

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tony Barone	:	
	:	
v.	:	C-2019-3011481
	:	
SmartEnergy Holdings LLC	:	

INITIAL DECISION

Before
Katrina L. Dunderdale
Administrative Law Judge

INTRODUCTION

The undersigned dismisses a Formal Complaint with prejudice because Complainant failed to appear at the initial hearing and prosecute the case.

HISTORY OF THE PROCEEDING

On July 1, 2019, Tony Barone (Mr. Barone or Complainant) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) against SmartEnergy Holdings LLC (SmartEnergy or Respondent). Complainant alleged SmartEnergy had incorrect charges on his bill and he averred he did not sign with SmartEnergy as his supplier when the supplier said he did. Complainant asked the Commission to order SmartEnergy to remove their charges.

On July 12, 2019, the Commission notified SmartEnergy that a Formal Complaint had been filed against it by Complainant by sending a letter to SmartEnergy by Certified Mail to Respondent's address on file at the Commission, c/o Daniel Kern, at 575 Lexington Avenue,

4th Floor, New York, New York 10022. That letter was returned to the Commission on August 21, 2019 as “Return to Sender, Refused, Unable to Forward.” On August 22, 2019, the Commission re-sent the letter to SmartEnergy at Respondent’s address on file at the Commission, c/o Daniel Kern, at 575 Lexington Avenue, 4th Floor, New York, New York 10022. On September 6, 2019, that letter was returned to the Commission as “Return to Sender, Insufficient Address, Unable to Forward.” Thereafter, the Commission re-sent the letter to SmartEnergy, c/o Daniel Kern, at 2040 Avenue C #200N, Bethlehem, Pennsylvania 18017.

The Commission’s letter dated September 6, 2019, was not returned to the Commission as undeliverable. SmartEnergy did not file an Answer.

By Call-In Telephone Hearing Notice dated October 30, 2019, the Office of Administrative Law Judge notified the parties an initial telephonic hearing was scheduled for Thursday, December 12, 2019, at 10:00 a.m. On November 1, 2019, the presiding officer issued a Prehearing Order which, *inter alia*, advised the parties that continuances would only be granted if requested and only in rare situations where sufficient cause was shown to exist.

On December 2, 2019, the Prehearing Order, which had been mailed to Respondent’s address on file at the Commission - 575 Lexington Avenue, 4th Floor, New York, New York 10022 - was returned to the presiding officer as “Return to Sender, Insufficient Address, Unable to Forward.” On December 3, 2019, the presiding officer issued the Amended Prehearing Order, which was mailed to SmartEnergy, c/o Daniel Kern, at 2040 Avenue C #200N, Bethlehem, Pennsylvania 18017. The Amended Prehearing Order dated December 3, 2019, was not returned to the Commission as undeliverable.

The time and date of the hearing on December 12, 2019, was included in the hearing notice, dated October 30, 2019, in the Prehearing Order, dated November 1, 2019 and in the Amended Prehearing Order, dated December 3, 2019. The hearing notice, the Prehearing Order and the Amended Prehearing Order specified how to call into the hearing on the scheduled day and at the scheduled time. The hearing notice, the Prehearing Order and the Amended

Prehearing Order stated in bold, underlined print that the case would be dismissed if Complainant failed to call into the hearing.

The presiding officer attempted to convene the telephonic hearing as scheduled on December 12, 2019, at 10:00 a.m. Complainant and Respondent failed to appear for the hearing. The presiding officer checked with her staff and the Commission's database to ascertain if Mr. Barone and/or SmartEnergy had called or sent any form of communication explaining the absence and/or requesting a continuance. The presiding officer went on the record at 10:10 a.m., at which time Complainant and Respondent continued to be absent from the initial hearing.

The presiding officer noted Complainant had not contacted the presiding officer's office by telephone or email in order to request a continuance or explain his absence. In addition, the presiding officer noted the Commission's Secretary's Bureau did not receive any mail from Complainant or have any mail sent to Complainant returned as undeliverable. The presiding officer noted on the record that all correspondence, mailed to Respondent at the New York address provided by Respondent was returned as undeliverable. However, the presiding officer also noted some correspondence - mailed to Bethlehem, Pennsylvania - was not returned as undeliverable. Specifically, the notice issued on September 6, 2019 and the Amended Prehearing Order dated December 3, 2019, were not returned as undeliverable. Lastly, the presiding officer noted the actions the Commission took to ensure Respondent received notice of the hearing.

The hearing concluded at 10:13 a.m. The hearing record closed on December 12, 2019, upon the conclusion of the telephonic hearing.

FINDINGS OF FACT

1. Complainant and ratepayer of record is Tony Barone, who resides at 88 Stella Drive, Trafford, Pennsylvania 15085 (service address).

2. Respondent is SmartEnergy Holdings LLC, an electric generation supplier company which provides or provided electric service at the service address.

