

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kelvin E. Thomas	:	
	:	
v.	:	F-2017-2611788
	:	
Philadelphia Gas Works	:	
(Complaint/Appellant)	:	
	:	
Kelvin E. Thomas	:	
	:	
v.	:	C-2017-2621275
	:	
Philadelphia Gas Works	:	

INITIAL DECISION ON REMAND

Before
Marta Guhl
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the formal Complaints for lack of prosecution because Kelvin E. Thomas failed to appear for the hearing and vacates the Bureau of Consumer Services' decision.

HISTORY OF THE PROCEEDING

This matter is an appeal of a decision from Bureau of Consumer Services (BCS) dated April 21, 2017, at Case No. 3491811, which granted in part the informal complaint of Kelvin E. Thomas (Complainant). BCS determined that Philadelphia Gas Works (PGW) should reduce the amount of unauthorized usage from 4940 CCFs to 818 CCFs and that the time frame of

unauthorized usage should be limited to April 28, 2015, (the date of the leak survey), to June 16, 2016.

On June 9, 2017, PGW filed a formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, PGW indicated that the BCS erred in its decision regarding an informal Complaint filed by Kelvin Thomas regarding a theft of service issue. Specifically, PGW asserts that BCS erred in determining that a leak survey conducted at the Service Address should have detected the meter tampering. The matter was docketed at Docket No. F-2017-2611788.

Mr. Thomas did not file an Answer to PGW's Complaint.

By Hearing Notice dated August 8, 2017, a hearing was scheduled for Thursday, October 12, 2017, at 10:00 a.m., and the matter was assigned to me.

On August 14, 2017, Mr. Thomas filed a formal Complaint with the Commission. Mr. Thomas alleged that there were incorrect charges on his bills and that PGW had overcharged him. Mr. Thomas was disputing the BCS decision at Case No. 3491811. The matter was docketed at Docket No. C-2017-2621275.

On September 8, 2017, I issued a Prehearing Order. The Prehearing Order directed the parties to comply with various procedural requirements and also explained that the Complainant bears the burden of proof to establish that the respondent violated its tariff, the Public Utility Code, or a Commission Order or regulation, and that it is entitled to the relief requested in the Complaint.

On September 20, 2017, PGW filed an Answer to Mr. Thomas' Complaint. PGW denied the material allegations of the Complaint.

On September 27, 2017, Mr. Thomas filed an amended Complaint with the Commission which was substantially similar to his original complaint. PGW did not file an Answer to the amended Complaint.

On October 11, 2017, a hearing was scheduled for Docket No. C-2017-2621275 for Monday, January 15, 2018, at 10:00 a.m., and the matter was assigned to me.

On October 11, 2017, PGW filed a Motion for Continuance and Consolidation of Dockets. PGW requested a continuance of the October 12, 2017, hearing and also requested that its Complaint be consolidated with the formal Complaint filed by Mr. Thomas docketed at Docket No. C-2017-2621275, as it dealt with the same issues from the BCS decision. I granted the continuance request to consider the Motion for Consolidation and the hearing for October 12, 2017, was cancelled.

On November 30, 2017, a Hearing Cancellation/Reschedule Notice was issued for Docket No. C-2017-2621275, indicating that the initial hearing would take place on February 7, 2018.

On January 30, 2018, a Corrected Hearing Notice was issued indicating that the initial hearing was rescheduled for Wednesday, February 7, 2018 at 10:00 a.m. for the Complaints filed by PGW and Mr. Thomas.

On February 6, 2018, I issued an Order consolidating the matters for hearing on February 7, 2018.

The hearing convened as scheduled on February 7, 2018. Mr. Thomas did not appear for the hearing. The Complaint/Appellant appeared and was represented by Graciela Christlieb, Esq., who presented the testimony of four witnesses. The Complaint/Appellant offered seven exhibits which were entered into the record.

The hearing resulted in a transcript with a total of 62 pages. The record closed on February 27, 2018, when I received the transcript of the hearing.

