

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Michele Thomas	:	
	:	
v.	:	C-2019-3009008
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Alphonso Arnold, III
Special Agent

INTRODUCTION

This Initial Decision dismisses the Complaint because the Complainant failed to appear for the hearing to prosecute her Complaint.

HISTORY OF THE PROCEEDING

On April 5, 2019, Michele Thomas (Complainant or Ms. Thomas) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (Respondent or PECO) requesting a payment arrangement.

On April 8, 2019, PECO filed an Answer to the Complaint, alleging that Ms. Thomas is not entitled to a payment arrangement from the Commission on her balance per 66 Pa.C.S. § 1405(c),¹ as she is actively enrolled in PECO’s Customer Assistance Program. PECO requested that the Commission dismiss the Complaint.

¹ **(c) Customer assistance programs.**--Customer assistance program rates shall be timely paid and shall not be the subject of payment arrangements negotiated or approved by the commission.

By Hearing Notice served upon the parties on April 15, 2019, the Commission scheduled this matter for a telephonic hearing on May 15, 2019 at 10:00 a.m. and assigned the case to me. Furthermore, the Hearing Notice stated the following: “*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*” (emphasis in the original).

A Prehearing Order, served upon the parties on April 17, 2019, reminded the parties of the date and time of the hearing and addressed, *inter alia*, the procedures applicable to the hearing and the method by which a party could request a change of the scheduled hearing date if the date was not convenient for them. Furthermore, the Prehearing Order stated the following: “**You must be available on the scheduled day and time. If you fail to be available, your case will be dismissed.**” (emphasis in the original).

On May 14, 2019, I received a phone call from Ms. Thomas asking for a continuance of the May 15, 2019 hearing. Since Complainant did not indicate she contacted PECO for agreement to her continuance request, I relayed this request to counsel for PECO, who objected to the continuance request. I issued an Order Granting Continuance, served upon the parties on May 15, 2019, granting the continuance request over the objection of PECO.

By Hearing Notice served upon the parties on May 15, 2019, the scheduled telephonic hearing was cancelled and rescheduled to June 18, 2019. The May 15, 2019 Hearing Notice again stated the following: “*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*” (emphasis in the original).

The Hearing Notices and the Prehearing Order informed the parties that the undersigned would call the parties by phone on the scheduled date and time to connect the parties to the hearing.

The June 18, 2019 hearing was held as scheduled. At 10:00 a.m. on that date, I called Ms. Thomas using the phone number that she had listed on her Complaint. Ms. Thomas did not answer my phone call. I left a voice message, wherein I reminded Ms. Thomas of the

hearing, informed her that I would attempt to call her back at approximately 10:15 a.m., and that if she was not available during my second phone call that the hearing would proceed without her and her case would be dismissed.

The attorney for PECO, Shawane L. Lee, Esquire, was successfully contacted and connected to the hearing. Attorney Lee was ready to proceed with the hearing with one witness.

At approximately 10:15 a.m., I again called Ms. Thomas and again Ms. Thomas did not answer. I left a second voice message, wherein I informed Ms. Thomas that the hearing would proceed without her, and to contact the Commission if she wanted to provide an excuse as to why she was unavailable for her hearing.

The June 18, 2019 hearing was held without Ms. Thomas. No witnesses were presented, and no exhibits were introduced for the record. PECO made a Motion to dismiss the Complaint with prejudice for failure to prosecute.

The record² closed on June 18, 2019, following the conclusion of the hearing. As of the date of this Initial Decision, no communication has been made to the Office of Administrative Law Judge on Ms. Thomas's behalf to explain her absence from the hearing. For the reasons discussed below, PECO's Motion will be granted, and the Complaint will be dismissed with prejudice.

FINDINGS OF FACT

1. The Complainant is Michele Thomas.
2. The Respondent is PECO Energy Company

² The telephonic hearing was recorded over the phone by means of a tape recorder. No Court Reporter was present.

3. By Hearing Notice served upon the parties on April 15, 2019, a telephonic hearing in this matter was scheduled for May 15, 2019 at 10:00 a.m.

4. The April 15, 2019 Hearing Notice stated the following: “*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*” (emphasis in the original).

5. By Prehearing Order served upon the parties on April 17, 2019, the parties were again informed of the date and time of the telephonic hearing and were provided with the method by which a party could request a continuance of the hearing date, if needed.

6. The Prehearing Order additionally stated the following: “**You must be available on the scheduled day and time. If you fail to be available, your case will be dismissed.**” (emphasis in the original).

