

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Titus Wright	:	
	:	
v.	:	F-2019-3007120
	:	
Philadelphia Gas Works	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses with prejudice the complaint of a natural gas service customer for the failure of the Complainant to appear at the scheduled hearing and prosecute the Complaint.

HISTORY OF THE PROCEEDING

On January 14, 2019, Titus Wright (Complainant) filed a formal Complaint against Philadelphia Gas Works (PGW or Respondent) with the Pennsylvania Public Utility Commission (Commission) asking that his natural gas service be reconnected with the removal of “at least” \$2,500 from his account arrearage.¹ Complainant asserted that he was not properly billed in 2010 and between September 2010 and January 2011. Complainant also asked that PGW repair his basement wall which he claimed the utility damaged in or around that time.

¹ I note that this Complaint is a timely appeal from a determination by the Commission’s Bureau of Consumer Services (BCS) at Case No. 3669706. Informal BCS decisions are "determinations" whereas the result of a Formal Complaint is termed a "decision." In addition, informal BCS determinations are governed primarily by Sections 3.111 to 3.113, 52 Pa. Code § 3.111 *et seq.*, whereas Formal Complaints are governed by Chapter 5, 52 Pa. Code, § 5.1 *et seq.*

On February 7, 2019, PGW filed an Answer and New Matter in which PGW argued that because this complaint is based on billing from 2010 to 2011, it is time barred under Section 3314 of the Pennsylvania Public Utility Code (Code), 66 Pa. C.S. § 3314. PGW admitted that Complainant's gas service has been terminated but denied that it had been improperly terminated or that PGW misbilled Complainant or damaged and failed to restore Complainant's property.

In its New Matter, PGW also asserted that it had, "completed work inside the basement of the Service Address, which is the basis of Complainant's damage allegation." New Matter at ¶ 15.

Also on February 7, 2019, PGW filed Preliminary Objections at this docket, asserting that the issue of misbilling in 2010 and 2011 had been previously resolved at consolidated Docket Nos. F-2010-2192191 and C-2011-2225996 by a Certificate of Satisfaction, which Complainant did not timely object to, that was filed with the Secretary of the Commission. PGW further asserted that on October 23, 2014, the Commission issued an Opinion and Order in another case at Docket No. C-2013-2368462 wherein the Complainant's claim with respect to misbilling in 2010 and 2011 was dismissed with prejudice as the issue had been resolved with the filing of a Certificate of Satisfaction in the underlying 2010 and 2011 consolidated case. PGW also argued that any claims raised in the complaint with respect to misbilling or damage caused by PGW are now beyond the time limitation at 66 Pa. C.S. § 3314 and asked that the Complaint be stricken as "impertinent matter" and hence legally insufficient under 52 Pa. Code § 5.101(a)(2).

On March 11, 2019, the Preliminary Objections were assigned to me for resolution with the case to be retained by me for adjudication in the event that the Preliminary Objections were denied in whole or in part. By notice issued March 13, 2019, this matter was set for hearing on April 26, 2019.

While Complainant did not file an Answer with respect to PGW's New Matter and Preliminary Objections, he did file proposed exhibits on March 16, 2019 and properly copied them to counsel for PGW. I note that the proposed exhibits all concern billing from 2010 to 2011.

On April 22, 2019, I directed that the hearing scheduled for April 26, 2019 be cancelled. My reason for doing so was to revisit PGW's Preliminary Objections in view of the clarification provided by Complainant's March 16, 2019 pre-hearing filing. As a result, a hearing cancellation Notice was issued on April 22, 2019 cancelling the April 26, 2019 hearing.

On April 23, 2019, PGW filed an untimely Motion for Continuance, supported by the Complainant, seeking an extension of time during which negotiations between the parties could continue. I communicated to counsel for PGW by email the fact that a hearing cancellation Notice had already been issued on April 22, 2019, so that I could resolve PGW's Preliminary Objections.²

On April 25, 2019, Complainant faxed to me a two-page letter, copied to counsel for PGW, reflecting a misunderstanding on the part of Complainant of the procedural posture of this case.

By Order dated May 2, 2019, I sustained in part the Preliminary Objections of PGW by striking all allegations with respect to improper billing set forth in the Complaint. The Order also established that the justiciable issues in the formal Complaint would be limited to the allegation of property damage.

On May 3, 2019, a hearing notice was issued setting June 10, 2019 as the date for an initial hearing. The hearing notice clearly set forth the date and time of the hearing and included in italicized letters the following: "*Attention: You may lose this case if you do not take part in this hearing and present facts on the issues raised.*"

On May 3, 2019, I also issued a Prehearing Order. The Prehearing Order directed the parties to comply with various procedural requirements (including submission of proposed exhibits, attorney representation, settlement discussions, etc.) and directed that a request to change the scheduled hearing should be sent at least five days prior to the hearing. It warned

² PGW stated that Complainant joined in the request for continuance, but Complainant subsequently denied this in an exchange of emails and faxed messages with counsel for PGW, variously presented to or copied to me. It appears that Complainant belatedly thought that a hearing on April 26, 2019 might have resulted in the stay of a pending sheriff's sale of his property. That contention has no bearing on the merits of this case, and as explained above, the hearing had already been rescheduled before the Motion for Continuance from PGW was received.

both parties of the potentially serious consequences if they failed to attend the hearing and explained that the Complainant bears the burden of proof.

The hearing convened as scheduled on June 10, 2019. Graciela Christlieb, Esquire, appeared on behalf of PGW and had a witness prepared to proceed. Mr. Wright was not present and did not contact the Office of Administrative Law Judge at any point before or after the hearing to indicate that he would not appear.

