

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Willard and Elsbeth Sunstein	:	
	:	
v.	:	C-2018-3000078
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This Decision grants a Motion to Dismiss for Failure to Prosecute because the Complainants failed to appear at the scheduled hearing despite being given notice of the hearing.

HISTORY OF THE PROCEEDING

On February 26, 2018, Willard and Elsbeth Sunstein (Mr. and Mrs. Sunstein or Complainants) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against PPL Electric Utilities Corporation (PPL or Respondent) at Docket Number C-2018-3000078. In the complaint, Mr. and Mrs. Sunstein averred that they wanted an accommodation of not having a wireless smart meter on their service property located at 860 Cupola Road, Honeybrook, Pennsylvania as it will be harmful to their health. Complainants also averred that the installation of wireless smart meters on their neighbors' properties had already created negative health effects upon them. Finally, Complainants contend the smart meters pose fire and safety concerns.

The Complaint was served upon Respondent on February 27, 2018. PPL filed an Answer on March 19, 2018 denying the material averments in the Complaint. PPL admitted to attempting to install a smart meter on Complainant's residence. However, PPL denied that its new smart meters have caused, contributed to, or exacerbated any illness or will cause, contribute to, or exacerbate any illnesses. PPL further denied that its meters pose any fire or safety concerns. PPL contends there is no opt-out provision in the law and Complainant is not entitled to the accommodation relief requested.

On April 5, 2018, a Call-In Telephone Hearing Notice was issued scheduling an Initial Call-In Telephonic Hearing on July 10, 2018 and assigning me as presiding officer. Also on April 5, 2018, I issued a Prehearing Order and a Protective Order as Complainants had already marked some of their Complaint as "confidential." The Prehearing Order stated at Ordering Paragraph No. 3 as follows:

A request for a change of the scheduled hearing date must be submitted in writing no later than five (5) days prior to the hearing. 52 Pa. Code § 1.15(b). The requesting party must contact the other party to determine whether there is agreement to the change prior to contacting the presiding officer. Requests for changes of initial hearings must be sent to me with copies to all parties of record. Changes are granted only in rare situations where sufficient cause exists.

Prehearing Order at 2.

On or about April 8, 2018, through e-mail correspondence, Mr. Sunstein requested the telephonic hearing be continued and converted to a 3-day in-person hearing. By notice dated June 20, 2018, the hearing was then converted to a telephonic prehearing conference and was held on July 10, 2018. Transcript Dated July 10, 2018 at 1-9. Complainants requested additional time to file an Amended Complaint. Transcript Dated July 10, 2018 at 9-11. By Third Interim Order dated August 8, 2018, Complainants were given until August 30, 2018 to file an Amended Complaint. Upon Complainants' request, this deadline was extended until September 7, 2018, via e-mail correspondence. To date, no amended complaint has been filed.

The Third Interim Order directed Complainants' Expert Direct Testimony be due on October 31, 2018 and Respondent's Expert Rebuttal Testimony be due on December 5, 2018.

Additionally, the Third Interim Order indicated that the Evidentiary Hearings would be rescheduled to January 24–25, 2019. A Notice dated August 9, 2018 scheduled in-person evidentiary hearings for January 24–25, 2019. The Hearing Notices stated, “Attention: You may lose the case if you do not come to this hearing and present facts on the issues raised.” The August 9, 2018 Hearing Notice was sent to Mr. and Mrs. Sunstein at the address provided on their complaint via first-class mail. The postal authorities did not return any Hearing Notices or Prehearing Orders to the Commission as being undeliverable to Complainants.

On November 20, 2018, PPL sent me a letter requesting the second day of hearings be cancelled as Complainants had failed to serve PPL with any written expert testimony or exhibits by October 31, 2018. On December 5, 2018, PPL mailed Complainants and the presiding officer copies of exhibits and statements it planned to utilize at the hearings. On January 18, 2019, PPL filed a Motion in Limine to Prohibit the Complainants from Presenting Any Expert Witnesses, Medical Records, and Health or Safety-Related Exhibits. On January 22, 2019, Mr. Sunstein e-mailed counsel for PPL and the presiding officer requesting a continuance of hearing, stating that he was suffering from health challenges. On the same date, PPL objected to a second continuance of the hearing as its witnesses had already made travel and lodging arrangements to attend the in-person hearings on January 24-25, 2019. PPL stated it had no indication from Complainants at least five days prior to the hearings that they would be making a second request for continuance.

I conditioned a grant of a second continuance upon the production of a medical excuse by noon Wednesday, January 23, 2019. At 3:00 p.m. on January 23, 2019, having not received any faxed or e-mailed medical excuse from Complainants, I e-mailed the parties denying the motion for continuance and directing them to plan to attend the next day’s hearing as scheduled. I was willing to accommodate requests for witnesses and complainants wishing to appear by phone.

The hearing was held in person as scheduled on January 24, 2019. Appearing in person for PPL was Michael Shafer, Esquire, Curtis Renner, Esquire, and Devin Ryan, Esquire. Transcript dated January 24, 2019 at 4. Also present and in person were four PPL witnesses.