On June 7, 2018, the Initial Decision in the matter was issued by the Secretary's Bureau of the Commission. The Decision dismissed the Complainant's Complaint and granted the Complaint of PGW.

By Motion of Commissioner Sweet on August 2, 2018, the Commission determined that the Initial Decision should be vacated and remanded to the Office of Administrative Law Judge (OALJ) for additional proceedings.

The Commission issued an Opinion and Order on August 31, 2018, based on the Motion of Commissioner Sweet, which vacated the Initial Decision and remanded the matter back to the OALJ for additional proceedings. Specifically, the Commission determined that proper notice had not been served on the Complainant in these matters and that the presiding officer had misapplied the burden of proof in the cases.

Via Hearing Notice dated October 11, 2018, a hearing was scheduled for Wednesday, November 7, 2018 at 10:00 a.m. The Hearing Notice was sent to the Complainant at 2003 North 25th Street, Philadelphia, Pennsylvania 19121 and 4446 N Gratz Street, Philadelphia, Pennsylvania 19140. The Hearing Notice was not returned by the U.S. Post Office as being undeliverable.

On the same date, I also issued a Prehearing Order which indicated the date, time and location for the hearing as well as the procedures for requesting a continuance or postponement of the hearing. The Prehearing Order was sent to the Complainant at 2003 North 25th Street, Philadelphia, Pennsylvania 19121 and 4446 N Gratz Street, Philadelphia, Pennsylvania 19140. The Prehearing Order was not returned by the U.S. Post Office as being undeliverable.

The hearing convened as scheduled on November 7, 2018. Counsel for PGW was present with three potential witnesses and was prepared to proceed. The Complainant was not present and had not contacted this office to indicate that he would or would not participate.

No witnesses were presented, and no exhibits were introduced into the record. PGW's counsel moved that the Complaint be dismissed with prejudice for lack of prosecution (Motion) pursuant to 52 Pa.Code § 5.245. In accordance with Commission policy, I am granting the Motion.

The record was closed on January 9, 2019, when I received a copy of the hearing transcript.

FINDINGS OF FACT

1. The Respondent Complaint/Appellant in this matter is the Philadelphia Gas Works.
2. The Complainant Respondent/Appellee in this proceeding is Kelvin Thomas.
3. The Service Address is 4446 North Gratz Street, Philadelphia, Pennsylvania 19140 (Service Address).
4. By Hearing Notice dated October 11, 2018, a hearing on remand was scheduled for November 7, 2018, at 10:00 a.m., with both parties given notice.
5. Notice was mailed to Mr. Thomas at 2003 North 25th Street, Philadelphia, Pennsylvania 19121 and 4446 N Gratz Street, Philadelphia, Pennsylvania 19140.
6. Both parties were advised of the procedures for requesting a continuance of a scheduled hearing by Prehearing Order dated October 11, 2018.

7. The Prehearing Order was mailed to Mr. Thomas at 2003 North 25th Street, Philadelphia, Pennsylvania 19121 and 4446 N Gratz Street, Philadelphia, Pennsylvania 19140.

8. The Hearing Notice and Prehearing Order were never returned by the U.S. Postal Service.

9. The Complainant was advised that the Complaint would be dismissed if he failed to appear for the scheduled hearing by the October 11, 2018, Hearing Notice and the October 11, 2018, Prehearing Order.

10. PGW appeared for the hearing at the scheduled date and time by legal counsel and a potential witness and was prepared to proceed.

