

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

George Harvey, Jr.	:	
	:	
v.	:	C-2019-3013001
	:	
Suez Water Pennsylvania, Inc.	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision sustains the utility’s motion to dismiss the formal complaint brought by George Harvey, Jr. against the utility for failure to maintain safe, adequate and reliable service. Mr. Harvey failed to appear at the hearing scheduled in this case; consequently, he has not met his burden of going forward with his complaint or his burden of proof. For the reasons stated below, the complaint is dismissed.

HISTORY OF THE PROCEEDING

On September 10, 2019, George Harvey, Jr. (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Suez Water Pennsylvania, Inc. (Suez or Respondent) alleging that Suez is providing inadequate utility service because of a drop in water pressure after Suez replaced water mains in Complainant’s service area.

On October 9, 2019, Suez filed an answer denying the material allegations in the complaint and maintaining that the pressure levels at Complainant's residence are within the range prescribed by the Commission's regulations at 52 Pa. Code § 65.6.

On October 28, 2019, Chief Administrative Law Judge Charles E. Rainey, Jr., issued an Interim Order referring the complaint to the Commission's Mediation Unit. Ultimately, the parties did not resolve this matter.

On April 21, 2020, the Commission served the parties a telephonic hearing notice by which it scheduled an initial telephonic hearing for June 3, 2020, at 10:00 a.m., and assigned me as the presiding officer. The hearing notice stated, *inter alia*, "Attention: You may lose the case if you do not take part in this hearing and present evidence on the issues raised." (emphasis in original).

On May 15, 2020, the Commission served the parties a prehearing Order in which I set forth certain procedural requirements pertaining to the hearing. The prehearing Order also reminded the parties of the date and time of the hearing. The prehearing Order stated, "**THIS COMPLAINT MAY BE DISMISSED IF THE COMPLAINANT FAILS TO PARTICIPATE IN THE HEARING AND PRESENT EVIDENCE IN SUPPORT OF THE COMPLAINT.**" (emphasis in original).

Both the Both the April 21, 2020 hearing notice and the May 14, 2020 prehearing Order were sent to Mr. Harvey at the electronic mail address provided by Complainant on his Complaint.¹ Neither document was returned to the Commission as undeliverable.

The hearing convened, as scheduled, at 10:00 a.m. on June 3, 2020. Thomas T. Niesen, Esquire, appeared on behalf of Suez. Complainant did not appear during the course of

¹ These documents were sent pursuant to the Commission's Order in *Emergency Order re Suspension of Regulatory and Statutory Deadlines, Modification to Filing and Service Requirements*, at Docket No. M-2020-3019262, p. 4 (Order entered March 20, 2020), in which the Commission directed that service by the Commission will be exclusively electronic during the pendency of the Governor's Proclamation of Disaster Emergency in response to the Covid-19 pandemic.

the hearing. Neither I nor the Office of Administrative Law Judge (OALJ) received any contact from the Complainant prior to the hearing about his unavailability. Accordingly, the hearing proceeded in his absence. Suez's counsel moved to dismiss the complaint due to the Complainant's failure to appear at the hearing and prosecute his case.

The hearing concluded and a transcript of six pages was filed on June 3, 2020. The record closed on that date. This Initial Decision grants Suez's motion to dismiss the complaint for failure of the Complainant to appear and prosecute his case.

FINDINGS OF FACT

1. The Complainant is George Harvey, Jr.
2. The Respondent is Suez Water Pennsylvania, Inc.
3. On September 10, 2019, Complainant filed a formal complaint against Suez.
4. On October 9, 2019, Suez filed an answer in which it denied the material allegations in the complainant.
5. On April 21, 2020, a telephonic hearing notice was sent to the parties which scheduled an initial telephonic hearing for June 3, 2020, at 10:00 a.m.
6. On May 14, 2020, a prehearing Order was sent to the parties which set forth certain procedural requirements applicable to the the initial hearing.
7. Both the prehearing Order and the hearing notice warned the parties that they may lose the case if they did not take part in the hearing and present evidence on the issues raised.
8. The hearing notice and the prehearing Order were sent to Complainant by electronic mail to the electronic mail address provided by Complainant on his complaint.

9. The hearing notice and prehearing Order sent to Complainant were not returned to the Commission as undeliverable.

10. The Complainant failed to appear at the scheduled date and time for the hearing.

DISCUSSION

In his complaint, Mr. Harvey averred that as a consequence of Suez replacing water mains in his service area, water pressure in his residence dropped to unacceptable levels.

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*, 70 A.2d 854 (Pa. 1950). As the party seeking relief from the Commission, Mr. Harvey bears the burden of proof.

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 provided with notice and an opportunity to be heard. *Id.*

No one appeared on behalf of Mr. Harvey at the date and time set for the hearing despite notice of the hearing having been sent to him at the email address provided by him.

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 notice and the prehearing Order were sent to Mr. Harvey by electronic mail to the email address provided by him on his complaint. Neither document was returned to the Commission as undeliverable. Accordingly, it must be presumed that these documents sent to the Complainant in the ordinary course of business were received by him. *Zirkel v. Philadelphia Gas Works*, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017; *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016). As noted above, both the hearing notice and prehearing Order warned the Complainant that he may lose the case if he failed to appear and present evidence on the issues he raised.

No request for a postponement or continuance of the hearing was received by my office. Thus, Mr. Harvey had notice of the hearing and an opportunity to be heard in this proceeding but chose not to appear. Therefore, the Complainant's due process rights have been fully protected. *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161106 (Order entered October 25, 1993); *see also*, 52 Pa.Code § 5.245(a).

During the hearing, counsel for Suez moved for dismissal of the complaint with prejudice for lack of prosecution. See *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995). I agree with counsel that by failing to appear and present

any evidence in support of his complaint, Mr. Harvey failed to carry his burden of proof. Consequently, the complaint will be dismissed. However, the complaint will not be dismissed with prejudice as it is one of three identical complaints with respect to the water pressure issue, two of which are awaiting adjudication. At hearing, I asked counsel if he had any objection to my referencing the facts in those other cases in the event that the Commission might have questions about the underlying facts, here.² Counsel had no objection. Tr. at 5. This is not to say that the testimony and evidence in those cases may be invoked to determine the merits in this case. By failing to appear at the hearing on June 3, 2020, Complainant failed to present evidence to meet the burden of proof in this case, and his complaint will be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of 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*, 70 A.2d 854 (Pa. 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 provided with notice and an 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

² The other two complaints with identical allegations are found at *Heston v. Suez Water Pa, Inc.*, Docket No. C-2019-3012999 and *Grell v. Suez Water Pa., Inc.*, Docket No. C-2019-3012992.

