

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Yvette Small	:	
	:	
v.	:	C-2019-3009002
	:	
Philadelphia Gas Works	:	

INITIAL DECISION

Before
Angela T. Jones
Administrative Law Judge

INTRODUCTION

The undersigned through this decision dismisses the formal Complaint (Complaint) filed in this matter for failure of the Complainant to appear at the hearing and prosecute the Complaint.

HISTORY OF THE PROCEEDING

On April 1, 2019, the Complainant, Yvette Small, filed a Complaint with the Pennsylvania Public Utility Commission (Commission or PUC) against Philadelphia Gas Works (PGW, Company or Respondent). The Complainant indicated that the utility threatened to terminate or has already terminated the Complainant’s gas service and that there were incorrect charges on her bill.

The Complainant alleged that the wrong amount was charged to her account. The Complainant also alleged that she went to court about this matter, but she did not present her proof because she was without a lawyer.

The Complaint was served on PGW electronically (eService) by the Commission's Secretary on April 5, 2019, according to the audit history of the docket. The eService is pursuant to the waiver of Section 702 program, under which the Respondent waives the service requirements in 66 Pa.C.S. § 702.

On April 25, 2019, Laureto Farinas, Esquire, counsel for the Respondent, filed an Answer to the Complaint. The Answer denied all material facts of the Complaint. The Respondent averred the Complainant had challenged posting of payments to her account in 2017 by filing an informal complaint at Case No. 3572604 on November 20, 2017, with the Commission's Bureau of Consumer Services (BCS). A BCS decision was rendered on February 12, 2017 for the Complainant's informal complaint. The BCS decision directed PGW to credit the Complainant's PGW service account in the amount of \$20.00. The BCS decision otherwise dismissed the complaint.

The Respondent requested that the Commission find against the Complainant and dismiss the Complaint.

A Hearing Notice dated May 2, 2019, notified the parties that an initial in-person hearing was scheduled for Friday, June 14, 2019, at 10:00 a.m. This Notice indicated that the case was assigned to the undersigned Administrative Law Judge (ALJ) as the presiding officer.

A Prehearing Order dated April 30, 2019, provided procedural rules and guidelines for the proceeding and emphasized the following:

- (1) a request to change the scheduled hearing should be sent at least five days prior to the hearing date;
- (2) the request for a hearing change is to be in writing and sent to all parties of record; and
- (3) a caution that Complainant may lose the case if she does not take part in the hearing and present evidence on the issues raised.

The Prehearing Order also stated that the Complainant filed a formal Complaint at Docket No. F-2018-3000910 which claimed incorrect charges on her bill. The formal Complaint was dismissed by the Commission finding that the Complainant failed to sustain her burden of

proof. See *Small v. Philadelphia Gas Works*, Docket No. F-2018-3000910 (Final Order entered October 1, 2018). The Prehearing Order cautioned the Complainant that issues heard at Docket No. F-2018-3000910 cannot be reheard.

On May 7, 2019, Attorney Farinas filed a Motion for Summary Judgment (Motion). The Motion contended that the instant Complaint was disputing the same subject matter of *Small v. Philadelphia Gas Works*, Docket No. F-2018-3000910 (Final Order entered October 1, 2018). The Motion argued that the instant Complaint should be dismissed because it raises the same issues raised and decided by the Commission previously, and therefore, there is a final judgment on the merits issued by the Commission on the subject matter in dispute. When the subject matter of a dispute has been decided and it is raised again subsequently, the principal of *res judicata* and 66 Pa.C.S. § 316 exists and the Complainant is prohibited from raising the same issue before the Commission a second time. Section 316 of the Pennsylvania Public Utility Code (Code) states, “Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” *Id.*

The evidentiary hearing convened as scheduled on June 14, 2019. As a preliminary matter the undersigned ruled on the Motion. The undersigned granted the Motion in part, finding that the Complainant may not present matter regarding the incorrect charges disputed in *Small v. Philadelphia Gas Works*, Docket No. F-2018-3000910 (Final Order entered October 1, 2018). The Motion was denied in part ruling that any incorrect charges after November 20, 2017 up to April 1, 2019, when the Complaint was filed, are ripe for the subject matter of this dispute.

The Complainant was not present and did not communicate an excuse as to why she was unable to appear. Attorney Farinas was present with one potential witness. Consistent with the practice of the undersigned, the hearing recessed for approximately 15 minutes to provide the Complainant time to communicate a reasonable excuse as to why she would be late or would be unable to appear. The hearing reconvened at approximately 10:30 a.m. and the Complainant was still absent. Attorney Farinas moved to dismiss the Complaint with prejudice for failure to prosecute. I stated that I would rule on this motion in writing and adjourned.

The transcript of this hearing consists of 12 pages. The record closed on July 5, 2019, when the undersigned received a copy of the transcript.

To date, there has been no further communication from the Complainant. This matter is ripe for decision.

