

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jeanene Denlinger

v.

City of Lancaster – Bureau of Water

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C-2019-3014806

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This Decision grants a Motion to Dismiss for Failure to Prosecute because the Complainant failed to appear at the scheduled hearing despite being given notice of the hearing.

HISTORY OF THE PROCEEDING

On November 29, 2019, Jeanene Denlinger (Ms. Denlinger or Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against the City of Lancaster – Bureau of Water (Lancaster) at Docket Number C-2019-3014806. In the complaint, Ms. Denlinger averred that she wished to opt out of a radio frequency meter installation at her property at 14 Susquaw Place, Lancaster, PA 17601.

Lancaster filed an Answer on January 10, 2020 denying the material averments in the Complaint. Lancaster denied it was violating its tariff or any Commission regulation in attempting to install a radio frequency device on the meter at the service property.

On February 10, 2020, a Call-In Telephone Hearing Notice was issued scheduling a hearing for March 24, 2020 and assigning the case to me. A Prehearing Order was issued on February 11, 2020. On March 17, 2020, due to management directives and the closure of the Commission as a result of the Covid-19 pandemic, the hearing was cancelled via a Notice of Cancellation of Hearing. On April 20, 2020, per management directives, the hearing was rescheduled by the issuance of a Hearing Notice rescheduling the hearing to 10:00 a.m. on May 21, 2020.

The Hearing Notices stated, “At the above date and time, you must call into the hearing. If you fail to do so, your case will be dismissed. You will not be called by the Administrative Law Judge.” All Hearing Notices and Prehearing Orders were served to Ms. Denlinger electronically to the email address provided to the Commission by Ms. Denlinger, in accordance with her selection to receive electronic service of all documents instead of receiving a paper copy in the mail.¹ The Commission’s case docketing system contains no notification that the Hearing Notices or Prehearing Orders failed to be delivered electronically at the e-mail address provided by the Complainant.

The hearing convened at 10:00 a.m. on May 21, 2020 as scheduled. John Gallagher, Esquire, appeared as counsel of record for Lancaster. Also present was a witness for Lancaster. Complainant did not appear while the presiding officer and counsel for Respondent waited on the line for fifteen minutes, until 10:15 a.m. The presiding officer went on the record of the hearing at 10:15 a.m. Lancaster’s counsel made an oral motion to dismiss the complaint with prejudice for failure to appear and prosecute. Counsel indicated Ms. Denlinger never returned messages to settle the matter prior to May 21, 2020. The record closed on May 21, 2020. The oral motion to dismiss is ripe for a decision.

¹ *Electronic.* 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).

FINDINGS OF FACT

1. The Complainant in this case is Jeanene Denlinger.
2. The Respondent in this case is City of Lancaster – Bureau of Water.
3. Complainant failed to appear and prosecute her Complaint at the hearing scheduled for May 21, 2020.
4. Complainant received notice of the hearing on or about April 20, 2020, when a Hearing Cancellation/Reschedule Notice was issued rescheduling the hearing from March 24, 2020 to May 21, 2020.
5. All Hearing Notices and Prehearing Orders were served electronically to the Complainant.
6. The Commission's case docketing system contains no notification that the Hearing Notices or Prehearing Orders failed to be delivered electronically at the e-mail address provided by the Complainant.
7. During the hearing, counsel for Lancaster indicated Ms. Denlinger failed to return messages from Lancaster to settle this matter prior to the hearing.
8. No motion for continuance of the hearing was sent to the presiding officer prior to the 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). "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. 45, 70 A.2d 854 (1950). In this proceeding, Ms. Denlinger filed a complaint against City of Lancaster - Bureau of Water seeking to opt out of a radio frequency meter installation at her property. Ms. Denlinger, therefore, has the burden of proof in this proceeding.

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 afforded notice and the opportunity to be heard. Id.

No one appeared on behalf of Ms. Denlinger 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 Notices were sent to Ms. Denlinger electronically to the email address Ms. Denlinger provided to the Commission. Accordingly, it must be presumed that the Hearing Notices sent to Ms. Denlinger in the ordinary course of business were received by Ms. Denlinger. 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). Moreover, counsel for Lancaster, John Gallagher, Esquire, indicated that Ms. Denlinger had not returned calls from Lancaster attempting to settle the matter prior to the hearing.

No one appeared on behalf of Ms. Denlinger at the time of the hearing. Nor did anyone ever request a postponement or continuance of the hearing. As such, Ms. Denlinger had notice and an opportunity to be heard in this proceeding but chose not to appear. Therefore, Complainant'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 Lancaster moved to have the complaint dismissed with prejudice for lack of prosecution. By failing to appear and present any evidence in support of her complaint, Ms. Denlinger 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. West Penn Power Company, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa.Code § 5.245. Accordingly, the merits of the complaint will not be addressed in this Initial Decision.

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).
3. "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. 45, 70 A.2d 854 (1950).

4. 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 afforded notice and the opportunity to be heard. Id.

5. 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).

6. Ms. Denlinger'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).

7. Ms. Denlinger failed to carry her burden of proof in this proceeding because she failed to appear and prosecute her complaint at the hearing.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of City of Lancaster-Bureau of Water to dismiss the formal complaint of Jeanene Denlinger at Docket Number C-2019-3014806 for failure to prosecute is granted.

2. That the formal complaint filed by Jeanene Denlinger at Docket Number C-2019-3014806 is hereby dismissed with prejudice.

