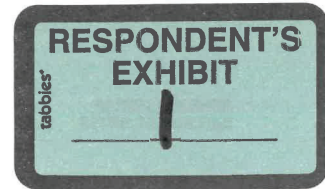




COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265



November 6, 2017

F-2017-2597039

James E. Elliott, Jr.

v.

Pennsylvania Electric Company

TO ALL PARTIES

Enclosed is a copy of the Initial Decision of the Office of Administrative Law Judge.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Your signed Exceptions to the decision, if any, must be: 1) **filed** with the Secretary of the Commission, and 2) mailed or hand-delivered to each party of record, **within twenty (20) days** of the date of this letter.

To file Exceptions with the Secretary of the Commission, you must mail or hand-deliver them as follows:

If using U.S. Postal Service:

If using Overnight or Hand Delivery Service:

Secretary
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Secretary
Pa. Public Utility Commission
400 North Street
Commonwealth Keystone Building, 2nd Floor
Harrisburg, PA 17120

Or, instead of mailing or hand-delivering your Exceptions, you may electronically file them with the Secretary of the Commission. To do so, you need to establish an account on the Commission's eFiling system, which may be accessed at <http://www.puc.state.pa.us/efiling/default.aspx>. Please note that Exceptions sent to the Commission by fax or e-mail will **not** be accepted for filing.

In addition to filing your Exceptions with the Secretary of the Commission, a courtesy copy of your Exceptions should be e-mailed to the Commission's Office of Special Assistants (OSA) at ra-OSA@pa.gov. If the document is too large to e-mail, please mail or hand-deliver a copy on CD-ROM or DVD (or other data storage media), in Microsoft Word 2010 format or other compatible format to either address noted above.

Replies to Exceptions, if any, must be **filed** with the Secretary of the Commission and **served** on each party of record and the Commission's OSA, in the manner described above. **They are due within ten (10) days of the date when Exceptions are due.**

It is your responsibility to serve all the parties with your Exceptions and Replies to Exceptions. Failure to do so may render your filing unacceptable. A certificate of service (see format in 52 Pa. Code §1.58) shall be attached to the filed Exceptions or Replies to Exceptions.

Exceptions and Replies to Exceptions shall follow 52 Pa. Code §§5.533 and 5.535 particularly the 40-page limit for Exceptions and the 25-page limit for Replies to Exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)". Any reference to specific sections of the Administrative Law Judge's Initial Decision shall include the page number(s) of the cited section of the decision.

If no Exceptions are received, the decision of the Administrative Law Judge could become final without further Commission action. You will receive written notification if this occurs. However, even if no exceptions are received, the Commission may review and change the decision pursuant to Section 332(h) of the Public Utility Code, 66 Pa. C.S. § 332(h).

JF

Enclosures
Certified Mail
Receipt Requested

Very truly yours,

Rosemary Chiavetta
Secretary

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

James E. Elliott, Jr.	:	
	:	
v.	:	F-2017-2597039
	:	
Pennsylvania Electric Company	:	

INITIAL DECISION

Before
Mark A. Hoyer
Deputy Chief Administrative Law Judge

This Initial Decision dismisses the formal complaint of James E. Elliott, Jr. (Complainant) filed with the Pennsylvania Public Utility Commission (Commission) against Pennsylvania Electric Company (Penelec or Respondent) on March 22, 2017, at Docket No. F-2017-2597039, for failure to meet the burden of proof. 66 Pa.C.S. § 332(a).¹

HISTORY OF THE PROCEEDINGS

On March 22, 2017, Mr. Elliott filed a formal complaint alleging that he was having a reliability, safety or quality problem with his electric utility service. He alleges that Penelec did not provide him with the results of its meter testing and he requested that his meter be tested by an independent company. On April 24, 2017, Penelec filed its answer. Penelec denies the material averments contained in the complaint and requests that the complaint be dismissed with prejudice or denied in its entirety.

¹ Mr. Elliott timely appealed the decision of the Commission's Bureau of Consumer Services (BCS) dismissing his informal complaint at BCS Case No. 3470795.

By Telephonic Hearing Notice dated April 25, 2017, Mr. Elliott and Penelec (the parties) were notified that an Initial Telephonic Hearing was scheduled for Friday, June 9, 2017 at 10:00 a.m. I was assigned to preside in this matter. On April 26, 2017, I issued a Prehearing Order which provided applicable procedures regarding submission of exhibits, attorney representation, continuances, subpoenas, and the burden of proof.

On May 23, 2017, Penelec filed a motion to compel discovery responses. Complainant did not file an answer to the motion to compel. On June 1, 2017, I issued a First Interim Order Granting Motion to Compel and requiring responses to Penelec's discovery to be served by June 7, 2017.

