

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Linda Divers	:	
	:	
v.	:	F-2019-3012987
	:	
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 failure of the Complainant to appear at the scheduled hearing at the designated date and time without good cause despite being given notice of the hearing.

**HISTORY OF THE PROCEEDING**

On September 7, 2019, Linda Divers (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (PGW or Respondent). In her complaint, Ms. Divers indicated she was seeking a Commission payment arrangement. The complaint is a timely appeal from a decision by the Commission's Bureau of Consumer Services (BCS) dated July 31, 2019 at BCS No. 3661992, which dismissed Ms. Divers' informal complaint.

On October 10, 2019, PGW filed an answer in response to the complaint asserting, *inter alia*, it provides service to 534 S. Yewdall Street, Philadelphia, Pennsylvania

(service address), but denied all other material allegations in the complaint. PGW concluded its answer by requesting denial and dismissal of the complaint.

The parties have selected to accept electronic service in this Commission proceeding. By selecting electronic service (eService), the parties have agreed that being provided with a notification of the filings as well as a link to the filings in this proceeding via e-mail shall constitute valid legal service in lieu of service through first-class mail. Therefore, all documents in this proceeding were served electronically to the parties.

On October 15, 2019, the Commission issued a Call-Out Telephonic Hearing Notice to the parties, establishing an initial telephonic hearing for November 21, 2019, at 10:00 a.m., and assigning the undersigned as Presiding Officer.<sup>1</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 original).

On October 16, 2019, a Prehearing Order was issued reminding the parties of the date and time of the hearing and addressed, *inter alia*, the procedures applicable to the hearing including the method by which a party could request a change of the scheduled hearing date 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 original).

Both the Hearing Notice and the Prehearing Order were sent to Ms. Divers at the e-mail address she provided to the eService system. The Commission's case docketing system

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<sup>1</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.

contains no notification that the Hearing Notice and/or Prehearing Order failed to be served electronically to the e-mail address provided by the Complainant.

On November 20, 2019, I received a letter from Ms. Divers indicating she would not be able to participate in the November 21, 2019 hearing as she had recently recovered from a medical condition and was able to return to work; however, she did not have any time accumulated to take off for the hearing.<sup>2</sup> It did not appear PGW was copied on the letter so the undersigned e-mailed a copy to Respondent, copying Complainant. PGW through counsel, Graciela Christlieb, Esquire, made no objection to the continuance request. As Respondent had no objections, the parties were informed that Complainant's continuance request was granted.

On November 21, 2019, a Call-Out Telephone Cancellation/Reschedule Hearing Notice rescheduling the initial telephonic hearing for January 8, 2020, at 10:00 a.m., was issued. Of note, the second Hearing Notice again 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 original).

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

Both the second Hearing Notice and the second Prehearing Order were sent to Ms. Divers at the e-mail address she provided to the eService system. The Commission's case docketing system contains no notification that the second Hearing Notice and/or second Prehearing Order failed to be served electronically to the e-mail address provided by the Complainant.

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<sup>2</sup> Ms. Divers' letter was treated as a continuance request.

The hearing convened on January 8, 2020, as scheduled at 10:0 a.m. Pursuant to the instructions in the Prehearing Order, the undersigned presiding officer called into the hearing conference via the toll-free bridge number. Attorney Christlieb appeared on behalf of Respondent and was ready to proceed with one witness. Complainant was not present. However, at that time, the undersigned noticed a discrepancy in the second Hearing Notice and the second Prehearing Order regarding the method by which the parties were to connect to the hearing. The second Hearing Notice instructed the parties that the undersigned presiding officer would contact them to connect them to the hearing, whereas the second Prehearing Order instructed the parties to dial into a toll-free bridge number to connect to the January 8, 2020 hearing.

Therefore, due to this discrepancy, Respondent and the undersigned left the hearing conference to allow for the undersigned to initiate a conference call by calling them. At 10:06 a.m., the undersigned called Complainant at the number provided in the complaint and left her a voicemail reminding her of the hearing and how to connect to the hearing. Additionally, during that phone call Complainant was advised that the undersigned would recess the hearing until 10:15 a.m. to allow Complainant time to connect to the hearing, and if at that time Complainant had not contacted the undersigned or the Office of Administrative Law Judge (OALJ), the hearing would proceed in her absence. With no contact from the Complainant, at 10:19 a.m., the undersigned again called the number provided by Complainant in her complaint to connect her to the hearing and left another message informing Complainant that the hearing would be held in her absence.

The hearing proceeded in Complainant's absence. Counsel for Respondent noted PGW made efforts to contact Complainant regarding this matter, without success. At the conclusion of the hearing, Respondent moved to dismiss the complaint 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. Out of an abundance of caution, after adjournment, at 10:27 a.m., the undersigned called back into the toll-free bridge number to see if Complainant had called in, no parties were present in the conferencing center.

The record closed on January 8, 2020, following the conclusion of the telephonic hearing.<sup>3</sup> At 11:15 a.m., Ms. Divers called the OALJ requesting a new hearing date. Ms. Divers was directed to place her request in writing including the reason she missed the hearing, and send it to the undersigned and counsel for PGW within ten (10) days. On January 30, 2020, Ms. Divers sent a written letter to the undersigned requesting a rescheduled hearing date, explaining that she was absent from the January 8, 2020 hearing due to receiving an overwhelming amount of mail and insurance advertisements, and that she had a difficult time deciphering which mail was “legitimate material.” It did not appear PGW was copied on the letter, so the undersigned e-mailed a copy to Respondent, copying Complainant. Respondent offered no response to the January 30, 2020 request for a further hearing.