Because a customer who files a complaint before the Commission has an affirmative duty to make himself or herself available to participate in hearings on the complaint, I deemed Mr. Wright's failure to appear on the date and time of the scheduled hearing as evidence that he did not wish to participate in the hearing.

No witnesses were presented, and no exhibits were introduced into the record. Respondent's counsel moved that the Complaint be dismissed with prejudice for lack of prosecution pursuant to 52 Pa. Code § 5.245, and I granted the Motion pending memorialization in an Initial Decision.

The record was closed with receipt of the six-page hearing transcript on June 25, 2019.

FINDINGS OF FACT

1. The Complainant in this proceeding is Titus Wright, whose address is listed in the Complaint as 907 Bridge Street, Philadelphia, Pennsylvania (service address).
2. The Respondent in this proceeding is Philadelphia Gas Works.
3. By Hearing Notice dated May 3, 2019, an initial telephonic hearing on the Complaint was scheduled for June 10, 2019, with both parties given notice.

4. Complainant was advised of the procedure for requesting a continuance of a scheduled hearing by Prehearing Order dated May 3, 2019.

5. Neither the Hearing Notice nor the Prehearing Order, both of which contained the date and time of the scheduled hearing, was returned as undeliverable.

6. Complainant was advised by both the Hearing Notice and the Prehearing Order that the Complaint would (potentially) be dismissed if he failed to appear at the scheduled hearing.

7. Respondent's counsel appeared for the hearing at the scheduled date and time on June 10, 2019 and was prepared to proceed.

8. Complainant failed to appear for the hearing scheduled for June 10, 2019.

DISCUSSION

The Public Utility Code, 66 Pa.C.S.A. § 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.A. § 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 Tel. 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 Trans. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S.A. § 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 Comp. Bd. of Review*, 194 Pa. Super. 278, 166 A.2d 96 (1960); *Murphy v. Commonwealth, Dep't of Public Welfare, White Haven Center*, 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.*

Notice of the hearing in this case was sent to the Complainant on May 3, 2019, by regular first-class mail to the address stated on the Complaint. This piece of mail was never returned to the sender, the scheduling staff of the OALJ in Harrisburg. In addition, I issued a Prehearing Order on May 3, 2019, which, *inter alia*, reminded the parties of the hearing date and time as well as how to obtain a continuance. That Order, which was also mailed to the Complainant at the address stated on the Complaint, was never returned. Notice 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.*, 455 Pa. 531, 317 A.2d 584 (1974); *Geary v. Verizon Pennsylvania Inc.*, Docket No. C-2009-2118625 (Opinion and Order entered Sept. 16, 2010). Therefore, Complainant is deemed to have received this document and had sufficient notice of the date and time of the scheduled hearing.

Section 332(f) of the Public Utility Code, 66 Pa.C.S.A. § 332(f), provides in relevant part:

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

Since the Complainant did not participate in the hearing, the hearing was held in accordance with 66 Pa.C.S.A. § 332(f) and 52 Pa. Code § 5.245 and the record was subsequently closed on June 25, 2019.

By not appearing for the scheduled hearing, Complainant failed to sustain his burden of proof. Complainant has not contacted me or the OALJ about his failure to appear. Complainant was notified of the scheduled hearing date and time, as well as how to contact the OALJ. Despite this, he made no attempt to notify either me or PGW that he did not plan to attend the hearing. Under these circumstances, it appears that Complainant had ample opportunity to appear and be heard in this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of the Complainant have been fully protected.

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. PUC*, 479 A.2d 10 (Pa.Cmwlth. 1984).

The Pennsylvania Commonwealth Court has also 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. 2009). See also, *Geary v. Verizon Pennsylvania Inc.*, C-2009-2118625 (Opinion and Order entered Sept. 16, 2010), where the Commission stated at 5: “While the Commission does not expect *pro se* complainants to be familiar with all the Commission’s procedures, the rules, which ensure notice and due process, must be followed by all complainants, whether or not they have counsel. Showing up for a hearing is among the most basic of the Commission’s requirements.”

Due to the waste of the Commission’s and Respondent’s time and resources occasioned by Complainant’s failure to appear at a hearing, of which he had notice, his 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); *Volgstadt v. UGI Penn Natural Gas, Inc.*, Docket No. F-02266429 (Opinion and Order entered September 12, 2008).

CONCLUSIONS OF LAW

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

2. Pursuant to 66 Pa.C.S.A. § 332(a), the burden of proof in this proceeding is upon Complainant. 66 Pa.C.S.A. § 332(a).

3. Notice properly mailed to a party's last known address and not returned is presumed to have been received. *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974).

4. Complainant had notice of the date, and time of the scheduled hearing.

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

6. The due process rights of Complainant have been fully protected in this proceeding. *Schneider v. Pennsylvania Pub. Util. Comm'n.*, 479 A.2d 10 (Pa.Cmwlt. 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. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995); *Volgstadt v. UGI Penn Natural Gas, Inc.*, Docket No. F-02266429 (Opinion and Order entered September 12, 2008).

8. The failure of the Complainant to appear for a scheduled hearing of which he had notice warrants dismissal of the Complaint with prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of the Philadelphia Gas Works to Dismiss the Complaint filed at Docket No. F-2019-3007120 is granted;
2. That the Complaint of Titus Wright against Philadelphia Gas Works at Docket No. F-2019-3007120 is dismissed with prejudice; and
3. That the record at Docket No. F-2019-3007120 is marked closed.

Date: August 28, 2019

/s/
Dennis J. Buckley
Administrative Law Judge