

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kevin Lofton, Jr.	:	
	:	
v.	:	F-2020-3021455
	:	
Philadelphia Gas Works	:	

INITIAL DECISION

Before
Kailey B. Maguire
Special Agent

INTRODUCTION

This decision grants a motion to dismiss the complaint of a gas service customer for failure of the customer to appear at the scheduled hearing and prosecute his complaint.

HISTORY OF THE PROCEEDING

On July 3, 2020, Kevin Lofton, Jr. (Complainant) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Philadelphia Gas Works (PGW or Respondent). In his complaint, Mr. Lofton alleges PGW is threatening to shut off his service or has already shut of his service and requests a Commission-directed payment arrangement. The complaint is a timely appeal from a decision by the Commission’s Bureau of Consumer Services (BCS) dated March 6, 2020 at BCS No. 3705267, dismissing Mr. Lofton’s complaint.

On September 11, 2020, PGW filed an answer in response to the complaint asserting, *inter alia*, it provides service to Complainant at 1961 Ashley 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 September 15, 2020, the Commission issued a Call-In Telephonic Hearing Notice to the parties, establishing an initial telephonic hearing for October 28, 2020, at 10:00 a.m. and assigning the undersigned as presiding officer.¹ 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 13, 2020, 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 September 15, 2020 Hearing Notice and October 13, 2020 Prehearing Order were served electronically to the e-mail address provided to the Commission by Mr. Lofton in his complaint, pursuant to the Commission’s Emergency Order which provides that service by the Commission on parties will be exclusively electronic during the pendency of the *Governor’s Proclamation of Disaster Emergency*.² No e-mail delivery failure notice was

¹ 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.

² See, *Emergency Order re Suspension of Regulatory and Statutory Deadlines, Modification to Filing and Service Requirements*, Docket No. M-2020-3019262 at 4 (Order Entered March 20, 2020). The Governor’s *Proclamation of Disaster Emergency* was in response to the COVID-19 pandemic.

received by the Commission indicating that the documents served electronically did not reach Complainant.

On October 22, 2020, Mr. Lofton e-mailed PGW counsel, Graciela Christlieb, Esquire, and the undersigned requesting a continuance of the October 28, 2020 hearing due to recently gaining employment. Respondent did not object to the continuance request.

On October 26, 2020, a Call-In Telephone Cancellation/Reschedule Hearing Notice was issued rescheduling the initial telephonic hearing for December 9, 2020. On November 24, 2020, a second Prehearing Order was issued reminding the parties of the date and time of the rescheduled hearing and addressed, *inter alia*, the procedures applicable to the proceeding. Both the October 26, 2020 Hearing Notice and the November 24, 2020 Prehearing Order advised the parties of the consequences for failing to appear at the hearing and present facts on the issues raised.

The hearing convened on December 9, 2020, at 10:00 a.m., as scheduled. Attorney Christlieb appeared on behalf of Respondent and was ready to proceed with one witness. Complainant did not appear. After waiting approximately fifteen minutes for Complainant to appear and participate, the hearing proceeded in Complainant's absence. At the conclusion of the hearing, Respondent made an oral motion to dismiss the complaint for failure of Complainant to appear and prosecute his complaint. The undersigned informed counsel that the motion would be taken under advisement and a ruling would be issued in an initial decision.

The record closed on December 19, 2020, following the conclusion of the telephonic hearing. No communication has been made to the Office of Administrative Law Judge (OALJ) by Mr. Lofton or on his behalf explaining the December 9, 2020 hearing absence. For the reasons discussed below, this decision grants Respondent's motion to dismiss the complaint.

FINDINGS OF FACT

1. Complainant is Kevin Lofton, Jr.
2. Respondent is Philadelphia Gas Works.
3. On October 26, 2020, a Call-In Telephonic Hearing Notice was issued, scheduling this matter for a telephonic hearing to be held on December 9, 2020, at 10:00 a.m.
4. 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 original).
5. By Prehearing Order issued on November 24, 2020, the parties were informed of the date and time of the call-in 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.
6. 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).
7. Both the Initial Hearing Notice and the Prehearing Order provided the parties with the toll-free bridge telephone number and PIN number to participate in the hearing.
8. The Hearing Notice and Prehearing Order were sent to the e-mail address provided by Mr. Lofton in his complaint.

9. No e-mail delivery failure notice was received by the Commission indicating the Hearing Notice or Prehearing Order failed to reach Mr. Lofton.

10. Complainant did not appear by phone to participate in the December 9, 2020 telephonic hearing.

11. No communication has been made to the OALJ by Mr. Lofton or on his behalf explaining the December 9, 2020 hearing 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.Cmwlt. 1984). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hosp. Ass'n of W. Pa. v. Pa. Pub. Util. Comm'n*, 421 A.2d 481, 484 (Pa. Cmwlt. 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 Elec. Utils. Corp.*, 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 October 26, 2020 Hearing Notice informed the parties of the date and time of the hearing and the November 24, 2020, Prehearing Order

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 could result in dismissal of the complaint. Both documents were served by e-mail in accordance with the Commission's *Emergency Order* which provides that service by the Commission on parties will be exclusively electronic during the pendency of the Governor's *Proclamation of Disaster Emergency*. No e-mail delivery failure notice was received by the Commission indicating the documents served electronically did not reach Mr. Lofton. 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 Co.*, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016); *Zirkel v. Phila. Gas Works*, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017). Accordingly, it must be presumed these documents, which were electronically served to the e-mail address provided by the Complainant, were received by Mr. Lofton.

Under these circumstances, the 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 he did not plan on participating in the December 9, 2020 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. Phila. 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 Utils., Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995) (*Jefferson*); *see also, 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 of a complainant to appear at a hearing. *See 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).

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. No communication has been received by the OALJ, by or on behalf of Complainant, regarding whether Complainant's absence was unavoidable or that Mr. Lofton made a good faith attempt to attend the December 9, 2020 hearing. Consequently, Complainant has waived the opportunity to participate in a hearing on the issues raised in the complaint.

Burden of Proof

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 Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. 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 & W. 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 December 9, 2020 hearing and proffer any evidence to support the complaint, Complainant has failed to satisfy his burden. Accordingly, the merits of the complaint will not be addressed herein, and the complaint will be dismissed 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 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.Cmwlt. 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 Tel. Co. of Pa.*, 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, shall not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, or 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 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).

6. Complainant's due process rights have been fully protected and Complainant's failure to appear was not unavoidable. *Sentner v. Bell Tel. Co. of Pa.*, 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 his 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 Kevin Lofton, Jr. at Docket No. F-2020-3021455 is granted.

2. That the complaint of Kevin Lofton, Jr. against Philadelphia Gas Works at Docket No. F-2020-3021455 is hereby dismissed without prejudice.

