

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Eleni DiSabatino	:	
	:	
v.	:	C-2018-3005278
	:	
PECO Energy Company	:	

Eleni DiSabatino	:	
	:	
v.	:	C-2018-3005452
	:	
PECO Energy Company	:	

**INITIAL DECISION**

Before  
Marta Guhl  
Administrative Law Judge

**INTRODUCTION**

This initial decision grants the Respondent’s Motion to Dismiss the Complainant’s formal Complaints (Complaints) for lack of prosecution because the Complainant failed to appear for the scheduled hearing in these matters.

**HISTORY OF THE PROCEEDING**

On October 11, 2018, Eleni DiSabatino (Complainant) filed a Complaint against PECO Energy Company (PECO or Respondent) alleging that the utility was threatening to shut off her service and that there were incorrect charges on her bills. Specifically, the Complainant

alleged that there were charges from a previous address which she disputed. The Complaint was docketed at Docket No. C-2018-3005278.

On October 17, 2018, the Complainant filed a second Complaint against PECO which was the same as the Complaint filed on October 11, 2018. This second Complaint was docketed at Docket No. C-2018-3005452.

On October 22, 2018, PECO filed an Answer to the first Complaint, which denied the material allegations of the Complaint.

By Hearing Notice dated November 6, 2018, an initial hearing was scheduled for the first formal Complaint on December 21, 2018, at 10:00 a.m., and the matter was assigned to me. The Hearing Notice advised the parties of the procedure for the hearing, as well as the date, time and location of the scheduled hearing and warned in italicized and underlined type: “Attention: *You may lose the case if you do not come to this hearing and present facts on the issues raised.*” The notice was mailed to the Complainant at the address listed on her Complaint.

A Prehearing Order was issued on November 6, 2018 for the first Complaint. The Prehearing Order directed the parties to comply with various procedural requirements and directed that a request to change the scheduled hearing should be sent to me prior to the hearing date, be in writing and state the agreement or opposition of the other party. It warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to participate in the hearing, including the dismissal of the Complaint. It 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 she is entitled to the relief requested in the Complaint. The Prehearing Order was not returned by the U.S. Postal Service as undeliverable.

On November 19, 2018, PECO filed an Answer to the second Complaint, which denied the material allegations of the Complaint.

On November 19, 2018, PECO also filed a Motion to Consolidate the Complaints in these cases.

On December 19, 2018, I issued an Order which granted the request to consolidate the Complaints. The Order indicated that both matters would be heard at the hearing on December 21, 2018.

On December 21, 2018 at approximately 8:30 a.m., the Complainant contacted my office and requested a continuance of the hearing. The Complainant did not provide any reason for the request. The Complainant was told that she needed to appear for the hearing to explain why she was making a continuance request. The Complainant indicated that she would be late but did not indicate that she would not appear for the hearing. As of the date of this Initial Decision, the Complainant did not provide any further communication regarding her Complaints.

The hearing convened on December 21, 2018. I waited to commence the hearing until approximately 11:30 a.m. to provide the Complainant with sufficient time to appear for the hearing. Counsel for PECO was present with one potential witness and was prepared to proceed. The Complainant was not present.

No witnesses were presented, and no exhibits were introduced into the record. Respondent's counsel moved that the Complaints 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 22, 2019, when I received a copy of the hearing transcript.

## FINDINGS OF FACT

1. The Complainant in this case is Eleni DiSabatino who resided at 22 Wheatsheaf Lane, Eagleville, Pennsylvania 19403.
2. The Respondent in this proceeding is PECO Energy Company.
3. By Hearing Notice dated November 6, 2018, a hearing was scheduled for December 21, 2018, at 10:00 a.m., and the notice was served on both parties.
4. Both parties were advised of the procedures for requesting a continuance of a scheduled hearing by Prehearing Order dated November 6, 2018.
5. The Hearing Notice and Prehearing Order were never returned by the U.S. Postal Service.
6. The Complainant was advised by the November 6, 2018, Hearing Notice and the November 6, 2018, Prehearing Order that the Complaints would be dismissed if she failed to appear for the scheduled hearing.
7. On December 19, 2018, I issued an Order which consolidated the Complaints and indicated that the Complaints would be heard on December 21, 2018.
8. The Complainant called the presiding officer's office on December 21, 2018, at approximately 8:30 a.m., requesting a continuance. Tr. 4.
9. The Complainant was advised that she needed to appear on that date to provide a reason for her request. Tr. 4.
10. The Complainant indicated that she would be an hour late for the scheduled hearing. Tr. 5.