3. The hearing notice, the Prehearing Order and the Amended Prehearing Order were sent to the address provided by Tony Barone in the Formal Complaint and were not returned as undeliverable.

4. Tony Barone was not present and did not participate in the hearing.

5. Respondent was not present and did not participate in the hearing.

6. Complainant did not contact the presiding officer or the Commission to request a continuance.

7. Respondent did not file an Answer in this proceeding or contact the presiding officer or the Commission to request a continuance.

DISCUSSION

Pursuant to Section 332(a) of the Public Utility Code, 66 Pa.C.S.A. § 332(a), the burden of proof is on the proponent of a rule or order. In this proceeding, Mr. Barone, as the Complainant, is the proponent of a rule or order. Therefore, Tony Barone bears the burden of proving by a preponderance of the evidence that Respondent violated the Public Utility Code or a regulation or order of the Commission.¹ Mr. Barone must show the utility is responsible or accountable for the problem described in the Complaint.² Administrative agencies, like the Public Utility Commission, are required to provide due process to the parties appearing before

¹ *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

² *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976).

them. This requirement is satisfied when the parties are provided with notice and the opportunity to appear and be heard.³

Complainant remains responsible to show Respondent was responsible for the problem even if Respondent does not answer the Formal Complaint and/or appear at the time of the hearing. Mr. Barone did not appear at the time scheduled for the hearing, and he did not participate in the hearing. The date, time and location of the hearing was listed in the hearing notice, dated October 30, 2019; in the Prehearing Order, dated November 1, 2019; and in the Amended Prehearing Order, dated December 3, 2019.

The Office of Administrative Law Judge mailed the hearing notice, the Prehearing Order and the Amended Prehearing Order to Complainant at the address Mr. Barone provided in the Formal Complaint. Once notice of a hearing and the opportunity to be heard was provided, it was the responsibility of Mr. Barone to appear and participate in the hearing.⁴ If Mr. Barone could not appear, for any reason, then it was the responsibility of Mr. Barone to notify the presiding officer immediately about the impediment or dilemma.

Section 332(f) of the Public Utility Code, 66 Pa.C.S.A. § 332(f), provides in pertinent 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 Mr. Barone did not appear or participate in the hearing, despite receiving three notices of the date and time of the hearing, the hearing was held in accordance with 66 Pa.C.S.A. § 332(f) and 52 Pa.Code § 5.245.

³ *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlth. 1984).

⁴ *Sentner v. Bell Telephone Co. of Pennsylvania*, Docket No. F-00161106 (Order entered October 25, 1993); *Mumma v. PPL Electric Utilities Corporation*, Docket No. C-00014869 (Order entered January 24, 2002).

The hearing record closed on December 12, 2019, pursuant to 52 Pa.Code § 5.431(a) and (b) which provides:

(a) The record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission.

(b) After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion.

In this proceeding, Mr. Barone did not call into the hearing as specified in the hearing notice, the Prehearing Order and the Amended Prehearing Order. The hearing notice, the Prehearing Order and the Amended Prehearing Order clearly indicated Complainant was to call. These documents provided Complainant with the Commission's toll-free conference bridge number and PIN number. The hearing notice, the Prehearing Order and the Amended Prehearing Order also provided an address where Mr. Barone could reach the presiding officer if a continuance request and/or additional information was needed prior to the hearing. In addition, the hearing notice provided a telephone number and a facsimile number for the office of the presiding officer if Complainant needed to request a continuance.

Mr. Barone did not contact the presiding officer or the Office of Administrative Law Judge to explain his absence or ask for a continuance. Complainant failed to take advantage of the opportunity provided in which to appear and prosecute the Formal Complaint against Respondent by presenting evidence to support the allegations. As a result, Complainant failed to sustain the burden of proof. Accordingly, the Formal Complaint will be dismissed in the Ordering Paragraphs below.⁵

⁵ *Volgstadt v. UGI Penn Natural Gas*, Docket No. F-02266429 (Order entered September 12, 2008) and *Martin Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995); *El-Ayazra v. West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter in this proceeding. 66 Pa.C.S.A. § 701.
2. Complainant has the burden of proof in this matter pursuant to 66 Pa.C.S.A. § 332(a).
3. The hearing record closed at the conclusion of the hearing on December 12, 2019. 52 Pa.Code § 5.431(a).
4. Complainant, by failing to appear at the scheduled hearing, waived the opportunity to participate in the hearing. 66 Pa.C.S.A. § 332(f).
5. 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*, 455 Pa. 531, 317 A.2d 584 (1974); *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944 (Pa.Cmwlth. 1994).
6. 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 Pa.*, Docket No. F-00161106 (Order entered October 25, 1993).
7. Complainant failed to sustain the burden of proof. 66 Pa.C.S.A. § 332(a).
8. The Commission or the presiding officer may disregard an error or defect or procedure at any stage of a proceeding if by doing so no substantive right of a party is adversely affected. 52 Pa.Code § 1.2.

