

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robin Callahan	:	
	:	
v.	:	C-2019-3010000
	:	
Aqua Pennsylvania, Inc.	:	

INITIAL DECISION

Before
Angela T. Jones
Administrative Law Judge

INTRODUCTION

This Initial Decision grants Aqua Pennsylvania, Inc.’s Motion to Dismiss the formal Complaint (Complaint) of Robin Callahan with prejudice because she failed to appear and prosecute the case.

HISTORY OF THE PROCEEDING

On May 17, 2019, Robin Callahan (Complainant) electronically filed (efiled) a Complaint against Aqua Pennsylvania, Inc. (Respondent or Aqua) with the Pennsylvania Public Utility Commission (Commission) alleging that the utility is threatening to shut off her water service or has already shut off her service. The Complainant also requested an affordable payment agreement. The Complainant asserted that service should not be terminated and that she has a medical condition and a financial burden.

On June 10, 2019, Respondent filed an Answer denying the material allegations of the Complaint.¹ The Respondent noted that it is willing to discuss a payment arrangement with the Complainant but had been unable to do so as of the filing of its Answer.

An Interim Order dated June 11, 2019 and issued by Chief Administrative Law Judge Charles Rainey, Jr., was electronically served (eServed) on the parties of record and assigned the matter to Mediator, Cynthia Lehman, for possible resolution. Mediation was unsuccessful.

A Hearing Notice was eServed on September 25, 2019, which notified the parties that an initial hearing was scheduled in this matter for Thursday, November 7, 2019, at 10:00 a.m.

A Prehearing Order was eServed on September 26, 2019, advising the parties of the location, date and time of the scheduled hearing, informing them of the procedures applicable to the proceeding, and directing the submission of documents prior to the hearing.

By facsimile on November 5, 2019, the Complainant requested that the initial hearing be rescheduled. Counsel for the Respondent did not object to the request by the Complainant. By Order dated November 6, 2019, the Complainant's request to reschedule the initial hearing was granted.

A Hearing Notice was eServed on November 6, 2019, which rescheduled the initial hearing for Wednesday, December 18, 2019, at 10:00 a.m.

The hearing convened as scheduled on December 18, 2019 at 10:00 a.m. Mary McFall Hopper, Esquire, appeared representing the Respondent. Neither the Complainant nor a counsel for the Complainant appeared at the hearing. After taking a brief recess, the hearing reconvened at approximately 10:22 a.m. after I confirmed that the Complainant had not called or

¹ The Commission served the Complaint on May 20, 2019, to the Respondent.

shown good cause why she had not appeared at the scheduled hearing. The Complainant and any representative remained absent.

Counsel for Aqua moved to dismiss the Complaint with prejudice for lack of prosecution. That Motion is granted pursuant to the ordering paragraphs below.

The record was closed upon receipt of the hearing transcript on January 15, 2020.

FINDINGS OF FACT

1. The Complainant is Robin Callahan.
2. The Respondent is Aqua Pennsylvania, Inc., a jurisdictional public utility that provides water and wastewater service in the Commonwealth of Pennsylvania.
3. On May 17, 2019, Complainant efiled a Complaint with the Commission against the Respondent.
4. The Respondent efiled its Answer on June 10, 2019, which denied any wrongdoing.
5. On September 25, 2019, a Hearing Notice was eServed which notified the parties that an initial hearing was scheduled for Thursday, November 7, 2019, at 10:00 a.m.
6. A Prehearing Order was eServed on September 26, 2019, advising the parties of the date and time of the scheduled hearing, informing them of the procedures applicable to the proceeding, and directing the submission of documents prior to the hearing.
7. By facsimile on November 5, 2019, the Complainant requested to reschedule the initial hearing.

8. On November 6, 2019, a Hearing Notice was eServed which canceled the November 7, 2019 initial hearing and rescheduled it for December 18, 2019, at 10:00 a.m.

9. Nothing in the Commission's electronic audit history for this docket shows that the Hearing Notice or the Prehearing Order were not emailed to the Complainant.

10. Neither the Complainant nor any counsel representing the Complainant appeared at the scheduled hearing on December 18, 2019.

11. The Complainant did not settle or withdraw this Complaint prior to the scheduled hearing date or obtain a continuance.

DISCUSSION

In this formal Complaint, the Complainant is disputing the payment arrangement with the Respondent and requested that her water service not be terminated. The Complainant requested an affordable payment arrangement. 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 this burden.

As the party seeking affirmative relief from the Commission, the burden of proof rests on the Complainant. 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.Cmwlt. 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 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).

Commission internal electronic activity for eService shows that the December 18, 2019 Hearing Notice was eServed to the email address that the Complainant provided in the Complaint at 3:30:43 p.m. on November 6, 2019. The Hearing Notice indicated the day, date, time and location of the hearing. This document is listed in the Commission's records as successfully served with no record indicating a failure or error in service.

The undersigned issued a Prehearing Order dated September 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 10:40:24 a.m. on September 26, 2019. This document is listed in the Commission records as successfully served with no record indicating a failure or error in service. Furthermore, the Complainant complied with the procedure in the Prehearing Order to request that the November 7, 2019, scheduled initial hearing be rescheduled. Such compliance in procedure supports a presumption that the Complainant received the document and the email address used to send the document was correct.

As stated above, the Hearing Notice contained the day, date, time and location of the hearing. In *Elliott, Jr. v. Pennsylvania Electric Co.*, Docket No. F-2017-2597039 (Opinion and Order entered October 4, 2018), the Complainant was thought to have an eService account, but eService was unsuccessful on the Complainant. An investigation showed the Complainant did not have an eService account; therefore, the documents were ordered to be reserved on the Complainant. The instant proceeding is distinguished from *Elliott* because 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 Notices or Prehearing Order, the facts are that there was no error in delivery. 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); *Morella V. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered January 31, 2017); and *Hu v. PECO Energy Co.*, Docket No. C-2019-3012075 (Final Order entered December 19, 2019).

The Complainant is deemed to have received these documents and had notice of the day, date, time and location of the scheduled hearing. The Complainant was also noticed of 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, 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 § 5.425(a).

As the party bringing the Complaint, the Complainant bears the burden of proving by a preponderance of the evidence that she is entitled to relief. By choosing not to appear and failing to 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-0014869, 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.Cmwlth. 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 Bd. of Review*, 970 A.2d 492, 494 (Pa.Cmwlth. 2008).

Counsel for Respondent moved that the Complaint be dismissed with prejudice for failure to prosecute. The Complainant had notice of the scheduled hearing and failed to appear to prosecute her Complaint. The failure of the Complainant to appear at the 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, 1992); *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); and *Whaumbush v. PECO Energy Co.*, Docket No. C-2017-2622269 (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. As the Complainant, Robin Callahan had the burden of proof. 66 Pa.C.S. § 332(a).
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); *Morella V. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered January 31, 2017); and *Hu v. PECO Energy Co.*, Docket No. C-2019-3012075 (Final Order entered December 19, 2019).

6. By Hearing Notice dated November 6, 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 have 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. 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).

9. 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).

10. The Complainant, Robin Callahan, failed to sustain her burden of proving that she was entitled to the relief sought from the Commission. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of Aqua Pennsylvania, Inc. to dismiss the formal Complaint of Robin Callahan at Docket No. C-2019-3010000 is granted.
2. That the formal Complaint filed by Robin Callahan against Aqua Pennsylvania, Inc. at Docket No. C-2019-3010000 is dismissed with prejudice for failure to prosecute.
3. That the Secretary's Bureau should mark this matter closed.

Date: February 18, 2020

/s/
Angela T. Jones
Administrative Law Judge