

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Vilma DeMarco	:	
	:	
v.	:	C-2019-3008544
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Andrew M. Calvelli
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. The Decision denies the company’s oral request to bar the Complainant from filing further complaints against the company until the outstanding arrearage is paid.

HISTORY OF THE PROCEEDING

On March 14, 2019, Vilma DeMarco filed a formal Complaint against PECO Energy Company (PECO) with the Pennsylvania Public Utility Commission (Commission) at Docket Number C-2019-3008544. In her Complaint, Ms. DeMarco stated that PECO was threatening to shut off her service and that she should not be responsible for electric charges incurred by her tenant. The Complaint was served on PECO by the Commission on March 14, 2019.

On March 19, 2019, PECO filed its Answer to Ms. DeMarco's Complaint. In its Answer, PECO asserted that Ms. DeMarco was responsible for the tenant's electric charges because there was foreign wiring at Ms. DeMarco's rental property. PECO also noted that Ms. DeMarco had previously filed a formal Complaint regarding the same subject matter at Docket Number C-2017-2613087, and that the Presiding Officer (the same Presiding Officer in this case) dismissed the Complaint due to Ms. DeMarco's failure to prosecute. PECO further noted that the Commission considered and rejected Ms. DeMarco's Petition for Rescission and upheld the Presiding Officer's Initial Decision, via Commission Order dated December 20, 2018.¹ PECO concluded its Answer by requesting dismissal of the Complaint.

On March 26, 2019, the Commission issued an Initial Call-In Telephonic Hearing Notice to the parties, indicating that a call-in telephonic hearing would take place on Monday, April 29, 2019 and that I was assigned as the Presiding Officer in this case.

On April 19, 2019, I issued a Prehearing Order to the parties, discussing various procedural rules that would govern the hearing. The Prehearing Order again advised the parties that the hearing was a call-in telephonic hearing.

Both the Hearing Notice and Prehearing Order advised the parties of the toll-free phone number to call to participate in the hearing, as well as the PIN number to enter once the toll-free number was called. Neither the Hearing Notice nor the Prehearing Order sent to Ms. DeMarco was returned to my office by the postal authorities as being undeliverable to Ms. DeMarco.

The hearing convened on April 29, 2019, as scheduled. Shawnee Lee, Esquire, appeared on behalf of PECO. No one appeared on behalf of Ms. DeMarco. Counsel made an on-the-record oral motion to dismiss the Complaint, due to Ms. DeMarco's failure to appear. Counsel also made an on-the-record oral motion to bar the Complainant from filing further Complaints against PECO until her arrearage is paid off, asserting that the Complainant was

¹ See, Vilma DeMarco v. PECO Energy Co., Docket No. C-2019-3008544 (Opinion and Order entered December 20, 2018).

abusing the Commission's administrative process through her actions. I closed the record and advised counsel that the Complaint was being dismissed, but that I would take under advisement whether to dismiss the Complaint with prejudice, as well as the motion to bar the Complainant from filing further complaints.

Shortly after the conclusion of the hearing on April 29, 2019, I returned to my office and was advised by clerical staff that Ms. DeMarco had called to state that she was waiting for my phone call so that she could take part in the hearing. I had the clerical staff advise Ms. DeMarco that both the Hearing Notice and Prehearing Order were clear about the hearing being a Call-In Hearing. I also had the clerical staff advise Ms. DeMarco that she could file a Petition to Re-Open Record, since the record had been closed.

On May 6, 2019, Ms. DeMarco sent a letter to my office, saying that she was confused about the hearing process and she requested another chance to attend a hearing. My review of the Commission's Dockets indicated that Ms. DeMarco did not file the letter with the Commission (as I had the clerical staff instruct her). As a result, I filed the letter with the Commission on June 18, 2019 and had the Commission docket the letter as Ms. DeMarco's "Petition to Re-Open Record." I then emailed the Petition to PECO's counsel, and advised PECO that it could have until July 8, 2019 to file a Reply to the Petition.

PECO filed its reply to the Petition on July 5, 2019. In its Reply, PECO noted that both the Hearing Notice and Prehearing Order were very clear in their indication that the hearing was a Call-In hearing, and that the parties needed to call-in to the phone number provided. PECO also noted the prior history of Ms. DeMarco with PECO and the Commission, again citing to Ms. DeMarco's 2017 formal Complaint and the fact that she failed to appear for that hearing as well. PECO also noted that the Commission had upheld my prior Initial Decision in that case, which dismissed Ms. DeMarco's claims with prejudice. PECO concluded its Reply by requesting that the Petition be denied.