11. Mr. Thomas failed to appear for the scheduled hearing.

12. Mr. Thomas did not settle or withdraw the Complaint nor obtain a continuance prior to the scheduled hearing.

DISCUSSION

The Commission in its Opinion and Order¹ in this matter noted that a timely appeal from an informal decision of the BCS is reviewed *de novo*. 52 Pa.Code §§ 56.173(a), 56.403(a). *De novo* means that there is no part of the record in the informal proceeding that can be relied upon in the formal proceeding. In a *de novo* appeal from a decision of the BCS, the burden of proof remains with the party who filed the original informal complaint, except for legal or policy issues raised by the utility on appeal. *See* 52 Pa.Code § 56.173(f); *see also Rafferty v. Verizon Pennsylvania, Inc.*, Docket No. F-02211831 (Order entered December 22,

¹ *Kelvin E. Thomas v. Philadelphia Gas Works (Complaint/Appellant); Kelvin E. Thomas v. Philadelphia Gas Works*, Docket Nos. F-2017-2611788; C-2017-2621275, p. 8 (Opinion and Order entered August 31, 2018).

2008); *Claypool v. T.W. Phillips Gas & Oil Company*, 1995 Pa. PUC LEXIS 160 (Order entered December 22, 1995) (In formal complaint proceedings, the burden of proof lies with the customer/complainant. “This remains true whether the case is being litigated as an informal complaint filed by the customer or as a formal complaint on appeal filed by the utility.” However, for legal or policy issues raised by the utility, “it would be absurd to impose the burden of proof concerning a legal and policy issue upon a customer who did not raise the issue and who probably has little knowledge of the issue itself.”); *Zapp v. Equitable Gas Company*, Docket No. Z-8188326, 1982 Pa. PUC LEXIS 127, 55 Pa. PUC 701 (Order entered April 2, 1982)(“The filing of such an appeal does not shift the burden of proof to the party taking the appeal, the burden of proof remains with the original complainant.”); *Hackett v. Columbia Gas of Pennsylvania, Inc., Complaint Appellant*, Docket No. C-2012-2308429, 2013 Pa. PUC LEXIS 527 (citing a change in the 2011 Chapter 56 rulemaking that erroneously states that the burden of proof remains with the party who filed the formal complaint, instead of informal complaint. The burden of proof in the BCS decision is with the complainant, and therefore, it would “remain” with the original complainant. It could not “remain” with the utility, which did not have the burden of proof at all).

The Commission also noted that 52 Pa.Code § 56.173(f) is part of the ongoing rulemaking at Docket No. L-2015-2508421, *Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 56 to Comply with the Amended Provisions of 66 Pa. C.S. Chapter 14* which explains that the language will be revised to clarify that the burden of proof remains with the party who filed the informal complaint in order to be consistent with Commission practice. *Kelvin E. Thomas v. Philadelphia Gas Works (Complaint/Appellant)*; *Kelvin E. Thomas v. Philadelphia Gas Works*, Docket Nos. F-2017-2611788; C-2017-2621275, p. 8, n.2 (Opinion and Order entered August 31, 2018) (citing Order of July 21, 2016 at p. 9). As Commission jurisdiction covers utilities and licensees, but only extends to those consumers who voluntarily submit to it, the only way to provide a meaningful appeal from a BCS determination is to start over, with the complainant in the informal BCS investigation as the complainant in the formal case arising from it. *Id.*

Mr. Thomas did not appear for the hearing or present any evidence on behalf of his Complaint. Mr. Thomas had adequate notice of the hearing on November 7, 2018, through the Hearing Notice dated October 11, 2018. Mr. Thomas did not request a continuance or postponement of the hearing or request to withdraw his Complaint. Mr. Thomas was also provided with the procedures for requesting a continuance or postponement of the hearing in the Prehearing Order dated October 11, 2018. Both the Hearing Notice and Prehearing Order were sent to Mr. Thomas at 2003 North 25th Street, Philadelphia, Pennsylvania 19121 and 4446 N Gratz Street, Philadelphia, Pennsylvania 19140. Neither the Hearing Notice nor the Prehearing Order were returned by the U.S. Postal Authorities as being undeliverable.

Under Section 5.245 of the Pennsylvania Code, if the presiding officer finds, after notice and opportunity for hearing, that the actions of a party in a proceeding obstruct the orderly conduct of the proceeding and are inimical to the public interest, the Commission or the presiding officer may take appropriate action, including dismissal of the complaint. 52 Pa.Code § 5.245(c). 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.Cmwlth. 2008).