The Initial Telephonic Hearing was held on June 9, 2017, as scheduled. On June 9, 2017, on the record, Complainant requested a continuance and Penelec agreed with the request. The continuance was granted. On June 13, 2017, a Telephone Hearing Notice was mailed to the parties scheduling a Further Telephonic Hearing for July 14, 2017. The Further Telephonic Hearing was held as scheduled.

Complainant appeared *pro se* and testified on his own behalf. Complainant did not offer any exhibits. Penelec was represented at the hearing by Margaret A. Morris, Esquire. Penelec presented two witnesses, Laurie Parker and Dallas W. Jenkins. Penelec offered Respondent's Exhibits 1, 2, 4, 5, 6, 8, 9, 10 and 11 that were marked and admitted into evidence. Briefs were not requested.

The hearing record was closed by Interim Order dated August 14, 2017. The record consists of the hearing transcripts for the June 9, 2017 and July 14, 2017 hearings and the aforementioned exhibits submitted by Penelec. This case is now ready for a decision.

FINDINGS OF FACT

1. Complainant, James E. Elliott, Jr., resides at P.O. Box 263, House 15, Fourth Street, Lucerne Mines, Pennsylvania 15754 (Tr. 8).²
2. Respondent, Penelec, provides non-heat residential electric utility service to Mr. Elliott at his residence (Tr. 8, 23).
3. Mr. Elliott's account is a post bankruptcy petition account established on March 23, 2015 and effective on January 23, 2015, the date he filed a bankruptcy petition (Tr. 23).
4. Mr. Elliott's residence is 900 square feet, includes 2 bedrooms, and has an electric hot water heater (Tr. 33-37; Respondent's Ex. 5).
5. On June 20, 2016, Mr. Elliott contacted Penelec to complain that his meter was running fast (Tr. 28; Respondent's Ex. 1).
6. On June 21, 2016, Penelec removed the meter at Mr. Elliott's residence and replaced it with a new meter (Tr. 28; Respondent's Ex. 1).
7. On June 24, 2016, the meter removed from Mr. Elliott's residence was tested at the Connellsville meter shop and it was found to be accurate (Tr. 58-65; Respondent's Ex. 6, 10).
8. On June 27, 2016, Penelec sent a letter to Mr. Elliott, including the results of the June 24, 2016 meter test, to the updated address Mr. Elliott provided to Penelec on June 20, 2016 (Tr. 40-41; Respondent's Ex. 1, 6).
9. Mr. Elliott's central air conditioning system became inoperable some time in 2016 when he had a new high efficiency furnace installed (Tr. 12).

² All transcript references are to the hearing transcript of the July 14, 2017 hearing.

10. Mr. Elliott used 23,181 kwh of electricity between July 2015 and June 2016 (Tr. 31-32; Respondent's Exhibit 4).

11. Mr. Elliott used 22,591 kwh of electricity between July 2016 and June 2017, without central air conditioning (Tr. 31-32; Respondent's Ex. 4).

12. On August 24, 2016, Mr. Elliott opened an informal complaint with the BCS at BCS Case No. 3470795. The informal complaint was dismissed on January 30, 2017 (Tr. 46-47; Respondent's Ex. 8).

13. On February 6, 2017, Mr. Elliott opened a second informal complaint with the BCS at BCS Case No. 3501542. The informal complaint was dismissed because of a concurrent pending complaint (Tr. 49; Respondent's Ex. 9).

DISCUSSION

Since Mr. Elliott is requesting affirmative relief from the Commission, he bears the burden of proof. 66 Pa.C.S. § 332(a). To satisfy this burden, he must demonstrate that Penelec violated the Public Utility Code (the Code), 66 Pa.C.S. § 101 *et seq*, a Commission regulation or a Commission Order. This must be shown by a preponderance of the evidence. 66 Pa.C.S. § 701; Patterson v. Bell Telephone Company of Pennsylvania, 72 Pa. PUC 196 (1990). Preponderance of the evidence means that the party with the burden of proof has presented evidence that is more convincing, by even the smallest amount, than that presented by the other party. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600, 602, alloc. den., 602 A.2d 863 (1992).

In addition, the Commission's findings of fact must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere "trace of evidence or a suspicion of the existence of a fact" is insufficient. Norfolk and Western Railway v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980).