11. The presiding officer waited to commence the hearing until approximately 11:30 a.m. to provide the Complainant with sufficient time to appear for the hearing. Tr. 5.

12. The Respondent's legal counsel and its potential witness appeared for the hearing at the scheduled date and time and both were prepared to proceed.

13. The Complainant failed to appear for the scheduled hearing.

14. The Complainant did not settle or withdraw the Complaints nor obtain a continuance prior to the scheduled hearing.

15. The Complainant did not contact the presiding officer's office again after the hearing.

#### DISCUSSION

The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, Complainant has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a).

To establish a sufficient case and satisfy the burden of proof, Complainant must show that the Respondent public utility is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Telephone Co. of Pa.*, 72 Pa. PUC 196 (1990), *Feinstein v. Philadelphia Suburban Water Co.*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, 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. More is required than a mere trace

of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Dep't of Public Welfare*, 480 A.2d 382 (Pa. Cmwlth. 1984).

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). However, this due process requirement is satisfied when the parties are provided notice and the opportunity to appear and be heard. *Id.*

The Hearing Notice for the December 21, 2018, hearing in this case was sent to the Complainant on November 6, 2018, by regular first-class mail to the address stated on the Complaint. The Notice was not returned to the Harrisburg Office of Administrative Law Judge by the U.S. Postal Service. The Prehearing Order was also never returned to the sender.

Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406 (1959); *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974). Therefore, the Complainant is deemed to have received this document and had sufficient notice of the location, date and time of the scheduled hearing.

The Complainant was notified of the scheduled hearing date, time, and location for the hearing. Despite this, she made no attempt to appear for the hearing. While the Complainant contacted my office on the date of the hearing, requesting a continuance, she did not follow the procedures regarding continuance requests under the Commission's regulations at Section 1.15(b).<sup>1</sup> These instructions appeared in the Prehearing Order that was sent to the parties on November 6,

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<sup>1</sup> Except as otherwise provided by statute, requests for continuance of hearings or for extension of time in which to perform an act required or allowed to be done at or within a specified time by this title or by order of the Commission or the presiding officer, shall be by motion in writing, timely filed with the Commission, stating the facts on which the application rests, except that during the course of a proceeding, the requests may be made by oral motion in the hearing before the Commission or the presiding officer. Only for good cause shown will requests for continuance be considered. The requests for a continuance should be filed at least 5 days prior to the hearing date. 52 Pa.Code § 1.15(b).

2018. The Complainant was advised that she needed to appear to provide a reason for her continuance request. I provided the Complainant additional time to appear for the hearing, and the Complainant did not appear and did not contact my office to indicate why she was unable to appear. Under these circumstances, the Complainant had ample opportunity to be heard in this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of the Complainant have been fully protected.

By not appearing for the scheduled hearing, the Complainant failed to bear her burden of proof. Consequently, the Complaints must be dismissed.

Under Section 5.245 of the Pennsylvania Code, if the presiding officer finds, after notice and opportunity for hearing, a party fails to appear for the hearing, the Commission or the presiding officer may take appropriate action, including dismissal of the complaint, if the action is that of complainant. 52 Pa.Code § 5.245(a) and (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 she had notice, these Complaints 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).

### 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 Complainant. 66 Pa.C.S. § 332(a).

3. By failing to appear at the scheduled hearing and failing to present any evidence, the Complainant has failed to satisfy the burden of proof.

4. Notice properly mailed to a party's last known address and not returned is presumed to have been received. *Meierdierck v. Miller*, 394 Pa. 484, 147 A.2d 406 (1959); *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974).

5. The Complainant had notice of the date, location and time of the scheduled hearing.

6. The due process rights of Complainant have been fully protected in this proceeding. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

7. 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(a), (c). *See also Mumma v. PPL Electric Utilities Corp.*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002).

8. The failure of the Complainant to appear for a scheduled hearing of which she 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).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss the Complaints filed at Docket Nos. C-2018-3005278 and C-2018-3005452 is granted;
2. That the Complaints of Eleni DiSabatino against PECO Energy Company at Docket Nos. C-2018-3005278 and C-2018-3005452 are dismissed with prejudice; and
3. That Docket Nos. C-2018-3005278 and C-2018-3005452 be marked closed.

Date: April 10, 2019

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Marta Guhl  
Administrative Law Judge