Complainants did not appear. Complainants did not submit pre-marked exhibits for the hearing. When I attempted to call Complainants at 10:00 a.m. on January 24, 2019, at the telephone number provided on the complaint, just prior to going on the record, the telephone rang until it was disconnected. I was unable to leave a voicemail message. Transcript dated January 24, 2019 at 4-8.

PPL's counsel made an oral motion to dismiss the complaint with prejudice for failure to appear and prosecute. Counsel indicated Complainants have repeatedly complained of health issues; however, they have never sent medical records or notes from any licensed medical professional saying Complainants have health issues precluding them from litigating their case. Additionally, Respondent would have preferred to have a telephonic hearing as it would be less burdensome on the utility. However, Complainants' request for a multiple day in-person hearing was granted and Complainants could have appeared in person or by phone but chose not to appear. PPL incurred expenses of reserving two days of hotel accommodations for counsel and witnesses and Complainants were afforded every full and fair opportunity to litigate a Complaint. Transcript dated January 24, 2019 at 7-8.

The hearing ended and the record closed on January 24, 2019. The oral motion to dismiss is ripe for a decision.

FINDINGS OF FACT

1. The Complainants in this case are Willard and Elsbeth Sunstein.
2. The Respondent in this case is PPL Electric Utilities Corporation.
3. The service property is located at 860 Cupola Road, Honeybrook, Pennsylvania.
4. Complainants failed to appear and prosecute their Complaint at the hearing scheduled for January 24-25, 2019.

5. Complainants received notice of the hearing on or about August 9, 2018, when a Hearing Notice was issued rescheduling the hearing from July 10, 2018 to January 24-25, 2019.

6. All Hearing Notices and Prehearing Orders were mailed to the address Complainants provided on their complaint.

7. No Hearing Notices or Prehearing Orders were returned to the Commission by the postal authorities as being undeliverable to Mr. and Mrs. Sunstein.

8. Two days before the hearing, on January 22, 2019, Mr. Sunstein complained of health issues and requested a second continuance of the hearing.

9. PPL objected to a second continuance made two days before an in-person hearing as its witnesses and counsel had already made travel arrangements.

10. Complainants did not produce a medical excuse.

11. Complainants did not serve any medical records upon the presiding officer or PPL prior to noon on Wednesday, January 23, 2019.

12. The presiding officer did not grant the second motion for continuance but allowed Complainants and witnesses to appear via telephone at the in-person hearing on January 24, 2019.

13. Although Respondent appeared at the hearing with four witnesses and exhibits and were prepared to proceed, Complainants failed to appear.

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. 45, 70 A.2d 854 (1950). In this proceeding, Mr. and Mrs. Sunstein filed a complaint against PPL seeking an accommodation from a smart meter installation at their property. Mr. and Mrs. Sunstein, therefore, have the burden of proof in this proceeding.

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 Complainants at the date and time set for the hearing 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(a).

The Hearing Notices were sent to Complainants by regular first class mail and were not returned to the Commission as being undeliverable. Accordingly, it must be presumed that the Hearing Notices sent to Mr. and Mrs. Sunstein in the ordinary course of business were received by them. Berkowitz v. Mayflower Securities, Inc., 317 A.2d 584 (Pa. 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). Moreover, counsel for PPL, Attorney Ryan, indicated that he had sent the company's exhibits prior to the hearing on or about December 5, 2018, and that they were confirmed as delivered.

No one appeared on behalf of Complainants at the time of the hearing. Although Complainants requested a postponement or continuance of the hearing two days before the in-person hearing, PPL objected to the continuance without a written medical excuse. I gave Complainants until noon on Wednesday, January 23, 2019 as a deadline to produce a medical excuse showing they were unable to litigate their complaint prior to the hearing. No medical excuse was produced prior to noon on Wednesday, January 23, 2019.

As such, the motion for continuance was denied and Complainants had notice and an opportunity to be heard in this proceeding but chose not to appear. Therefore, Complainants' 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 PPL moved to have the complaint dismissed with prejudice for lack of prosecution. By failing to appear and present any evidence in support of their complaint, Complainants have failed to carry their 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).

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. 45, 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 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. Mr. and Mrs. Sunstein'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).

7. Mr. and Mrs. Sunstein failed to carry their burden of proof in this proceeding because they failed to appear and prosecute their complaint at the hearing.

8. A request for a change of the scheduled hearing date must be submitted in writing no later than five (5) days prior to the hearing. 52 Pa. Code § 1.15(b).

9. Mr. and Mrs. Sunstein's second request for a continuance was made two days before the scheduled hearing over the objection of PPL without good cause. 52 Pa. Code § 1.15.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PPL Electric Utilities Corporation to dismiss the formal complaint of Willard and Elsbeth Sunstein at Docket Number C-2018-3000078 for failure to prosecute is granted.

2. That the formal complaint filed by Willard and Elsbeth Sunstein at Docket Number C-2018-3000078 is hereby dismissed with prejudice.

3. That Docket Number C-2018-3000078 shall be marked closed by the Secretary's Bureau.

Date: February 28, 2019

/s/
Elizabeth H. Barnes
Administrative Law Judge