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 he had notice, Mr. Thomas’ 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 Corporation*, Docket No. C 20042399 (Final Order entered October 13, 2004); *Jones v. Peoples Natural Gas Company*, Docket No. C-20054885 (Opinion and Order entered February 14, 2006); *El-Ayazra v. West Penn Power Company*, Docket No. F-2509292 (Opinion and Order entered June 30, 2016).

Leak Survey

PGW's appeal of the BCS decision dealt with the issue of the leak survey and whether the survey would detect the unauthorized usage by Mr. Thomas at the Service Address.

Under the Commission's regulations at Section 59.34, a public utility must establish and execute a leak survey plan which will periodically survey customer owned service lines for leakage. 52 Pa.Code § 59.34(a). The term "customer-owned service line" includes that piping serving a residential customer which is between the main, pipeline or other source of supply and whichever is the more remote of either the meter set assembly, or the wall of the residence or commercial building if the customer owns part of the piping. *Id.*

If the leak survey requires access to the premises of a customer and the customer refuses access, or if the public utility requires a customer to inform it of the location of a service line and he fails to provide the information, the public utility may shut off gas service until access is permitted. 52 Pa.Code § 59.34(b). If a leakage survey to a meter set assembly inside the wall of a residence or commercial building is required, and the public utility cannot gain access to the building because of absence of the occupants, the public utility shall leave a notice at the premises, instructing the customer to designate to the public utility a day and time during normal working hours when access may be had. 52 Pa.Code § 59.34(b).

Under the Federal Pipeline Safety Regulations, Section 192.723, a leak survey with leak detector equipment must be conducted outside business districts as frequently as necessary, but at least once every five calendar years at intervals not exceeding 63 months. 49 C.F.R. § 192.723(b)(2).

The Commission in its Opinion and Order² in this matter noted that as to merits of PGW's Appeal, based on the record evidence produced by PGW, BCS's informal decision should not stand as PGW's testimony presented at the evidentiary hearing effectively rebutted the BCS's conclusion that a leak survey would detect unauthorized usage. In fact, it only detects leaks. Unauthorized usage that was not leaking would not be detected. Tr. 48-50.

CONCLUSIONS OF LAW

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

2. The burden of proof in this proceeding is upon the original Complainant/customer. 66 Pa.C.S. § 332(a).

3. Any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa.Cmwlth. 1982); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704.

4. The proceeding is a *de novo* review of the BCS determination. 52 Pa.Code § 56.403(a).

5. A formal Complaint may be dismissed if, after notice and opportunity to be heard, a Complainant fails to appear and prosecute the Complaint. 52 Pa.Code § 5.245(c). *See also Mumma v. PPL Electric Utilities Corp.*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002).

² *Kelvin E. Thomas v. Philadelphia Gas Works (Complaint/Appellant); Kelvin E. Thomas v. Philadelphia Gas Works*, Docket Nos. F-2017-2611788; C-2017-2621275, p. 11, n.3 (Opinion and Order entered August 31, 2018).

6. The failure of the Complainant to appear for a scheduled hearing of which he had notice warrants dismissal of the Complaint with prejudice. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995).

7. A public utility must establish and execute a leak survey plan which will periodically survey customer owned service lines for leakage. 52 Pa.Code § 59.34(a).

8. Kelvin E. Thomas failed to meet his burden of demonstrating that he was eligible for the relief requested in his Complaint to the Commission.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Kelvin E. Thomas v. Philadelphia Gas Works (Complaint/Appellant) at Docket No F-2017-2611788 is dismissed for lack of prosecution;
2. That the decision from the Bureau of Consumer Services dated April 21, 2017, at Case No. 3491811, is vacated.
3. That the record at Docket No. F-2017-2611788 be marked closed.
4. That the Complaint of Kelvin E. Thomas v. Philadelphia Gas Works at Docket No. C-2017-2621275 is dismissed with prejudice for lack of prosecution.