7. By Order Granting Continuance served upon the parties on May 15, 2019, the Complainant’s request to continue the May 15, 2019 hearing was granted.

8. By Hearing Notice served upon the parties on May 15, 2019, the scheduled telephonic hearing was cancelled and rescheduled to June 18, 2019.

9. The May 15, 2019 Hearing Notice again stated the following: “*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*” (emphasis in the original).

10. The Hearing Notices and the Prehearing Order informed the parties that they would be contacted by phone on the hearing date and time to be connected to the hearing.

11. The May 15, 2019 Hearing Notice was not returned to the Commission as undeliverable.

12. The Complainant was not available by phone to participate in the June 18, 2019 hearing.

13. The Complainant did not withdraw or settle her Complaint with the Respondent, nor did she request a continuance of the hearing date.

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). To satisfy this burden, the Complainant must show that the named 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). This must be shown by a preponderance of the evidence, that is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600 (Pa.Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992); Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950).

If a Complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the Complainant will prevail. If the utility rebuts the Complainant's evidence, the burden of going forward with the evidence shifts back to the Complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on a Complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); see also, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

Additionally, this Commission's decision must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere

trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980).

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).

The Complainant did not participate in the June 18, 2019 hearing. The date and time of the hearing were provided in the May 15, 2019 Hearing Notice. The Notice informed the Complainant that she was to be available by phone on June 18, 2019 at 10:00 a.m. to be contacted and connected to the hearing. The undersigned attempted to call and connect the Complainant to the hearing at approximately 10:00 a.m. and 10:15 a.m., using the phone number on file for the Complainant, but was unable to do so. The Notice warned the Complainant that she may lose the case if she did not take part in the hearing and present facts on the issues raised.

The Hearing Notice was sent to the Complainant by regular first-class mail. The Notice was not returned to the Commission as undeliverable. Accordingly, it must be presumed that this document, which was sent to the Complainant in the ordinary course of business, was received by her. 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). Therefore, the Complainant is deemed to have had sufficient notice of the day, date and time of the scheduled hearing and for whatever reason chose not to appear at the hearing to prosecute her Complaint. Furthermore, the proposed hearing exhibits that were served upon the Complainant by the Respondent on June 12, 2019 contained a cover letter that included the date of the June 18, 2019 hearing. The Complainant made no attempt to notify the presiding officer that she did not plan to participate in the scheduled June 18, 2019 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 have been provided to the parties, it is the responsibility of both parties to appear and participate in the hearing. Schneider v. Pa. Pub. Util. Comm'n, 479 A.2d 10 (Pa.Cmwlt. 1984). Therefore, 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). The Complainant did not appear, and the hearing proceeded in her absence. 66 Pa.C.S.A. § 332(f) and 52 Pa.Code § 5.245(a) provide that a party that fails to be represented at a scheduled hearing shall waive the opportunity to participate in the hearing and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat.

§ 332. Procedures in general.

(f) Actions of parties and counsel.--Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat, or to recall for further examination of witnesses who were excused, unless the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting such reopening or further examination. . . .

66 Pa.C.S. § 332(f).

§ 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.

. . .

52 Pa. Code § 5.245(a).

As the party seeking relief from the Commission, Ms. Thomas bears the burden of proof. By choosing not to participate in the hearing and proffer any evidence to support the Complaint, Ms. Thomas failed to meet this burden.

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. Therefore, the Respondent's Motion to dismiss the Complaint is granted. Accordingly, the Complaint in this matter will be dismissed in its entirety with prejudice. El-Ayazra v. West Penn Power Company, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); Volgstadt v. UGI Penn Natural Gas, Inc., Docket No. F-02266429 (Opinion and Order entered September 12, 2008) and Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (Opinion and Order entered December 26, 1995).

CONCLUSIONS OF LAW

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

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

3. Administrative agencies 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).

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 (Opinion and Order entered October 25, 1993).

5. By failing to appear at her scheduled hearing, the Complainant waived her opportunity to participate in the hearing and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat, or to recall for further examination of witnesses who were excused. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

6. The Complainant'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. By failing to appear and proffer any evidence in support of the Complaint, the Complainant has failed to meet the burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss the Complaint at Docket Number C-2019-3009008 for failure to prosecute is granted.

2. That the Complaint filed by Michele Thomas against PECO Energy Company at Docket Number C-2019-3009008 is hereby dismissed with prejudice.

3. That the docket at Docket Number C-2019-3009008 is marked closed.

Date: June 24, 2019

/s/
Alphonso Arnold, III
Special Agent