

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Julie Toucher	:	
	:	
v.	:	C-2019-3012028
	:	
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision grants a motion to dismiss for failure to prosecute because the complainant failed to appear for the hearing at the designated date and time despite being given notice of the hearing.

HISTORY OF THE PROCEEDING

On July 31, 2019, Julie Toucher filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company (Met-Ed or the company), docket number C-2019-3012028. In her complaint, Ms. Toucher averred that “when the smart meter was installed on my house about a year ago, my family has had significant sleep issues.” Ms. Toucher requested that her smart meter be removed and replaced with an analog meter.

On August 26, 2019, Met-Ed filed an answer and new matter in response to Ms. Toucher’s complaint. In its answer, Met-Ed admitted or denied the various averments made in

the complaint. In particular, Met-Ed admitted that a smart meter was installed at the service address on September 28, 2017 in accordance with Act 129 of 2008 and the company's Commission-approved tariff. In its new matter, which was accompanied by a notice to plead, Met-Ed explained the process by which a smart meter was placed at the service address and the legal justification for doing so. Met-Ed concluded by requesting that Ms. Toucher's complaint be dismissed with prejudice.

On September 23, 2019, a hearing notice was issued setting an initial call-in telephonic hearing for this matter for Tuesday, November 12, 2019 at 10:00 a.m. and assigning me as the presiding officer. A prehearing order dated September 24, 2019 was issued setting forth various procedural rules that would govern the hearing. Of note, the hearing notice stated that a party may lose the case if it does not take part in the hearing and present facts on the issues raised. Similarly, the prehearing order stated, among other things, that: "If a party fails to participate in the hearing, the hearing may proceed without that party and a decision may be entered against that party." Both the hearing notice and the prehearing order were sent to Ms. Toucher at the address provided on her complaint via first-class mail. Neither was returned as undeliverable.

The hearing convened on November 12, 2019, as scheduled. Tori Giesler, Esquire and Lauren Lepkoski, Esquire appeared on behalf of Met-Ed. No one appeared on behalf of Ms. Toucher.

The record in this case consists of the hearing transcript of 9 pages. The record closed in this proceeding when the transcript was filed with the Commission on December 4, 2019. This Initial Decision grants the motion of Met-Ed made at the conclusion of the hearing to dismiss the complaint for failure to prosecute.

FINDINGS OF FACT

1. The Complainant in this case is Julie Toucher.

2. The Respondent in this case is Metropolitan Edison Company.
3. The service address is 806 N. Richmond St, Fleetwood, PA.
4. No one called in to the hearing as instructed on the hearing notice and in the prehearing order on behalf of Ms. Toucher. Tr. 4.
5. The hearing was delayed 13 minutes to accommodate any delay in anyone appearing at the hearing on behalf of Ms. Toucher. Tr. 4.
6. Ms. Toucher received notice of the hearing when she was sent a hearing notice via first-class mail to the address she provided on her formal complaint on September 23, 2019. Tr. 5.
7. Ms. Toucher received notice of the hearing when she was sent a prehearing order via first-class mail to the address she provided on their formal complaint on September 24, 2019. Tr. 5.
8. Neither the hearing notice nor the prehearing order were returned to the Commission as undeliverable.
9. Both the hearing notice and the prehearing order indicated that a party may lose the case if they do not appear and take part in the hearing. Tr. 5.
10. Counsel for Met-Ed indicated during the hearing the numerous efforts that the company took to provide Ms. Toucher with notice of the hearing. Tr. 6-7.

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). As a matter of law, a

complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. Patterson v. Bell Tel. Co. of Pa., 72 Pa. PUC 196 (1990). “Burden of proof” means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950). The offense must be a violation of the Public Utility Code, the Commission’s regulations or an outstanding order of the Commission. 66 Pa.C.S. § 701. In this proceeding, based on a reading of her complaint, Ms. Toucher complained that she would like her smart meter removed and an analog meter installed at her home. Ms. Toucher, therefore, has the burden of proof in this proceeding.

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). This due process requirement is satisfied when the parties are afforded notice and the opportunity to be heard. Id.

No one appeared on behalf of Ms. Toucher at the date and time set for the hearing in her case despite notice of the hearing. Commission regulations address circumstances when a party fails to appear in a proceeding. Section 5.245 provides:

§ 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.
 - (3) Not be permitted to recall witnesses who were excused for further examination.

52 Pa.Code § 5.245(a).

The prehearing order and hearing notice were sent to Ms. Toucher by regular first-class mail and neither were returned to the Commission as undeliverable. Accordingly, it must be presumed that these documents sent to Ms. Toucher in the ordinary course of business were received by Ms. Toucher. 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). Of note, the hearing notice and the prehearing order stated that, if a party fails to participate in the hearing, the hearing may proceed without that party and a decision may be entered against that party. Furthermore, counsel for Met-Ed indicated during the hearing the numerous efforts that the company took to provide Ms. Toucher with notice of the hearing. Tr. 6-7.

No one appeared on behalf of Ms. Toucher at the time of the hearing. Nor did anyone ever request a postponement or continuance of the hearing. As such, Ms. Toucher had notice and an opportunity to be heard in this proceeding but chose not to appear. Therefore, Ms. Toucher's due process rights have been fully protected. Sentner v. Bell Telephone Company of Pennsylvania, Docket No. F-00161106 (Order entered October 25, 1993); *see also*, 52 Pa.Code § 5.245(a).

During the hearing, counsel for Met-Ed moved to have the complaint dismissed for lack of prosecution. Tr. 7. By failing to appear and present any evidence in support of her complaint, Ms. Toucher has failed to carry her burden. Thus, it is appropriate to dismiss the complaint. Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (Order entered December 26, 1995). Accordingly, the merits of the complaint will not be addressed in this Initial Decision.

CONCLUSIONS OF LAW

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

2. 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).

3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 54, 70 A.2d 854 (1950).

4. 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). This due process requirement is satisfied when the parties are afforded notice and the opportunity to be heard. Id.

5. 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; and 3) not be permitted to recall witnesses who were excused for further examination. 52 Pa.Code § 5.245(a).

6. Ms. Toucher'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. Ms. Toucher has failed to carry her burden of proof in this proceeding.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Metropolitan Edison Company to dismiss the formal complaint of Julie Toucher at docket number C-2019-3012028 for failure to prosecute is granted.

2. That the formal complaint filed by Julie Toucher against Metropolitan Edison Company at docket number C-2019-3012028 is hereby dismissed.

3. That this matter be marked closed.

Date: December 9, 2019

_____/s/
Joel H. Cheskis
Deputy Chief Administrative Law Judge