

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joseph Epp and Cynthia Rao	:	
	:	
v.	:	F-2019-3013395
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Alphonso Arnold III
Special Agent

INTRODUCTION

This Initial Decision dismisses the Complaint because the Complainants failed to appear for the hearing to prosecute their Complaint.

HISTORY OF THE PROCEEDING

On September 30, 2019, Joseph Epp and Cynthia Rao (Complainants) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (Respondent or PECO). In their Complaint, the Complainants stated the following: “PECO needs to improve customer service and bill procedures. They are to stop repeating same charges in billing summary on customer bills.” Complaint ¶4. For relief, the Complainants asked that the Commission order PECO to refund duplicate charges, refund late fees, and provide them with a copy of the bills for the billing periods from June 12, 2018 – July 12, 2018 and July 12, 2018 – August 3, 2018. The Complaint is a timely appeal of a decision made by the Commission’s Bureau of Consumer Services (BCS) at BCS No. 3674722.

On October 28, 2019, PECO filed an Answer to the Complaint, denying that there were any improper charges assessed to the Complainants. PECO requested that the Commission dismiss the Complaint.

By Hearing Notice served on the parties on October 30, 2019, the Commission scheduled this matter for a telephonic hearing on January 6, 2020, at 1:30 p.m. and assigned the case to me. The Hearing Notice stated the following: “*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*” (emphasis in the original).

A Prehearing Order, served on the parties on December 10, 2019, reminded the parties of the date and time of the hearing and addressed, *inter alia*, the procedures applicable to the hearing and the method by which a party could request a change of the scheduled hearing date if the date was not convenient for them. Furthermore, the Prehearing Order stated the following: “**You must be available on the scheduled day and time. If you fail to be available, your case will be dismissed.**” (emphasis in the original).

The Hearing Notice and the Prehearing Order informed the parties that the undersigned would call the parties by phone on the hearing date and time to connect the parties to the hearing.

On January 6, 2020, at 1:30 p.m., I called the Complainants at the phone number listed on their Complaint form and the Complainants did not answer. I called the Complainants at a second phone number provided to me by PECO’s proposed witness and again the Complainants did not answer. I left a voice message at both numbers, informing the Complainants that I would attempt to call them again at 1:45 p.m.

The attorney for PECO, Edward Fisher, Esquire, was successfully contacted and connected to the hearing conference. Attorney Fisher was ready to proceed with the hearing with a witness.

At 1:45 p.m., I called the Complainants at the two phone numbers I had previously attempted, and again they did not answer. I left a second voice message at both numbers, informing the Complainants that the hearing would be held without them, and to contact the Commission if they wanted to provide a reason as to why they were unavailable to participate in the hearing.

The January 6, 2020 hearing was held at 1:45 p.m. without the Complainants. No witnesses were presented, and no exhibits were introduced for the record. PECO made a Motion to dismiss the Complaint for failure to prosecute.

The record closed on January 6, 2020, following the conclusion of the telephonic hearing. As of the date of this Initial Decision, no communication has been made to the Office of Administrative Law Judge on the Complainants' behalf to explain their absence from the hearing. For the reasons discussed below, PECO's Motion will be granted, and the Complaint will be dismissed with prejudice.

FINDINGS OF FACT

1. The Complainants are Joseph Epp and Cynthia Rao, whose mailing address is 344 South Lincoln Avenue, Newton, Pennsylvania.
2. The Respondent is PECO Energy Company.
3. By Hearing Notice served upon the parties on October 30, 2019, the Commission scheduled this matter for a telephonic hearing on January 6, 2020.
4. The Hearing Notice served in this matter stated the following: "Attention: *You may lose the case if you do not take part in this hearing and present facts on the issues raised.*" (emphasis in the original).

5. By Prehearing Order served upon the parties on December 10, 2019, the parties were reminded of the date and time of the telephonic hearing and were provided with the method by which a party could request a continuance of the hearing date, if needed.

6. The Prehearing Order served in this matter stated the following: “**You must be available on the scheduled day and time. If you fail to be available, your case will be dismissed.**” (emphasis in the original).

7. The Hearing Notice and the Prehearing Order served in this matter informed the parties that they would be contacted by phone on the hearing date and time to be connected to the hearing.

8. Neither the Hearing Notice nor the Prehearing Order served to the Complainants at their mailing address was returned to the Commission as being undeliverable by the postal authorities.

9. The Complainants were not available by phone to participate in the January 6, 2020 hearing.

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). To satisfy this burden, the Complainant must show that the named utility is responsible or accountable for the problem described in the Complaint. Patterson v. Bell Telephone Co. of Pa., 72 Pa. PUC 196 (1990); Feinstein v. Philadelphia Suburban Water Co., 50 Pa. PUC 300 (1976). This must be shown by a preponderance of the evidence, that is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600 (Pa.Cmwlt. 1990), alloc. den., 602 A.2d 863 (Pa. 1992); Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950).