In Waldron v. Philadelphia Electric Company, 54 Pa. PUC 98 (1980), the Commission outlined the general dynamics for the burden of proof in a case that raises a high bill dispute. In order to determine whether a complainant has established a *prima facie* case where there are claims of unusually high bills, the Commission has declared that certain factors must be considered. While the accuracy of the meter is an important factor in resolving a billing dispute, it is not the sole criterion. *Id.* at 100. A complainant may establish a *prima facie* case by showing that: (1) the disputed bill was abnormally high when compared to prior usage patterns; and (2) his/her pattern of usage had not changed. *Id.* In looking at these criteria, one may consider the billing history of the account, any change in the number of occupants residing in the household, the potential for energy utilization, and any other relevant facts or circumstances that come to light during the proceeding. Replogle v. Pennsylvania Electric Company, 54 Pa. PUC 528 (1980). In this way, a complainant may prove entitlement to relief by wholly circumstantial evidence, rather than direct evidence of some utility misfeasance. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001).

In Nehemiah B. Thomas v. PECO, Docket No. C-2010-2187197 (Order entered November 15, 2011), the Commission reiterated its position as set forth in Charisse Bennett v. Peoples Natural Gas Co., Docket No. C-2009-2122979 (Order entered October 13, 2010), which clarifies the Waldron rule provision that a complainant may establish a *prima facie* case in a “high bill” complaint by showing that the disputed bill is abnormally high when compared to prior usage patterns and his or her pattern of usage has not changed *or by providing other relevant evidence showing that the disputed bill is unreasonably high*. In evaluating a “high bill” complaint, the Commission may consider such evidence as “the billing history of the account, any change in usage patterns (such as a change in the number of occupants residing in the household or potential energy utilization), *and any other relevant facts or circumstances that come to light during the proceeding.*” *Id.* at 6 (emphasis added).

In the instant case, Mr. Elliott claimed that his meter was inaccurate and that it was registering high before it was removed on June 21, 2016. The evidence of record does not support this claim and, as a result, Mr. Elliott failed to establish a *prima facie* case that his bills for service were inaccurate and high prior to June 21, 2016. Mr. Elliott did not complain

specifically about any monthly bill being inordinately high. Rather, he complained generally that his meter was running fast and testified that he was told by a Penelec meter reader that Penelec sets the meters to run fast. I did not find this testimony to be credible. In addition, the usage analysis for the residence and the usage comparison submitted into evidence by Penelec do not provide evidence of unexplained high bills. The undersigned concludes, based upon the year-to-year usage comparison, customer billing analysis and meter test, that Mr. Elliott's bills were not abnormally high prior to June 21, 2016.

Consequently, Mr. Elliott has failed to meet his burden of proof. Accordingly, the complaint is dismissed in the ordering paragraphs to follow for failure to meet the burden of proof. 66 Pa.C.S. § 332(a).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S. §§ 701, 1501.

2. Complainant bears the burden of proving his entitlement to relief from the Commission. 66 Pa.C.S. § 332(a).

3. "Burden of proof" means the duty to establish one's case by a preponderance of the evidence, which requires that the evidence be more convincing by even the smallest amount, than the evidence presented by the other side. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600, 602 (1990), alloc. den., 602 A.2d 863 (1992).

4. Complainant has failed to meet his burden of proof. 66 Pa.C.S. § 332(a); Waldron v. Philadelphia Electric Company, 54 Pa. PUC 98 (1980).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal complaint of James E. Elliott, Jr. filed on March 22, 2017 at Docket No. F-2017-2597039, against Pennsylvania Electric Company, is dismissed.
2. That the Docket in this proceeding, Docket No. F-2017-2597039, be marked closed.

Date: October 27, 2017

/s/
Mark A. Hoyer
Administrative Law Judge



PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held October 4, 2018

Commissioners Present:

Gladys M. Brown, Chairman
Andrew G. Place, Vice Chairman
Norman J. Kennard
David W. Sweet
John F. Coleman, Jr.

James E. Elliott, Jr

F-2017-2597039

v.

Pennsylvania Electric Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the late-filed Exceptions¹ of James E. Elliott, Jr. (Complainant or Mr. Elliott, Jr.)² filed on April 13, 2018, to the Initial Decision (I.D.) of

¹ The Complainant's Exceptions were due on April 5, 2018, but were filed over a week late. Since the Complainant is unrepresented and considering the circumstances of the events of this case, we shall consider the Exceptions, *nunc pro tunc*, and will address the Exceptions in order to secure a just, speedy, and inexpensive determination in this proceeding, consistent with 52 Pa. Code § 1.2(a).

² On April 20, 2018, the Commission's Secretary issued a Secretarial Letter to the Parties, stating that the Complainant's untimely filed Exceptions did not contain a certificate of service or other indication that the Complainant served the Respondent with the Exceptions. Thus, the Secretary's Bureau enclosed a copy of the Exceptions and notified the Respondent that any Replies to Exceptions were due by April 30, 2018.

Administrative Law Judge (ALJ) Mark A. Hoyer issued on March 15, 2018,³ in the above-captioned proceeding. Replies to Exceptions were filed by Pennsylvania Electric Company (Penelec or the Company) on April 26, 2018. For the reasons stated below, we shall deny the Complainant's Exceptions.

