

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Binghua Hu	:	
	:	
v.	:	C-2019-3012075
	:	
PECO Energy Company	:	

**INITIAL DECISION**

Before  
Angela T. Jones  
Administrative Law Judge

**INTRODUCTION**

This Initial Decision grants the Respondent’s Motion to Dismiss for Failure to Prosecute because the Complainant failed to appear at the scheduled hearing despite being given notice of the hearing.

**HISTORY OF THE PROCEEDING**

On August 8, 2019, the Complainant, Binghua Hu, filed a Complaint with the Pennsylvania Public Utility Commission (Commission or PUC) against PECO Energy Company (PECO, Company or Respondent). The Complainant indicated that there were incorrect charges on her bill. The Complainant alleged that an amount for electric service at 3728 N. 15<sup>th</sup> Street, Philadelphia, Pennsylvania (service address 1) should be paid by the evicted tenant and not the landlord of the property, the Complainant. The Complainant also alleged that an amount transferred to the service account for 19 King Avenue, Folcroft, Pennsylvania, (service address 2) should be attributed to the evicted tenant and not transferred to the account of the Complainant. The Complaint was electronically filed (eFiled).

The Complaint was electronically served (eServed or eService) on PECO by the Commission's Secretary on August 8, 2019, according to the audit history of the docket.

On August 16, 2019, Shawane Lee, Esquire, counsel for the Respondent, filed an Answer to the Complaint. The Answer denied all material facts of the Complaint and averred that a foreign wiring balance was transferred to the Complainant in compliance with Commission statute, regulations and precedent.

The Respondent requested that the Commission dismiss the Complaint.

A Hearing Notice dated August 21, 2019, notified the parties that an Initial In-Person Hearing was scheduled for Monday, October 7, 2019, at 10:00 a.m. This Hearing Notice indicated that the case was assigned to the undersigned Administrative Law Judge (ALJ) as the presiding officer. 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 eServed to the Complainant at the email address listed on her Complaint and registered in the Commission's system.

A Prehearing Order dated August 26, 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 explained that the Complainant bears the burden of proof to establish that the Respondent violated its tariff, the Pennsylvania Public Utility Code (Code), or a Commission Order or regulation, and that she is entitled to the relief requested in the Complaint.

On September 23, 2019, Edward Fisher, Esquire, filed a Notice of Appearance to represent the Respondent. The notice was accompanied by a certificate that certified service to the Complainant “via email and/or First Class [sic] mail.”

On October 7, 2019, Angela Lorenz, Esquire, filed a Notice of Appearance to represent the Respondent.

The evidentiary hearing convened as scheduled on October 7, 2019. The Complainant was not present and did not communicate an excuse as to why she was unable to appear. Attorney Lorenz was present with two potential witnesses. 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 10:25 a.m. and the Complainant was still absent. The undersigned stated on the record that the Complainant had not communicated that her failure to appear was unavoidable. Attorney Lorenz moved to dismiss the Complaint with prejudice for failure to prosecute. I stated that I would rule on this motion in writing and adjourned.

By electronic mail dated October 11, 2019, the Complainant requested a continuance to the scheduled hearing, stating she was not “formally informed” of the hearing date. The undersigned recognized that the requested continuance was not eFiled by the Complainant. The requested continuance noted, “cc: Edward T. Fisher, An attorney of PECO.” However, there was no email address for Attorney Fisher on the correspondence received from the Complainant. By memorandum dated October 15, 2019, the undersigned requested that the email be filed with the Secretary’s Bureau and the email was forwarded to Attorney Fisher.

By letter sent by facsimile dated October 16, 2019, Attorney Fisher objected to the requested continuance because the Complainant did not show good cause for the request and the request was made after the hearing. The letter was copied to the Complainant; however, it was not filed with the Secretary’s Bureau. By memorandum dated October 17, 2019, the undersigned sent the letter to be filed with the Secretary.

The transcript of this hearing consists of nine pages. The record closed on October 29, 2019, when the undersigned received a copy of the transcript.

This matter is ripe for decision.

#### FINDINGS OF FACT

1. The Complainant is Binghua Hu.
2. The Respondent is PECO Energy Company, a jurisdictional public utility that provides electric distribution service in the Commonwealth of Pennsylvania.
3. On August 8, 2019, the Complainant eFiled a Complaint with the Commission against the Respondent.
4. The Complainant is registered as a user of the Commission's electronic system.
5. The Respondent filed its Answer on August 16, 2019, which denied any wrongdoing.
6. A Hearing Notice dated August 21, 2019, was sent by eService to the parties and scheduled a hearing for Monday, October 7, 2019, at 10:00 a.m.
7. A Prehearing Order sent on August 26, 2019, provided the parties with the proper procedure to participate in the hearing and to obtain a continuance to reschedule the hearing date.
8. The Commission's electronic audit system did not show that the Hearing Notice or the Prehearing Order failed to be successfully emailed to either party.

