

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kemberly Francois	:	
	:	
v.	:	F-2019-3013967
	:	
Philadelphia Gas Works	:	

**INITIAL DECISION**

Before  
Kailey B. Maguire  
Special Agent

**INTRODUCTION**

This decision grants a motion to dismiss for failure to prosecute the complaint of a natural gas service customer for the failure of the Complainant to appear at the scheduled hearing, at the designated date and time, despite being given notice of the hearing.

**HISTORY OF THE PROCEEDING**

On November 1, 2019, Kemberly Francois (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (PGW or Respondent). In her complaint, Ms. Francois averred PGW was threatening to shut off her service or had already shut off her service. As relief, Complainant requested a payment arrangement. The complaint is a timely appeal from a decision by the Commission's Bureau of Consumer Services (BCS) dated September 9, 2019 at BCS No. 3732495 in which Ms. Francois was granted a level two (2) payment arrangement.<sup>1</sup>

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<sup>1</sup> A level two customer is defined as a customer having a household with a gross monthly income exceeding 150% and not more than 250% of the Federal poverty level and is provided with a repayment period of not more than 36 months. 66 Pa. C.S. § 1405(b)(2).

On November 21, 2019, PGW filed an answer in response to the complaint asserting, *inter alia*, it issued a shut off notice for the service at 6112 Gillespie Street, Philadelphia, Pennsylvania (service address), and denied all other material allegations in the complaint. PGW concluded its answer by requesting dismissal of the complaint.

On November 22, 2019, the Commission issued a Call-In Telephonic Hearing Notice to the parties, establishing an initial telephonic hearing for January 17, 2020, at 10:00 a.m. and assigning the undersigned as presiding officer.<sup>2</sup> Of note, the Hearing Notice advised the parties: “*Attention: You may lose this case if you do not take part in this hearing and present facts on the issues raised.*” (emphasis in the original).

On November 27, 2019, a Prehearing Order was issued reminding the parties of the date and time of the hearing and addressing, *inter alia*, the procedures applicable to the hearing including the method by which a party could request a change of the scheduled hearing if the date was not convenient for them. Further, the Prehearing Order advised the parties:

If you fail to participate in the hearing on the scheduled day and time, the hearing will proceed in your absence. You will be deemed to have waived the opportunity to participate in the hearing. **The case may be dismissed ‘with prejudice,’ whereby, you will be barred from filing another complaint raising the same claim(s) and issue(s) presented in the dismissed complaint.**

(emphasis in the original).

Both the Hearing Notice and Prehearing Order were sent to Ms. Francois at the address provided in her complaint via regular, first-class mail. Neither document was returned by the postal authorities as undeliverable.

The hearing convened on January 17, 2020, at 10:00 a.m., as scheduled. Laureto Farinas, Esquire, appeared on behalf of Respondent and was ready to proceed with one witness. Complainant did not appear. After waiting for approximately fifteen minutes for Complainant to

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<sup>2</sup> 52 Pa. Code § 56.174 provides for review by a special agent of any case in which the issue is solely the ability to pay.

appear and participate, the hearing proceeded in Complainant's absence. Counsel for Respondent reported PGW made multiple efforts to contact Complainant via mail, email, and telephone, without success. At the conclusion of the hearing, Respondent moved to dismiss the complaint with prejudice for failure of Complainant to appear and prosecute her complaint. The undersigned informed counsel the motion would be taken under advisement and a ruling would be issued in an initial decision.

The record closed on January 17, 2020, following the conclusion of the telephonic hearing.<sup>3</sup> As of the date of this decision, no communication has been made to the Office of Administrative Law Judge (OALJ) by Ms. Francois or on her behalf explaining the January 17, 2020 absence. For the reasons discussed below, this decision grants Respondent's motion to dismiss the complaint with prejudice.

#### FINDINGS OF FACT

1. Complainant is Kemberly Francois.
2. Respondent is Philadelphia Gas Works.
3. The service address is 6112 Gillespie Street, Philadelphia, Pennsylvania.
4. On November 22, 2019, a Call-In Telephone Hearing Notice was issued scheduling this matter for a telephonic hearing to be held on January 17, 2020, at 10:00 a.m.
5. The Hearing Notice stated the following: *Attention: You may lose this case if you do not take part in this hearing and present facts on the issues raised.*" (emphasis in the original).
6. By Prehearing Order issued on November 27, 2019, the parties were informed of the date and time of the call-in telephonic hearing and were provided with various

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<sup>3</sup> Pursuant to 52 Pa. Code § 56.174(3), the hearing was digitally recorded. No court reporter was present.

procedures applicable to the hearing, notably, the method by which a party could request a continuance of the hearing date, if needed.

7. The Prehearing Order advised the parties: “If you fail to participate in the hearing on the scheduled day and time, the hearing will proceed in your absence. You will be deemed to have waived the opportunity to participate in the hearing. **The case may be dismissed ‘with prejudice,’ whereby, you will be barred from filing another complaint raising the same claim(s) and issue(s) presented in the dismissed complaint.**” (emphasis in the original).

8. Both the Hearing Notice and Prehearing Order provided the parties with the toll-free bridge telephone number and PIN number to participate in the hearing.

9. The Hearing Notice and the Prehearing Order were sent to the address provided in the complaint via regular, first-class mail.

10. Neither the Hearing Notice nor the Prehearing Order served upon Ms. Francois was returned to the Commission as undeliverable by the postal authorities.

11. Complainant did not appear by phone to participate in the January 17, 2020 telephonic hearing.

12. As of the date of this decision, no communication has been made to the Office of Administrative Law Judge by Ms. Francois or on her behalf explaining the January 17, 2020 absence.