History of the Proceeding

On March 22, 2017, the Complainant filed a Formal Complaint (Complaint) against Penelec alleging that he was having a reliability, safety or quality problem with his electric utility service. This Complaint is a timely appeal of a Bureau of Consumer Services informal decision at BCS Case No. 3470795. The Complainant alleged that Penelec refused to provide him with the results of its meter testing. For relief, the Complainant requested that his meter be tested by an independent company and an adjustment be made to his bill, if necessary. Complaint at 2-3; I.D. at 1.

On April 25, 2017, Penelec filed an Answer admitting and denying certain material allegations of fact in the Complaint. Penelec explained that it removed the Complainant's meter on June 21, 2016 and tested it on June 24, 2016.⁴ According to Penelec, the results proved to be within Penelec's and the Commission's guidelines and were provided to the Complainant on June 27, 2016. Answer at 2-5.

On June 9, 2017, a hearing was held in this matter (*June 2017 Hearing*). The Complainant appeared and requested a continuance to which Penelec agreed and the ALJ granted. On July 14, 2017, a second hearing was held in this matter (*July 2017*

³ ALJ Hoyer's Initial Decision was initially issued on November 6, 2017, but was later re-issued on March 15, 2018.

⁴ Penelec Exhibit 2 shows that the Complainant's meter No. 5000260755 was removed on June 20, 2016, and was replaced with Meter No. 5000499494 (a new meter) on June 21, 2016. Penelec also testified that both meters are smart meters.

Hearing). The Complainant appeared *pro se* and testified on his behalf, offering no exhibits. Penelec appeared and was represented by counsel, who presented the testimony of two witnesses. Penelec also offered nine exhibits (Exhibits 1, 2, 4, 5, 6, 8, 9, 10 and 11) during the hearing, which were all admitted into the record. In addition to the nine exhibits, the record in this case also contains a 105-page transcript (pages 1-23 for the *June 2017 Hearing* and pages 1-82 for the *July 2017 Hearing*).⁵ The record closed on August 14, 2017, upon receipt of the transcripts by the ALJ. I.D. at 2.

In his Initial Decision issued on November 6, 2017, ALJ Hoyer dismissed the Complaint for failure by the Complainant to meet his burden of proof.

On January 18, 2018, the Commission entered an Order which adopted ALJ Hoyer's Initial Decision (*January 2018 Order*), as no Exceptions or Replies to Exceptions were filed by the Parties. Prior to adopting the *January 2018 Order*, Pennsylvania Public Utility Commission Chairman Gladys A. Brown issued a statement expressing concern with the high usage registered by the Complainant.⁶ Accordingly, Chairman Brown encouraged Penelec to inform the Complainant of any options available under the Company's Act 129 Plan and Universal Service and Energy Conservation Program, to the extent eligible, that could assist the Complainant in reducing his electricity consumption.

On March 15, 2018, the Commission entered an Order rescinding ALJ Hoyer's Initial Decision issued on November 6, 2017 (*March 2018 Order*). The *March 2018 Order* stated that on March 8, 2018, the Parties informed the Commission that they

⁵ For the purpose of this document, all transcript references are to the *July 2017 Hearing*.

⁶ According to Chairman Brown, the record indicated that the Complainant consumed an average of approximately 1,900 kwh of electricity per month in a 900 square foot home he occupies by himself.

never received service of ALJ Hoyer's Initial Decision. The Commission investigated and found that eService to the Counsel for the Respondent was successful, but eService to the Complainant was unsuccessful. The *March 2018 Order* further stated "[O]ur records indicating eService for the Complainant were in error as the Complainant does not have an eService account." *March 2018 Order* at 1-2. Therefore, the Order directed that ALJ Hoyer's Initial Decision be re-served to both parties at Docket No. F-2017-2597039. The Order then gave the parties twenty (20) days to file Exceptions to the Initial Decision and ten (10) days to file Reply Exceptions. *March 2018 Order* at 2.

As noted, *supra*, the Complainant filed Exceptions on April 13, 2018, and Penelec filed Replies to Exceptions on April 26, 2018.

Discussion

Legal Standards

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that Penelec is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlt. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by Penelec. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlt. 1982). 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. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the customer shifts to Penelec. If the evidence presented by Penelec is of co-equal value or “weight,” the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of Penelec. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

The burden of proof for “high bill” complaints has been explained in *Waldron v. Philadelphia Electric Company*, 54 Pa. P.U.C. 98 (1980) (*Waldron*), and its progeny. In *Waldron*, the Commission adopted the Michigan Public Service Commission’s (PSC’s) policy announced in *Hallifax v. O & A Electric Co-Op*, Case No. U-5825, May 1979, which stated that, while the accuracy of the meter is an important factor in resolving billing disputes, it is not the sole criterion. The Commission stated that it will also consider the following factors: the billing history of the complainant; any change in the number of occupants residing at the household; the potential for energy utilization; and any other relevant facts or circumstances that are brought to light during the complaint proceeding. *Waldron* at 100.