9. Neither the Complainant nor any counsel representing the Complainant appeared at the scheduled hearing on October 7, 2019.

10. On October 11, 2019, the Complainant sent an email to the undersigned requesting a continuance of the October 7, 2019 hearing.

11. By letter sent by facsimile dated October 16, 2019, Attorney Fisher objected to the requested continuance.

### DISCUSSION

In her Complaint, the Complainant alleged that there are incorrect charges on her bill and that an amount transferred to her account for electric service should not have been transferred but should have been attributed to the account of her evicted tenant. 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 her burden.

Pursuant to 52 Pa.Code § 1.15(b), a request for a change of the scheduled hearing date must be submitted by motion in writing, filed no later than five (5) days prior to the hearing with the Commission. The continuance requested by the Complainant is not timely and is not in the correct form.

52 Pa.Code § 1.2(a), (c) and (d) state,

(a) This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.

\* \* \*

(c) The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party.

(d) These liberal construction provisions apply with particularity in proceedings involving pro se litigants.

The Complainant is a pro se litigant.

Although the communication is not in the correct form, disregarding this defect will not adversely affect the substantive rights of any party to this proceeding. Therefore, Complaint's continuance request will be addressed to secure a just, speedy and inexpensive determination pursuant to 52 Pa.Code § 1.2(a), (c) and (d).

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 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's continuance request stated, "My apology for not showing on the hearing data [sic] 07Oct2019, however, I was not formally informed about the hearing data [sic]. I am writing to request a hearing continuance because of my unknowing absence."

A party to a proceeding has the right to request a continuance of the hearing, which may be considered and granted by the presiding officer only for good cause shown. See 52 Pa.Code § 1.15(b). The party making the request must file a motion at least five days prior to the hearing

date stating the facts on which the request is made, except that during a hearing, an oral request for hearing continuance may be made before the presiding officer in the hearing room. *Id.*

If a party fails to appear at a scheduled and notified hearing, the party will be deemed to have waived the opportunity to participate in a hearing in the matter. 66 Pa.C.S. § 332(f); 52 Pa.Code § 5.245(a)-(b). This result is not applied to the party if the presiding officer determines that the party's failure to appear was unavoidable and the interest of the other and the public will not be prejudiced by permitting the reopening or further examination. *Id.* This result may not be applied if the presiding officer or the Commission determines that the complainant demonstrated a good faith attempt to attend the hearing. See, *Then v. Philadelphia Gas Works*, Docket No. F-2012-2318264 (Order entered June 3, 2012) and *Wiggins v. PECO Energy Co.*, Docket No. C-2010-2190335 (Order entered October 27, 2011).

The public interest is prejudiced by the wasteful use of the agency's and the respondent's time and resources in addressing a complaint. See *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995) and *Nicholas v. Bell Atlantic-Pennsylvania*, Docket No. C-00956667 (Opinion and Order entered August 4, 1995).

The Complainant filed her Complaint electronically. Pursuant to 52 Pa.Code § 1.32(b)(1), "Registration as a filing user constitutes an agreement to receive electronic service unless the filing user indicates upon registration that the filing user does not agree to receive electronic service." According to the audit history of the docket, there is no indication that the Complainant did not agree to receive eService.

Commission internal electronic activity for eService shows that the Hearing Notice was eServed to the email address that the Complainant provided in the Complaint at 4:01:07 p.m. on August 21, 2019. The Hearing Notice indicated the day, date, time and location of the hearing. This document is listed in the Commission records as successfully served with no record indicating a failure or error in service.

The undersigned issued a Prehearing Order dated August 26, 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 was eServed to the email address that the Complainant provided in the Complaint at 2:40:40 p.m. on August 26, 2019. This document is listed in the Commission records as successfully served with no record indicating a failure or error in service.

Both Commission documents contained the day, date, time and location of the scheduled hearing. Unlike *Elliott v. Pennsylvania Electric Co.*, Docket No. F-2017-2597039 (Opinion and Order entered October 4, 2018) (where eService was unsuccessful on the Complainant and an investigation showed the Complainant did not have an eService account; therefore, the documents were ordered to be reserved on the Complainant), Commission records show the Complainant has an eService account and eService was successful.

Although in the instant proceeding the U.S. Postal Service was not involved in the delivery of the Hearing Notice and Prehearing Order, the facts are that there was no error in delivery and thus, it is presumed the documents emailed to the address were received. EService of the Hearing Notice and Prehearing Order was done through the ordinary course of business. Notice eServed to a party's registered email address with no notification that service failed to be delivered to that email address is presumed to have been received. *Zirkel v. Philadelphia Gas Works*, Docket No. C-2016-2561176 (Final Order entered April 7, 2017); and *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered January 31, 2017).