## DISCUSSION

### Due Process

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. 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 fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hospital Ass'n of Western Pa. v. Pa. Pub. Util. Comm'n*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

The Commission is required to fix the time and place of a hearing in a complaint proceeding and to serve notice thereof upon the parties in interest. *See* 66 Pa. C.S. § 703(a)-(b). Service on interested persons is sufficient to provide notice. 52 Pa. Code § 5.201(a). Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *See Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (1974) (*Mayflower*); *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944, 946 (Pa. Cmwlth. 1994), *appeal denied*, 653 A.2d 1234 (Pa. 1994); *Geary v. Verizon Pa. Inc.*, Docket No. C-2009-2118625 (Order entered September 16, 2010) (*Geary*).

Once notice of a hearing and the opportunity to be heard have been provided to the parties, it is the responsibility of the parties to appear and participate in the hearing. *Mumma v. PPL Electric Utilities Corporation*, Docket No. C-00014869 (Order entered January 24, 2002); *Sentner v. Bell Tel. Co. of PA*, Docket No. F-00161106 (Order entered October 25, 1993) (*Sentner*).

In the instant matter, the record shows Complainant was provided both notice and the opportunity to appear and be heard. The November 22, 2019 Hearing Notice and the November 25, 2019 Prehearing Order informed the parties of the date and time of the hearing and addressed, *inter alia*, the method to request a continuance prior to the hearing, and that failure to appear for the hearing and present evidence on the issues raised in the complaint would result in dismissal of the complaint. Both documents were served separately, by regular first-class mail to the address provided by Ms. Francois in the complaint. Neither document was returned to the Commission as undeliverable by the postal authorities. Accordingly, it must be presumed the documents, which were sent to the Complainant in the ordinary course of business, were received by Ms. Francois. *Mayflower*.

Under these circumstances, Complainant had ample notice and opportunity to appear and be heard in this proceeding, however, chose not to do so. Additionally, Complainant made no attempt to notify the presiding officer she did not plan on participating in the scheduled hearing. Therefore, the due process rights of Complainant have been fully protected. *Sentner*.

#### Failure to Appear

Both the Public Utility Code and the Commission's regulations provide that, after being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing and shall not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). However, these provisions do not apply if the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting the reopening or further examination, 66 Pa.C.S. § 332(f); 52 Pa.Code § 5.245(a)-(b), or if the presiding officer determines that the complainant demonstrated a good faith attempt to attend the hearing. *See, e.g., Then v. Philadelphia Gas Works*, Docket No. F-2012-2318264 (Order entered June 13, 2013); *see also, C. Wiggins v. PECO Energy Co.*, Docket No. C-2010-2190335 (Order entered October 27, 2011).

The public interest is prejudiced by the wasteful use of the Commission's and the respondent's time and resources in addressing a complaint. *See Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995) (*Jefferson*); *see also, e.g., Nichols v. Bell-Atlantic-Pa.*, Docket No. C-00956667 (Order entered August 4, 1995). Out of concern for the waste of the Commission's (and respondent's) time and resources, the Commission has dismissed *pro se* complaints with prejudice for failure to appear at a hearing. *See e.g., Santore Smith v. PECO Energy Co.*, Docket No. F-2014-2446204 (Order entered September 3, 2015); *Day v. PECO Energy Co.*, Docket No. C-2010-2181515 (Order entered June 10, 2011); and *Geary*.

In the instant matter, Complainant failed to appear for the hearing despite being given two written notices. Further, once the hearing began, the undersigned waited an additional fifteen minutes to allow Complainant time to appear. To date, no communication has been

received by the OALJ, by or on behalf of Complainant, regarding whether Complainant's absence was unavoidable or that Ms. Francois made a good faith attempt to attend the hearing. Consequently, Complainant has waived the opportunity to participate in a hearing on the issues raised in the complaint.

### Burden of Proof and Dismissal of Complaint

The proponent of any request for relief from the Commission bears the burden of proof. 66 Pa.C.S. § 332(a). To satisfy this burden, a complainant, as the proponent of the request for relief, must show 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 presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, the Commission's decision must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence 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).

As the proponent of the request for relief from the Commission, Complainant bears the burden of proof. By failing to participate in the January 17, 2020 hearing and proffer any evidence to support the complaint, Complainant has failed to satisfy her burden. Accordingly, the merits of the complaint will not be addressed herein, and the complaint will be dismissed in its entirety with prejudice. *Williams v. PECO Energy Co.*, Docket No. C-2018-300734 (Opinion and Order entered March 14, 2019), citing, *inter alia*, *Jefferson*.

## CONCLUSIONS OF LAW

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

2. The Commission is 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).

3. 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).

4. After being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing, not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f); 52 Pa.Code § 5.245(a).

5. If the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting the reopening or further examination, the presiding officer may find that a party did not waive the opportunity to participate in the hearing. 66 Pa.C.S. § 332(f); 52 Pa.Code § 5.245(a).

6. Complainant's due process rights have been fully protected and complainant's failure to appear was not unavoidable. *Sentner v. Bell Telephone Company of Pennsylvania*, Docket No. F-00161106 (Order entered October 25, 1993); 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

7. As the proponent of the request for relief, Complainant bears the burden of proof by a preponderance of the evidence standard. 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

8. By failing to appear and participate in the hearing and proffer any evidence in support of the complaint, Complainant has failed to satisfy her burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Philadelphia Gas Works to dismiss with prejudice the formal complaint of Kemberly Francois at Docket No. F-2019-3013967 is granted.

2. That the complaint of Kemberly Francois against Philadelphia Gas Works at Docket No. F-2019-3013967 is hereby dismissed with prejudice for failure to appear and prosecute the complaint.

3. That the Secretary's Bureau shall mark Docket No. F-2019-3013967 as closed.

Date: May 4, 2020

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/s/  
Kailey B. Maguire  
Special Agent