FINDINGS OF FACT

1. The Complainant is Yvette Small.
2. The Respondent is Philadelphia Gas Works, a jurisdictional public utility that provides gas distribution service in the Commonwealth of Pennsylvania.
3. On April 1, 2019, the Complainant filed a Complaint with the Commission against the Respondent.
4. The Respondent filed its Answer on April 25, 2019, which denied any wrongdoing.
5. A Prehearing Order, dated April 30, 2019, provided the Complainant with the proper procedure to participate in the initial hearing and to obtain a continuance to reschedule the hearing date.
6. A Hearing Notice dated May 2, 2019, was sent by regular first-class mail to the Complainant and scheduled an initial hearing for Friday, June 14, 2019, at 10:00 a.m.
7. None of the documents mailed to the Complainant were returned to the Commission by the United States post office as undeliverable.
8. Neither the Complainant nor any counsel representing the Complainant appeared at the scheduled hearing on June 14, 2019.

9. The Complainant did not settle or withdraw the Complaint.

DISCUSSION

In this Complaint, the Complainant indicated that the Respondent threatened to terminate her gas service, and the Respondent had incorrect charges on her bill. The issues in this proceeding are determined by whether the Complainant sustained her burden of proof. By failing to participate in the hearing, the Complainant was unable to meet this burden.

The party seeking affirmative relief from the Commission bears the burden of proof. 66 Pa.C.S. § 332(a). As a matter of law, a complainant must show that the named utility is responsible or accountable for the problem described in the Complaint to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976). This responsibility or accountability to the named utility must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa.Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). A preponderance of the evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

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). Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944 (Pa.Cmwlth. 1994).

The Commission sent a Hearing Notice dated May 2, 2019, to the Complainant by regular first-class mail to the address listed on the Complaint. This document was never returned to the sender, the scheduling staff of the Office of Administrative Law Judge (OALJ) in Harrisburg.

The undersigned issued a Prehearing Order dated April 30, 2019, which *inter alia*, instructed the parties that any request to change the scheduled hearing date should state the agreement or opposition of the other party and be submitted in writing no later than five days prior to the hearing. The Prehearing Order, which was mailed to the Complainant at the address shown in the Complaint, was never returned by the U.S. post office as undeliverable. Accordingly, it is presumed that this mailing, which was done through the ordinary course of business, was received by the Complainant. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meirerdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 449 A.2d 658 (Pa.Super. 1982).

The Complainant is deemed to have received these documents and had sufficient notice of the day, date and time of the scheduled hearing. The Complainant was notified of the scheduled hearing date and time, as well as how to contact the OALJ. The Complainant made no attempt whatsoever to notify the presiding officer that she did not plan to participate in the hearing scheduled for June 14, 2019.

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 has been provided to the parties, it is the responsibility of both parties to appear and participate in the hearing. 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); 52 Pa.Code § 5.245(a).

Section 332(a) of the Public Utility Code (Code), 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of any request for relief. As the party bringing this Complaint, the Complainant bears the burden of proving by a preponderance of the evidence that she is entitled to relief. By choosing not to appear and proffer any evidence to support the Complaint, the Complainant has failed to meet this burden.

As the Commission stated in *Mumma v. PPL Electric Utilities Corp.*, Docket No. C-00014869, p. 3 (Opinion and Order entered January 28, 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).

The Respondent’s counsel moved that the Complaint be dismissed with prejudice for failure to prosecute. As stated above, 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. The failure of the Complainant to appear at this scheduled hearing is unexcused. By her failure to attend the hearing and present evidence on the issues raised, the Complainant failed to sustain her burden of proof.

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, this 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 Corp.*, Docket No. C-20042399 (Final Order entered October 13, 2004); *Jones v. The Peoples Natural Gas Co.*, Docket No. C-20054885 (Opinion and Order entered February 14, 2006); *El-Ayazra v. West Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); *Hack v. Pa. American Water Co.*, Docket No. F-2017-2618548 (Opinion and Order entered August 23, 2018); *Whaumbush v. PECO Energy Co.*, Docket No. C-2017-262269 (Opinion and Order entered August 23, 2018).

The Complainant waived the opportunity to participate in the hearing by failing to appear. This case will be dismissed. 52 Pa.Code § 5.245(a); *Jefferson v. UGI Utilities, Inc.*, 1995 Pa. PUC LEXIS 159.

CONCLUSIONS OF LAW

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

2. Notice properly mailed to a party's last known address and not returned by the post office is presumed to have been received. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meirerdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 449 A.2d 658 (Pa.Super. 1982).

3. By Hearing Notice dated May 2, 2019, the Complainant had notice of the day, date and time of the scheduled hearing. 52 Pa.Code § 5.201(a).

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 (Order entered October 25, 1993).

5. As the party seeking affirmative relief from the Commission, the Complainant bears the burden of proof. 66 Pa.C.S. § 332(a).

6. The due process rights of the Complainant have been fully protected because the Complainant was afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlt. 1984).

7. A formal complaint may be dismissed if, after notice and an opportunity to be heard, a Complainant fails to appear and prosecute the Complaint. *Mumma v. PPL Electric Utilities Corp.*, Docket No. C-00014869 (Opinion and Order entered January 28, 2002).

8. The Complainant, Yvette Small, failed to sustain her burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion by Philadelphia Gas Works to dismiss the formal Complaint of Yvette Small at Docket No. C-2019-3009002 for lack of prosecution is granted.

2. That the formal Complaint filed by Yvette Small against Philadelphia Gas Works at Docket No. C-2019-3009002, is dismissed in its entirety with prejudice.

3. That the Secretary's Bureau mark Docket No. C-2019-3009002 closed.

Dated: July 8, 2019

/s/
Angela T. Jones
Administrative Law Judge