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 Office of Administrative Law Judge.

It is within the discretion of the presiding officer to decide whether the Complainant's failure to appear was unavoidable and whether permitting a hearing after such a "no-show" would prejudice the public interest or the interest of the other party. See 66 Pa.C.S.

§ 332(f); see also, 52 Pa.Code § 5.245(a)-(b). From a due process standpoint, the question is whether the Complainant's failure to appear shall be deemed as the Complainant's waiver of the opportunity to participate in a hearing in the Complaint proceeding, pursuant to 66 Pa.C.S. § 332(f) and 52 Pa. Code § 5.245(a)-(b). Whether the Complainant failed to appear at the hearing due to unavoidable circumstances is a fact-based question. *DiSabatino v. PECO Energy Co.*, Docket Nos. C-2018-3005278 and C-2018-3005452 (Opinion and Order entered September 19, 2019); *Sunstein v. PPL Electric Utilities Corp.*, Docket No. C-2018-3000078 (Opinion and Order entered October 3, 2019); and *Atuahene v. Philadelphia Gas Works*, Docket No. F-2018-3004665 (Opinion and Order entered October 11, 2019).

Based on the record evidence and the pleadings, I do not find credible the Complainant's assertion that she was not "formally informed" of the scheduled hearing date. The record evidence shows that the Complainant received by eService the Hearing Notice and Prehearing Order. EService constitutes a valid legal means of service and both documents contained the scheduled hearing date. I find that the Complainant had an opportunity to appear and be heard in this proceeding but failed to appear at the scheduled hearing. Furthermore, the Complainant made no assertion that her failure to appear was unavoidable.

The Respondent's counsel objected to the request by the Complainant to have the hearing rescheduled. That objection is sustained by the ordering paragraph below.

Under these circumstances, the Complainant had 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).

As the party bringing this Complaint, the Complainant bears the burden of proving by a preponderance of the evidence that he is entitled to relief. By choosing not to

appear and proffer any evidence to support the Complaint, the Complainant waived her opportunity to appear and failed to meet her burden of proof.

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.Cmwlt. 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.Cmwlt. 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. Registration as a filing user constitutes an agreement to receive electronic service unless the filing user indicates upon registration that the filing user does not agree to receive electronic service. 52 Pa.Code § 1.32(b)(1).

3. It is within the discretion of the presiding officer to decide whether the Complainant's failure to appear was unavoidable and whether permitting a hearing after such a "no-show" would prejudice the public interest or the interest of the other party. See 66 Pa.C.S. § 332(f); see also, 52 Pa.Code § 5.245(a)-(b).

4. Whether the Complainant failed to appear at the hearing due to unavoidable circumstances is a fact-based question. *DiSabatino v. PECO Energy Co.*, Docket Nos. C-2018-3005278 and C-2018-3005452 (Opinion and Order entered September 19, 2019); *Sunstein v. PPL Electric Utilities Corp.*, Docket No. C-2018-3000078 (Opinion and Order entered October 3, 2019); and *Atuahene v. Philadelphia Gas Works*, Docket No. F-2018-3004665 (Opinion and Order entered October 11, 2019).

5. Notice eServed to a party's registered email address with no notification that service failed to be delivered to that email address is presumed to have been received. *Zirkel v.*

*Philadelphia Gas Works*, Docket No. C-2016-2561176 (Final Order entered April 7, 2017); and *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered January 31, 2017).

6. By Hearing Notice dated August 21, 2019, and Prehearing Order dated August 26, 2019, the Complainant had notice of the day, date and time of the scheduled hearing. 52 Pa.Code § 5.201(a).

7. 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).

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

9. 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).

10. 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).

11. The Complainant, Binghua Hu, failed to sustain her burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion by Binghua Hu, to reschedule the evidentiary hearing of the formal Complaint of Binghua Hu filed against PECO Energy Company at Docket No. C-2019-3012075, is denied.

2. That the motion by Angela Lorenz, Esquire, on behalf of PECO Energy Company, to dismiss the formal Complaint of Binghua Hu filed against PECO Energy Company at Docket No. C-2019-3012075, is granted.

3. That the formal Complaint of Binghua Hu filed against PECO Energy Company at Docket No. C-2019-3012075 is dismissed in its entirety with prejudice.

4. That the Secretary's Bureau mark Docket No. C-2019-3012075 closed.

Dated: October 29, 2019

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/s/  
Angela T. Jones  
Administrative Law Judge