr. Fabian. Tr. 5. Mr. Fabian did not call in for the hearing as instructed on the Hearing Notice and Prehearing Order. Id. The Presiding Officer advised West Penn's counsel that he would give an extra 10 minutes for Mr. Fabian to call in to the hearing. Tr. 4. By 10:12 a.m. on the date of the hearing, Mr. Fabian still had not called in to the hearing. Tr. 4, 5.

Counsel for West Penn then made a motion to dismiss the Complaint, due to Mr. Fabian's failure to appear and prosecute his case. Tr. 6. Counsel also noted that he had attempted to contact Mr. Fabian the day prior to the hearing, but Mr. Fabian's phone had been disconnected. Id. The record in this case consists of the hearing transcript of 8 pages, and the record closed when the transcript was filed with the Commission on October 22, 2018.

## FINDINGS OF FACT

1. The Complainant in this case is Waylon Fabian.
2. The Respondent in this case is West Penn Power Company.
3. No one appeared at the hearing on behalf of Mr. Fabian. Tr. 5.
4. Mr. Fabian received notice of the hearing on July 23, 2018 when the Commission mailed a Hearing Notice to the address he provided on his complaint.
5. Mr. Fabian also received notice of the hearing on September 5, 2018 when the Commission mailed a Prehearing Order to the address he provided on his complaint.
6. Neither the Hearing Notice nor the Prehearing Order were returned to the Commission by the postal authorities as being undeliverable to Mr. Fabian.
7. Both the Hearing Notice and Prehearing Order advised Mr. Fabian that he could lose his case if he did not attend the 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 this proceeding, Mr. Fabian filed a Complaint against West Penn. Mr. Fabian, therefore, has the burden of proof.

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.

No one appeared on behalf of Mr. Fabian at the date and time set for the hearing in his case despite notice of the hearing. Commission regulations address circumstances when a party fails to appear in a proceeding. 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

The Hearing Notice and Prehearing Order were sent to Mr. Fabian by regular first class mail, and were not returned to the Commission as being undeliverable. Accordingly, it must be presumed that the Hearing Notice and Prehearing Order sent to Mr. Fabian in the ordinary course of business were received by Mr. Fabian. 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, 449 A.2d 658 (1982). Of note, the Hearing Notice and Prehearing Order stated that, if a party fails to participate in the hearing, the hearing may proceed without that party and a decision may be entered against that party.

No one appeared on behalf of Mr. Fabian at the time of the hearing. Nor did anyone ever request a postponement or continuance of the hearing. As such, Mr. Fabian had notice and an opportunity to be heard in this proceeding, but chose not to appear. Therefore, Mr. Fabian's due process rights have been fully protected. Sentner v. Bell Telephone Company of Pennsylvania, Docket No. F-00161106 (Order entered October 25, 1993); *see also*, 52 Pa.Code § 5.245(a).

During the hearing, counsel for West Penn moved to have the Complaint dismissed for lack of prosecution. Tr. 6. By failing to appear and present any evidence in support of his complaint, Mr. Fabian has failed to carry his burden of proof. Thus, it is appropriate to dismiss the complaint. Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (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. 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). "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).

3. 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.

4. 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).

5. Mr. Fabian's due process rights have been fully protected. Sentner v. Bell Telephone Company of Pennsylvania, Docket No. F-00161106 (Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

6. Mr. Fabian failed to carry his burden of proof in this proceeding because he failed to appear at the hearing to present his case to the Commission.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of West Penn Power Company to dismiss the Complaint of Waylon Fabian at Docket Number C-2018-3003088 is granted.

2. That the Complaint filed by Waylon Fabian at Docket Number C-2018-3003088 is hereby dismissed.

3. That Docket Number C-2018-3003088 shall be marked closed by the Secretary's Bureau.

Date: January 4, 2019

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/s/  
Andrew M. Calvelli  
Administrative Law Judge