If a Complainant establishes a *prima facie* case, the burden of going forward with the evidence shifts to the utility. If a utility does not rebut that evidence, the Complainant will prevail. If the utility rebuts the Complainant's evidence, the burden of going forward with the evidence shifts back to the Complainant, who must rebut the utility's evidence by a preponderance of the evidence. The burden of going forward with the evidence may shift from one party to another, but the burden of proof never shifts; it always remains on the Complainant. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001); see also, Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982).

Additionally, this Commission's decision must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 413 A.2d 1037 (Pa. 1980).

Administrative agencies, like the Public Utility 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 Complainants did not participate in the January 6, 2020 hearing. The date and time of the hearing were provided in the Hearing Notice and Prehearing Order served to the Complainants in this matter. The Notice and Order informed the Complainants that they were to be available by phone on January 6, 2020 at 1:30 p.m. to be contacted and connected to the hearing. The undersigned attempted to contact and connect the Complainants to the hearing at 1:30 p.m. and 1:45 p.m., using two phone numbers for the Complainants, but was unable to do so. The Notice and Order warned the Complainants that they may lose their case if they failed to participate in the scheduled hearing.

The Hearing Notice and Prehearing Order were sent to the Complainants by regular first-class mail. Neither document was returned to the Commission as undeliverable.

Accordingly, it must be presumed that these documents, which were sent to the Complainants in the ordinary course of business, were received by them. 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). Therefore, the Complainants are deemed to have had sufficient notice of the day, date and time of the scheduled hearing and for whatever reason chose not to appear at the hearing to prosecute their Complaint. The Complainants made no attempt to notify the presiding officer that they did not plan to participate in the scheduled hearing.

Under these circumstances, the Complainants had ample 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 have been provided to the parties, it is the responsibility of both parties to appear and participate in the hearing. Schneider v. Pa. Pub. Util. Comm'n, 479 A.2d 10 (Pa.Cmwlt. 1984). Therefore, the due process rights of the Complainants have been fully protected. Sentner v. Bell Tel. Co. of Pa., Docket No. F-00161106 (Opinion and Order entered October 25, 1993). The Complainants did not appear, and the hearing proceeded in their absence. Both 66 Pa.C.S.A. § 332(f) and 52 Pa.Code § 5.245(a) provide that a party who fails to be represented at a scheduled hearing shall waive the opportunity to participate in the hearing and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat.

§ 332. Procedures in general.

(f) Actions of parties and counsel.--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, or to recall for further examination of witnesses who were excused, unless the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting such reopening or further examination. . . .

66 Pa.C.S. § 332(f).

§ 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.

. . .

52 Pa. Code § 5.245(a).

As the party seeking relief from the Commission, the Complainants bear the burden of proof. By choosing not to participate in the hearing and proffer any evidence to support the Complaint, the Complainants failed to meet this burden.

The due process rights of the Complainants have been protected. The Complainants had notice of the scheduled hearing and failed to appear to prosecute their Complaint. Therefore, the Respondent's Motion to dismiss the Complaint is granted. Accordingly, the Complaint in this matter will be dismissed in its entirety with prejudice. El-Ayazra v. West Penn Power Company, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); Volgstadt v. UGI Penn Natural Gas, Inc., Docket No. F-02266429 (Opinion and Order entered September 12, 2008) and Jefferson v. UGI Utilities, Inc., Docket No. Z-00269892 (Opinion and Order entered December 26, 1995).

CONCLUSIONS OF LAW

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

2. The burden of proof in this proceeding is on the Complainants. 66 Pa.C.S. § 332(a).

3. Administrative agencies 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).

4. Documents sent to a party in the ordinary course of business and not returned to the Commission as undeliverable are presumed to be received by the party. 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).

5. 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 (Opinion and Order entered October 25, 1993).

6. By failing to appear at their scheduled hearing, the Complainants waived their opportunity to participate in the hearing and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat, or to recall for further examination of witnesses who were excused. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

7. The Complainants' 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).

8. By failing to appear and proffer any evidence in support of the Complaint, the Complainants have failed to meet the burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss the Complaint at Docket No. F-2019-3013395 for failure to prosecute is granted.
2. That the Complaint at Docket No. F-2019-3013395 is hereby dismissed with prejudice.
3. That the docket at Docket No. F-2019-3013395 is marked closed.

Date: January 14, 2020

/s/
Alphonso Arnold III
Special Agent