For the reasons discussed below, this decision grants Respondent’s motion to dismiss the complaint but does so without prejudice.

#### FINDINGS OF FACT

1. Complainant is Linda Divers.
2. Respondent is Philadelphia Gas Works.
3. The service address is 534 S. Yewdall Street, Philadelphia, Pennsylvania.
4. The parties have selected to accept eService in this Commission proceeding. By selecting eService, the parties have agreed that being provided with a notification of the filings as well as a link to the filings in this proceeding via e-mail shall constitute valid legal service in lieu of service through first class mail. Therefore, all documents in this proceeding were served electronically to the parties instead of by first-class mail.
5. On November 21, 2019, a second Call-Out Telephone Hearing Notice was issued scheduling this matter for a telephonic hearing to be held on January 8, 2020, at 10:00 a.m.

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

6. 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).

7. The November 21, 2019 Hearing Notice informed the parties that the undersigned presiding officer would contact them to connect them to the hearing.

8. By Prehearing Order issued on November 27, 2019, the parties were informed of the date and time of the telephonic hearing and were provided with various procedures applicable to the hearing, notably, the method by which a party could request a continuance of the hearing date, if needed.

9. The November 27, 2019 Prehearing Order directed the parties to call into a toll-free bridge number to connect to the hearing and PIN number to participate in the hearing.

10. 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).

11. The Commission's case docketing system contains no notification that the Hearing Notice or the Prehearing Order failed to be delivered electronically at the e-mail address provided by the Complainant.

12. Complainant did not appear by phone to participate in the January 8, 2020 telephonic hearing.

13. Complainant did not answer her phone when contacted by the undersigned at the time of the hearing.

14. Ms. Divers contacted the Office of Administrative Law Judge at 11:15 a.m. on January 8, 2020 after adjournment of the hearing and close of the record, requesting a new hearing date. Ms. Divers was directed to place her request in writing including the reason she missed the hearing, and send it to the undersigned and counsel for PGW within ten (10) days.

15. On January 30, 2020, Ms. Divers sent a written letter to the undersigned requesting a rescheduled hearing date, explaining that she was absent from the January 8, 2020 hearing due to receiving an overwhelming amount of mail and insurance advertisements, and that she had a difficult time deciphering which mail was “legitimate material.”

16. Respondent offered no response to Ms. Divers’ January 30, 2020 letter.

## 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). 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 21, 2019 Hearing Notice and the November 27, 2019 Prehearing Order informed the parties of the date and time of the hearing and addressed, *inter alia*, how 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 by eService in accordance with Complainant's selection to receive electronic service of all documents instead of receiving a paper copy via first-class mail. EService, in lieu of paper service, constitutes valid legal service. 52 Pa.Code § 1.53(b)(3). The Commission's case docketing system contains no notification that the Hearing Notice and/or Prehearing Order failed to be served electronically to the e-mail address provided by the Complainant. Therefore, the Complainant is 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 the complaint. *Morella v. PECO Energy Company*, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016); *Zirkel v. Philadelphia Gas Works*, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017). The Complainant made no attempt to notify the presiding officer that she did not plan to participate in the scheduled hearing, prior to the hearing date. Accordingly, it must be presumed these documents, which were eServed to the e-mail address provided by the Complainant, were received by Ms. Divers.

Additionally, Ms. Divers received notice of the day, date, and time of the scheduled proceeding as evidenced by her contact with the OALJ via telephone at 11:15 a.m. on January 8, 2020 at which time she sought a hearing for further examination. Complainant was directed to provide evidence of the reason for her absence from the January 8, 2020 hearing in writing within ten (10) days. Ms. Divers did provide a written document evidencing the reason for her absence twenty-three days after the hearing.

Under these circumstances, Complainant had ample notice and opportunity to appear and be heard in this proceeding, however, chose not to do so. 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, 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., 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 and a prior continuance. Further, once the hearing began, the undersigned waited an additional 20 minutes to allow Complainant time to appear. Moreover, on

January 8, 2020, Complainant was directed to submit in writing her reason for her absence from the January 8, 2020 hearing within ten days. Although Ms. Divers did not timely comply with this directive, nonetheless, I do not find receiving an overwhelming amount of mail and advisements as an unavoidable preclusion from attending and participating in the January 8, 2020 hearing. Consequently, Complainant has waived the opportunity to participate in a hearing on the issues raised in the complaint as her absence was not unavoidable.

#### 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 8, 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 but without 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. Service may be made electronically to filing users who have agreed to receive electronic service. Filing users will be sent an electronic mail notice informing them that a document was posted on the Commission's electronic filing system and providing a link to the document on the same day the document is posted. 52 Pa. Code § 1.53(b)(3).

4. Absent notification from the Commission's case docketing system indicating that notice has failed to be delivered electronically at the e-mail address provided by the Complainant, the Complainant is deemed to have received notice and had sufficient notice of the day, date and time of the scheduled hearing. *Morella v. PECO Energy Company*, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016); *Zirkel v. Philadelphia Gas Works*, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017).

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 Pa.*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993).

6. 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).

7. If the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and of 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).

8. Complainant's due process rights have been fully protected and complainant's failure to appear was not unavoidable nor did Complainant make a good faith attempt to attending the hearing. *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).

9. 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).

10. 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 the formal complaint of Linda Divers at Docket No. F-2019-3012987 is granted.

2. That the complaint of Linda Divers against Philadelphia Gas Works at Docket No. F-2019-3012987 is hereby dismissed without prejudice for failure to appear and prosecute the complaint.

3. That the Secretary's Bureau shall mark Docket No. F-2019-3012987 as closed.

Date: May 21, 2020

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/s/  
Kailey B. Maguire  
Special Agent