

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Arthur Daly	:	
	:	
v.	:	C-2019-3012947
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Angela T. Jones
Administrative Law Judge

INTRODUCTION

This Initial Decision grants PECO Energy Company’s Motion to Dismiss the formal Complaint (Complaint) for lack of prosecution.

HISTORY OF THE PROCEEDING

On September 4, 2019, Arthur Daly (Complainant) filed a Complaint against PECO Energy Company (PECO or Respondent) with the Pennsylvania Public Utility Commission (Commission). The Complaint indicated that:

- (1) the utility is threatening to shut off gas service or has already shut off gas service;
- (2) the Complainant requested a payment arrangement;
- (3) the Complainant received incorrect charges for billed service;
and
- (4) there are reliability, safety or quality problems with the gas service.

The Complainant requested the Commission order the Respondent to investigate the rate, charges, and usage of electric service and to initiate a payment plan after the completion of the investigation.

On October 8, 2019, Angela Lorenz, Esquire, electronically filed (efiled) the Answer of the Respondent, denying the material allegations of the Complaint.¹

By Hearing Notice dated October 10, 2019, the Complaint was scheduled for an Initial Hearing on November 19, 2019, at 10:00 a.m., and was assigned to Administrative Law Judge (ALJ) Angela T. Jones, the undersigned.

The undersigned issued a Prehearing Order dated October 11, 2019, which confirmed the scheduled hearing on November 19, 2019, and provided the procedural rules for this proceeding.

On Monday, November 18, 2019, Edward T. Fisher, Esquire, filed a Notice of Appearance on behalf of the Respondent. The Notice of Appearance was efiled with the Commission. The certificate of service shows that the Complainant was served the Notice of Appearance by first-class mail.

On Monday, November 18, 2019, the Complainant called to request that the Initial Hearing be rescheduled. The Complainant sent his request by facsimile, alleging that he did not receive a Hearing Notice, had no actual knowledge of the hearing date and did not prepare a defense to the allegations raised by the Respondent. The Complainant stated that PECO had no objection to the continuance request. The Complainant requested that the Initial Hearing be rescheduled for approximately 90 days.

By electronic mail on November 18, 2019, PECO confirmed that it had no objection to continuing the scheduled hearing.

¹ On September 18, 2019, the Complaint was served on the Respondent.

By Order dated November 19, 2019, the Complaint was rescheduled for hearing, to take place no earlier than March 2, 2020.

By a Cancellation Notice dated November 19, 2019, the hearing for November 19, 2019 was canceled. By a separate Hearing Notice dated November 19, 2019, this Complaint was scheduled for an Initial Hearing on Monday, March 9, 2020, at 10:00 a.m.

By facsimile dated March 9, 2020, at 8:33 a.m., the undersigned received a letter (Complainant Exhibit 1) from the Complainant, which requested that his hearing be rescheduled for 90 days because he had several ailments. Complainant Exhibit 1 indicated that it was sent by facsimile to Attorney Fisher.

The hearing convened on March 9, 2020, at approximately 10:30 a.m. Attorney Fisher was present representing the Respondent. The Complainant was not present. Attorney Fisher stated that he had not seen Complainant Exhibit 1. Complainant Exhibit 1 was admitted into the record. The Respondent objected to any request for a continuance because the Complainant already had this matter rescheduled due to a previous request for a 90-day continuance. The Respondent stated any further delay would be prejudicial. The Respondent moved that the Complaint be dismissed with prejudice for lack of prosecution (PECO Motion).

By Order dated March 9, 2020, the undersigned directed:

- (1) that the Complainant provide confirmation from a medical professional that he is currently suffering from his alleged ailments by March 19, 2020;
- (2) that the PECO Motion be held in abeyance;
- (3) that if the Complainant provides the requisite confirmation, then the Respondent be given until March 30, 2020 to object; and
- (4) that if the Complainant fails to provide the requisite confirmation, then the PECO Motion would become ripe for decision.

On March 6, 2020, Governor Tom Wolf issued an Emergency Order declaring the COVID-19 pandemic a disaster in Pennsylvania. On March 16, 2020, due to the COVID-19 pandemic, Governor Wolf directed all Commonwealth of Pennsylvania (Commonwealth) offices to be closed effective March 17, 2020 for 14 days.² However, the Commission has continued to be fully operational and working remotely. But, because the physical offices were closed, the undersigned could not confirm whether the Complainant complied with the March 9, 2020 Order.

On August 19, 2020, the undersigned obtain permission to enter the Philadelphia offices. The undersigned did not find any communication in compliance with the March 9, 2020 Order from the Complainant at the office.

On August 21, 2020, the transcript of the March 9, 2020, hearing was filed, and the record was closed.

FINDINGS OF FACT

1. The Complainant is Arthur Daly.
2. The Respondent is PECO Energy Company, a jurisdictional public utility that provides electric and gas service in the Commonwealth of Pennsylvania.
3. On September 4, 2019, a Complaint was filed with the Commission against the Respondent.
4. The Respondent efiled its Answer on October 8, 2019, which denied any wrongdoing.
5. On October 10, 2019, a Hearing Notice was served on the parties of record informing them of a scheduled Initial In-Person Hearing on November 19, 2019, at 10:00 a.m.

² By Executive Order the closure of Commonwealth offices was extended through the date of this decision.

6. On October 10, 2019, both parties of record were served a Prehearing Order advising them of the date and time of the scheduled hearing and informing them of the procedures applicable to the proceeding.

7. By Order dated November 19, 2019, the presiding officer granted the unopposed request of the Complainant to reschedule the hearing no sooner than 90 days from the date of the Order.