The Commission explained the burden of proof set forth in *Waldron* as follows:

[T]he *Waldron* Rule allows a complainant to establish a *prima facie* case in a “high bill” complaint by showing that the disputed bill is abnormally high when compared to prior usage patterns and his or her pattern of usage has not changed *or by providing other relevant evidence showing that the disputed bill is unreasonably high*. In evaluating a “high bill” complaint, the Commission may consider such evidence as “the billing history of the account, any change in usage patterns (such as a change in the number of occupants residing in the household or potential energy utilization), *and any other relevant facts or circumstances that come to light during the proceeding.*”

See Nehemiah B. Thomas v. PECO Energy Company, Docket No. C-2010-2187197 (Order entered November 15, 2011) at 5.

ALJ Hoyer made thirteen Findings of Fact and reached four Conclusions of Law. I.D. at 3-4, 6. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

ALJ’s Initial Decision

In his Initial Decision, the ALJ concluded that the Complainant failed to establish a *prima facie* case that his bills were inaccurate or high prior to June 21, 2016, because the record evidence did not support the Complainant’s claim that his meter was inaccurate and was registering high before it was removed on June 21, 2016. I.D. at 5. The ALJ also found that the Complainant’s testimony that his observation of his meter was supported by Penelec’s meter reader who told him that Penelec sets the meters to run fast, was not credible. The ALJ determined that the Complainant’s usage analysis and the usage comparison provided by Penelec in this proceeding did not support the Complainant’s unexplained high bills allegations. According to the ALJ, the year-to-year usage

comparison, customer billing analysis and meter tests provided by the Company did not indicate an abnormally high usage prior to June 21, 2016, as alleged by the Complainant. *Id.* at 6.

In light of all of the above, the ALJ denied the Complaint for failure of the Complainant to meet his burden of proof regarding his allegations in the instant proceeding. *Id.* at 6-7.

Exceptions and Replies

Before addressing the Exceptions and Replies, we note that any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlt. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlt. 1984).

In his Exceptions, the Complainant disagrees with the ALJ's Initial Decision and avers that, based on the outcome of this proceeding, his due process was violated. The Complainant also accuses the Commission and the ALJ of treating him unfairly and further alleges that the Commission and the ALJ discriminated against him based on his race and his disabilities. *Exc.* at 1-2. The Complainant also raises new allegations in his Exceptions that Penelec terminated the employment of its meter reading technician because of the information she provided to the Complainant regarding his meter. *Id.* at 3-4. Finally, the Complainant accuses Penelec's counsel of intimidating him over the phone. *Id.* at 4-5.

In its Replies to Exceptions, Penelec initially requests that the Commission reject the Complainant's Exceptions because they were untimely filed, and the

Complainant failed to address the reason why they were not timely filed or even to seek an extension of time to file the Exceptions.⁷ R. Exc. at 3. Penelec also points out that the Exceptions violate Section 5.533(b) of the Commission's Regulations, 52 Pa. Code §5.533(b), which requires each Exception to be numbered, to identify the Finding of Fact or Conclusion of Law to which Exception is taken, and to cite to the relevant pages in the ALJ's Initial Decision. *Id.* at 3-4.

In response to the Complainant's due process violation allegation, Penelec replies that the Complainant's Exceptions regarding this matter should be summarily dismissed because the Complainant's alleged due process violations were cured by the re-issuance of the *March 2018 Order* which permitted the Parties to file Exceptions on or before April 4, 2018. R. Exc. at 4. Penelec argues the ALJ's decision in this matter was based on a thorough review of the record evidence and his determination that the Complainant was unable to carry his burden of proof that his bills were uncharacteristically high prior to June 21, 2016. *Id.* at 5-6 (citing *Waldron*).

Regarding the Complainant's allegation of discrimination based on race and disabilities, Penelec contends the allegation is without merit and requests that this Exception be summarily dismissed or be stricken from the record because, according to Penelec, nothing in the record supports the Complainant's claim. R. Exc. at 8.