By Order dated January 2, 2020, I denied the Petition to Re-Open Record. The matter is now ready for disposition. For the reasons discussed below, the Complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant in this case is Vilma DeMarco.
2. The Respondent in this case is PECO Energy Company.
3. No one appeared at the hearing on behalf of Ms. DeMarco. Tr. 5, 6.
4. Ms. DeMarco received notice of the hearing on March 26, 2019 when the Commission mailed a Hearing Notice to the address she provided on her Complaint.
5. Ms. DeMarco also received notice of the hearing on April 19, 2019 when the Commission mailed a Prehearing Order to the address she provided on her Complaint.
6. Neither the Hearing Notice nor the Prehearing Order were returned to the Commission by the postal authorities as being undeliverable to Ms. DeMarco.
7. Both the Hearing Notice and the Prehearing Order advised Ms. DeMarco that the hearing was a call-in telephonic hearing, and both documents advised Ms. DeMarco of the toll-free phone number to call for the hearing as well as the PIN number to input for the hearing.
8. Both the Hearing Notice and Prehearing Order advised Ms. DeMarco that she could lose her case if she did not attend the hearing.
9. During the hearing, counsel for PECO made an oral on-the-record motion to dismiss the Complaint with prejudice, due to Ms. DeMarco's failure to appear for the hearing. Tr. 5, 6.

10. During the hearing, counsel for PECO made an oral on-the-record motion to bar the Complainant from filing further complaints against PECO until Complainant's outstanding balance was paid.

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). "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). In this proceeding, Ms. DeMarco filed a Complaint against PPL. Ms. DeMarco, therefore, has the burden of proof.

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 accorded notice and the opportunity to be heard. Id.

No one appeared on behalf of Ms. DeMarco 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 Hearing Notice and Prehearing Order were sent to Ms. DeMarco by regular first-class mail and were not returned to the Commission as being undeliverable. Accordingly, it must be presumed that the Hearing Notice and Prehearing Order sent to Ms. DeMarco in the ordinary course of business were received by Ms. DeMarco. 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 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.

No one appeared on behalf of Ms. DeMarco at the time of the hearing. Nor did anyone ever request a postponement or continuance of the hearing. As such, Ms. DeMarco had notice and an opportunity to be heard in this proceeding but chose not to appear. Therefore, Ms. DeMarco'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 PPL moved to have the Complaint dismissed for lack of prosecution. Tr. 5, 6. By failing to appear and present any evidence in support of her complaint, Ms. DeMarco has failed to carry her burden of proof. Thus, it is appropriate to dismiss the complaint. Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (Order entered December 26, 1995). El-Ayazra v. PPL Power Company, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa.Code § 5.245.

In addition to dismissing the Complaint, I conclude that the Complaint should be dismissed with prejudice, since it is the same Complaint that the Commission dismissed with prejudice in Case Number C-2017-2613087. Ms. DeMarco is attempting to re-litigate

issues that have been conclusively decided by the Commission via its prior final Order in that case which was entered on December 20, 2018. Since that final Order dismissed Ms. DeMarco's Complaint with prejudice, this Complaint must also be dismissed with prejudice.

Finally, PECO requested that the Complainant be precluded from filing further Complaints against it until the arrearage is paid, asserting that the Complainant was abusing the Commission's administrative processes by her actions. I note that there is Commission precedent to support the preclusion of a party from filing further informal or formal complaints when the party has been an abuser of the system. See, Seidenstricker v. Metropolitan Edison Co., Docket No. F-2008-2019388 (Final Order entered July 28, 2009) (Seidenstricker); Argento's Pizza v. Philadelphia Gas Works, Docket No. C-2009-2138055 (Final Order entered October 1, 2010). The factors to be considered as put forth in the Argento's Pizza case include the following: 1) the number and nature of complaints; 2) the number of defaulted payments; 3) the use of tactics to avoid payments and service terminations that became due; and 4) the history of payments. Given that the Complainant failed to appear for her hearing, and given that this is only the second time that the Complainant has failed to appear for a hearing before the undersigned Presiding Officer, I cannot at this time conclude that the Complainant is deliberately abusing the Commission's administrative processes.

Since Ms. DeMarco's Complaint is being dismissed with prejudice for failure to appear and present evidence in support of her Complaint, it is not necessary to address the merits of her Complaint in this Initial Decision. An appropriate Order will follow below.

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). "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).

3. 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 accorded notice and the opportunity to be heard. Id.

4. 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 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).

5. Ms. DeMarco'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).

6. Ms. DeMarco failed to carry her burden of proof in this proceeding because she failed to appear at the hearing to present her case to the Commission.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss with prejudice the Complaint of Vilma DeMarco at Docket Number C-2019-3008544 is granted.