8. On November 19, 2019, a Hearing Notice was served on the parties of record informing them of a scheduled Initial In-Person Hearing on March 9, 2020, at 10:00 a.m.

9. Neither the Complainant nor any counsel representing the Complainant appeared at the scheduled hearing on March 9, 2020.

10. None of the documents served on the Complainant were returned as undeliverable.

11. By Order dated March 9, 2020, the undersigned directed that the Complainant, by March 19, 2020, send documentation from a medical professional confirming that he suffers from the ailments that he alleged prevented him from appearing at the scheduled hearing on March 9, 2020.

12. The Complainant did not comply with the March 9, 2020 Commission Order.

DISCUSSION

In this Complaint, the Complainant requested a payment arrangement, indicated that his gas service was either terminated or scheduled to be terminated by the Respondent, alleged incorrect charges for billed service, and alleged service safety, quality and reliability issues of electric service. The issue in this proceeding is whether the Complainant sustained his

burden of proof. By failing to appear at the scheduled hearing, the Complainant failed to meet this burden.

A. Applicable Law

As the party seeking 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.Cmwlth. 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).

B. Complainant's Failure to Appear

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). Notice mailed to a party's last known address and not returned by the post office is presumed to have been received. *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944 (Pa.Cmwlth. 1994). The Commission sent a Hearing Notice dated November 19, 2019, to the Complainant by regular first-class mail to the address listed on the Complaint. This document was never returned to the sender, the scheduling staff of the Office of Administrative Law Judge (OALJ) in Harrisburg.

The undersigned issued a Prehearing Order dated October 10, 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, which was mailed to the Complainant at the address provided in the Complaint, was never returned by the U.S. post office as undeliverable.

Accordingly, it is presumed that this mailing, which was done through the ordinary course of business, was received by the Complainant. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meirerdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 449 A.2d 658 (Pa.Super. 1982).

The Complainant is deemed to have received these documents and had notice of the date and time of the scheduled hearing. The Complainant was notified of the scheduled hearing date and time, as well as how to contact the OALJ.

As stated by the Commission in *Epp v. PECO Energy Co.*, Docket No. F-2019-3013395 (Opinion and Order entered August 6, 2020):

Whether the complainant's failure to appear at the hearing was "unavoidable" is a fact-based question. Where a complainant's failure to appear at a scheduled hearing is unavoidable, the presiding officer has the discretion to recognize that and to reschedule the hearing. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). However, if a complainant fails to bring the situation to the attention of the presiding officer prior to the issuance of the Initial Decision, the record closes and the presiding officer can no longer exercise that discretion. *See e.g., Alice Anderson v. PECO Energy Company*, Docket No. F-2017-2614241 (Order entered July 18, 2018).

Id. at 10-11.

By facsimile on the day of the scheduled hearing, the Complainant offered medical issues or ailments as the reason he could not appear. By Order dated March 9, 2020, the Complainant was directed to provide documentation to substantiate his assertions. Due to the Covid-19 pandemic, the Complainant was afforded substantial time to provide evidence to substantiate his assertions but has failed to do so. Based on the record evidence, there is nothing to show that the Complainant's failure to appear at the March 9, 2020, scheduled evidentiary hearing was unavoidable.

The Respondent's counsel moved that the Complaint be dismissed with prejudice for failure to prosecute. The PECO Motion is granted in the ordering paragraph below.

C. Conclusion

The Complainant choose not to appear at the scheduled hearing. The Complainant choose not to comply with a Commission Order to substantiate his failure to appear as unavoidable. Thus, the lack of prosecution by the Complainant at a scheduled hearing warrants the basis for dismissal of the Complaint. Consistent with *Epp v. PECO Energy Co.*, Docket No. F-2019-3013395 (Opinion and Order entered August 6, 2020), the Complaint is dismissed with prejudice.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S. § 701.
2. Notice properly mailed to a party's last known address and not returned by the post office is presumed to have been received. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meirerdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 449 A.2d 658 (Pa.Super. 1982).
3. By Hearing Notice dated November 19, 2019, the Complainant had notice of the date and time of the scheduled hearing. 52 Pa.Code § 5.201(a).
4. 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 (Order entered October 25, 1993).

5. As the party seeking affirmative relief from the Commission, the Complainant bears the burden of proof. 66 Pa.C.S. § 332(a).

6. The due process requirement for all parties 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).

7. 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 24, 2002).

8. Whether a party's failure to appear at a scheduled hearing is unavoidable is a fact-based issue. *Epp v. PECO Energy Co.*, Docket No. F-2019-3013395 (Opinion and Order entered August 6, 2020).

9. When it is determined that a party's failed appearance is unavoidable, the presiding officer has the discretion to reschedule the hearing. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b).

10. If a party fails to substantiate that the failed appearance at a scheduled hearing was unavoidable prior to an issued Initial Decision, then the record closes and the presiding officer can no longer exercise the discretion to reschedule a hearing. *Epp v. PECO Energy Co.*, Docket No. F-2019-3013395 (Opinion and Order entered August 6, 2020), *citing*, *Anderson v. PECO Energy Co.*, Docket No. F 2017 2614241 (Order entered July 18, 2018).

11. The Complainant, Arthur Daly, failed to sustain his burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of Edward Fisher, Esquire, counsel for PECO Energy Company, to dismiss with prejudice the formal Complaint of Arthur Daly at Docket No. C-2019-3012947 for lack of prosecution is granted.
2. That the formal Complaint of Arthur Daly against PECO Energy Company at Docket No. C-2019-3012947 is dismissed in its entirety with prejudice.
3. That the Secretary's Bureau should mark this matter closed.

Date: September 16, 2020

/s/
Angela T. Jones
Administrative Law Judge