In its response to the Complainant's new allegation that Penelec terminated its meter reading technician for telling the Complainant that the Company turns up its meters, Penelec contends this claim is also without merit. Penelec argues the Initial Decision clearly indicated that the ALJ's position was that the Complainant's claim was not credible. R. Exc. at 6-7 (citing I.D. at 6). Penelec reiterates the expert testimony of

⁷ According to Penelec, Exceptions were due on April 4, 2018, but were not filed by the Complainant until April 13, 2018. R. Exc. at 3.

its witness, Mr. Dallas Jenkins, that showed that Penelec's meter testing and meter testing facilities comply fully with Commission Regulations.⁸ Furthermore, Penelec cites to Mr. Jenkins' testimony that it is not possible to turn up the Complainant's meter since smart meters have non-adjustable calibration that is set at the factory by the manufacturer. R. Exc. at 7 (citing Tr. at 58-65; Exhs. 6 and 10).

Finally, with regard to the Complainant's claim that he was intimidated over the phone by Penelec's counsel, Penelec argues that this Exception also should be summarily dismissed because the Complainant improperly characterized privileged conversations between Penelec's counsel and the Complainant during settlement discussions. R. Exc. at 9 (citing *December 1980 Order*).⁹

Disposition

Upon our consideration of the record and the relevant facts in this matter, we shall deny the Complainant's Exceptions. Initially, we shall reject Penelec's request that we do not consider the Exceptions on the merits and deny the Exceptions on the basis that they were untimely filed. As we indicated, because the Complainant is unrepresented and in consideration of the unusual circumstances of the events in this

⁸ Mr. Jenkins is the supervisor of Penelec's Connellsville meter test shop. Mr. Jenkins has been with Penelec for over twenty-six years and has been the supervisor of the meter test shop for over fifteen years. Mr. Jenkins supervises the day-to-day operation of the meter test shop including the testing and calibration of meters. See Tr. at 58.

⁹ *Pa PUC v. Pennsylvania Electric Company*, Docket Nos. R-80051197, C-80072106, (Opinion and Order entered December 4, 1980) (*December 1980 Order*). According to Penelec, in the *December 1980 Order*, the Commission stated that "the privilege reasonably extends to any unaccepted proposals of settlement or to any discussions regarding settlement, as well as a wide variety of other matters which would expedite the proceeding" (Emphasis added).

case, particularly the need to re-issue the Initial Decision of the presiding ALJ, we will consider the Exceptions in order to secure a just, speedy, and inexpensive determination in this proceeding, consistent with 52 Pa. Code § 1.2(a).

The Complainant's primary concerns in this case involves the accuracy of Penelec's meter readings and the test results from the meter that was removed from his property on June 20, 2016. The Complainant also claims Penelec's meter reading technician informed him that Penelec "turns up" its meters to read faster than they should. Tr. at 8-10. However, in reviewing the merits of this case, we find that the Complainant has not presented sufficient evidence in this proceeding to support his allegations.

First, contrary to the Complainant's allegations concerning the accuracy of Penelec's meter and his concern that Penelec refused to send him the meter test results, our review of the record shows that the meter was removed on June 20, 2016, tested on June 24, 2016, and the results were sent to the *Complainant's Indiana PA Address* on June 27, 2018.¹⁰ Tr. at 40, 64; Exhs. 6, 10. The record also confirms that the meter test results were within Penelec's and the Commission's accuracy guidelines. Tr. at 64, 77-78; Exh. 10.

According to Penelec, the meter in question was previously tested on May 18, 2015, prior to installation at the Complainant's property. Penelec stated that the pre-installation test which had a weighted average of 100.3 percent, was also within the accuracy guidelines consistent with Chapters 57.20 and 57.24 of the Commission's

¹⁰ Penelec's witness, Ms. Laurie Parker, testified that the Complainant called the Company on June 20, 2016, and requested that his mailing address be changed from P.O. Box 263, House 15, 4th Street, Lucerne Mines, PA (*Complainant's Lucerne Mines Address*) to 305 Green Valley Drive, Indiana, PA (*Complainant's Indiana PA Address*). Tr. at 41-43; Penelec Exhs. 6, 10.

Regulations. Tr. at 61-63; Exh. 10. Penelec further stated that the Complainant's usage is supported by a consumer billing analysis and an appliance analysis it conducted on June 20, 2016. Tr. at 34-37; Exh. 5. As such, both the pre-installation and post-installation tests of the Complainant's meter confirm that the meter accurately measured the Complainant's usage. Hence, we find that Penelec's testing facilities and meter testing are in compliance with the Commission's Regulations and, under the considerations of *Waldron*, were never rebutted by any evidence put forward by the Complainant.

Second, with regard to the Complainant's allegation that Penelec's meter reading technician informed him that Penelec turns up its meters and that the employment of the said technician was terminated by Penelec, we again find nothing in the record that supports this claim. We agree with Penelec that these allegations are without merit. We note that other than the Complainant's mere assertions and his unsubstantiated opinion, the Complainant has not provided any documentation or evidence in support of his claims or allegations. Mere assertions, personal opinions or perceptions regarding Penelec's service do not constitute evidence. Tr. at 15; R. Exc. at 7. We also acknowledge the expert testimony of Mr. Jenkins that it is not possible to turn up the Complainant's meter because smart meters have non-adjustable calibration that only can be set by the manufacturer at the factory. Tr. at 68; R. Exc. at 7.

Third, we also find no merit in the Complainant's claim that he was treated unfairly based on his race and his disabilities. Based on our review of the record in this proceeding, we find that there was no mention about either the Complainant's race or his disabilities throughout this proceeding. Likewise, we find no support for the Complainant's allegation that he was intimidated over the phone by Penelec's counsel since the Complainant failed to provide any evidence or support for his claim during the proceeding. Therefore, for the foregoing reasons, we shall deny the each of the Complainant's Exceptions.

Notwithstanding our denial of the Complainant's Exceptions, in light of the Complainant's high electric usage and consistent with the concerns expressed by Chairman Brown in her Statement during the January 18, 2018 Public meeting prior to the adoption of the *January 2018 Order*, to the extent the Complainant is eligible to participate, we encourage Penelec to inform the Complainant of any available options under Penelec's Act 129 Plan and Universal Service and Energy Conservation Program, that may assist the Complainant in reducing his electricity consumption.

Conclusion

Consistent with the foregoing discussion, we shall deny the Complainant's Exceptions and modify the Initial Decision of ALJ Hoyer, which denies the Complaint in its entirety; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of James E. Elliott, Jr., filed on April 13, 2018, to the Initial Decision of Administrative Law Judge Mark A. Hoyer, that was issued on November 6, 2017, and later re-issued on March 15, 2018, are denied, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Mark A. Hoyer, issued November 6, 2017, and later re-issued on March 15, 2018, is adopted, consistent with this Opinion and Order.
3. That the Formal Complaint filed by James E. Elliott, Jr. on March 22, 2017, against the Pennsylvania Electric Company is dismissed, consistent with this Opinion and Order.

4. That this proceeding be marked closed.

BY THE COMMISSION,

A handwritten signature in cursive script, appearing to read "Rosemary Chiavetta".

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: October 4, 2018

ORDER ENTERED: October 4, 2018

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held February 6, 2020

Commissioners Present:

Gladys Brown Dutrieuille,
Chairman, Statement, Dissenting
David W. Sweet, Vice Chairman
Andrew G. Place
John F. Coleman, Jr.
Ralph V. Yanora

James E. Elliott, Jr.

F-2018-3003502

v.

Pennsylvania Electric Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of James E. Elliott, Jr. (Mr. Elliott or the Complainant) filed on January 4, 2019, to the Initial Decision (Initial Decision or I.D.) of Administrative Law Judge (ALJ) Mary D. Long in the above-captioned proceeding. The ALJ's Initial Decision which was issued on December 19, 2018, dismissed the Complainant's Formal Complaint (Complaint) for failure to appear for a scheduled hearing without good cause. Pennsylvania Electric Company (Penelec or the Company)

filed its Replies to Exceptions on January 17, 2019. For the reasons set forth below, we shall deny the Complainant's Exceptions, adopt the ALJ's Initial Decision, and dismiss the Complaint, consistent with this Opinion and Order.

History of the Proceeding

On July 16, 2018, the Complainant filed the instant Complaint against Penelec disputing Penelec's billing for service and raising claims regarding inadequate service reliability and poor customer service by Penelec. I.D. at 1; Complaint at 2. For relief, the Complainant requested, *inter alia*, an independent verification of his meter and for his bills to be corrected. Complaint at 3.

On August 8, 2018, Penelec filed an Answer and New Matter (Answer) denying the material allegations of the Complaint and asserting that the Complaint should be barred as an attempt to relitigate the identical issues raised by Complainant in a prior formal complaint.¹ I.D. at 1-2; Answer at 2-6.

By notice, dated August 30, 2018 (Hearing Notice), the Commission Scheduled this matter for a Call-In Telephonic Hearing on September 27, 2018, before ALJ Long. On September 5, 2018, the ALJ issued a Prehearing Order setting forth the procedures for the conduct of the hearing. I.D. at 2. The Prehearing Order stated as follows:

A request for a change of the scheduled hearing date must state the agreement or opposition of other parties, and must be submitted in writing no later than five (5) days prior to the hearing. 52 Pa.Code § 1.15(b). Requests for changes of hearing dates must be sent to me and all parties of record. The correct address is:

¹ See, Docket No. F-2017-2597039, Opinion and Order entered October 4, 2018.

Pennsylvania Public Utility Commission
Office of Administrative Law Judge
Piatt Place, Suite 220
301 Fifth Avenue
Pittsburgh, PA 15222
Telephone: (412) 565-3550
Fax: (412) 565-5692

Changes are granted only in rare situations where good cause exists.

Prehearing Order at Para. 1 (emphasis in original).

By electronic mail (email), dated September 24, 2018, from Penelec to ALJ Long, Penelec advised the ALJ that the Complainant had requested a continuance of the hearing for medical reasons, which Penelec did not oppose. I.D. at 2. The ALJ granted the unopposed request for continuance by email dated September 25, 2018. I.D. at 2. The ALJ memorialized the grant of continuance by written order on September 27, 2018. I.D. at 2.

By email, dated October 10, 2018, from the Complainant to the ALJ and Penelec, the Complainant requested an in-person hearing, and requested that the hearing be scheduled after November 16, 2018, to accommodate the Complainant's medical appointments. *Id.* The Complainant provided an email address where he could be contacted. *Id.* In reply to all, Penelec agreed to the Complainant's request for accommodation due to medical appointments, however, the Company requested that the Complainant be required to confirm his ability to appear at the scheduled in-person hearing, since Penelec's witnesses would be required to travel two hours to attend. *Id.* In reply to all, ALJ Long directed the Complainant to confirm his ability to appear at an in-person hearing and further requested that the Complainant provide a telephone number where he may be reached on the day of the scheduled hearing. I.D. at 3. No email reply was received from the Complainant. *Id.*

ALJ Long issued an Order on October 16, 2018, directing that the Complainant provide a written confirmation of his request for an in-person hearing by October 29, 2019. *Id.*

On October 29, 2019, the Complainant reiterated his request for an in-person hearing *via* an email to ALJ Long.

By Interim Order dated October 30, 2018, the Complainant's request for an in-person hearing was granted. By Hearing Notice, issued on October 31, 2018, the matter was scheduled for an in-person hearing on December 7, 2018, at 11:00 a.m., in the Commission's Pittsburgh Office. I.D. at 3.

On the morning of December 7, 2018, ALJ Long received an email communication asserting that the Complainant was unable to attend the scheduled hearing due to a medical emergency. The email was submitted to ALJ Long on December 6, at 11:19 p.m., from "Charlene Elliott" who represented that she was the Complainant's wife. The email alleged that the Complainant was unable to appear at the hearing due to a slip and fall accident and that he was scheduled for surgery for December 7, 2018. Three photographs were attached to the email. Counsel for Penelec was neither included in, nor copied on, the email communication. I.D. at 4.

The ALJ notified counsel for Penelec by forwarding the email communication asserting that the Complainant's medical emergency precluded his appearance. Counsel for Penelec, Margaret A. Morris, Esq., who stopped in transit from Philadelphia to Pittsburgh to attend the hearing, was granted leave to appear at the hearing *via* telephone. *Id.*

The hearing was convened as scheduled on December 7, 2018, at 11:00 a.m. Margaret A. Morris, Esq., appeared on behalf of Penelec. The Complainant

did not appear. The email communication from Charlene Elliot was read into the record, asserting a medical emergency and surgery as an unavoidable reason for the Complainant's failure to appear. Counsel for Penelec opposed any continuance and moved to dismiss the Complaint with prejudice based on the Complainant's failure to appear and prosecute the Complaint. I.D. at 4.

By Interim Order, dated December 7, 2018, ALJ Long provided the Complainant with an opportunity to substantiate the asserted medical emergency to prove his failure to appear was unavoidable. Specifically, the ALJ directed:

That on or before **December 17, 2018**, the Complainant shall file a request for a continuance of the December 7, 2018 hearing. **The request must include a certification from a licensed physician, dentist or nurse practitioner which verifies that the Complainant was unable to participate in the hearing at the scheduled date and time either in person or by telephone. This request must be filed with the Commission's Secretary's Bureau at the address below:**

December 7, 2018 Interim Order at Para. I (emphasis in original), I.D. at 4.

The Complainant did not submit a request for a continuance or any supporting documentation by the December 17, 2018 due date. I.D. at 5.

The record was closed on December 18, 2018. *Id.*

On December 19, 2018, the Commission served the Initial Decision of ALJ Long on the Parties. The Initial Decision granted Penelec's motion to dismiss the Complaint for failure to prosecute.

On January 4, 2019, the Complainant filed Exceptions to the Initial Decision. Penelec filed Replies to Exceptions on January 17, 2019.

Discussion

A. Legal Standards

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (*Schneider*), citing *Fusaro v. Pa. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984), citing *Township of Middleton v. The Institute District of the County of Delaware*, 293 A.2d 885 (Pa. Cmwlth. 1972), aff'd 450 Pa. 282, 299 A.2d 599 (Pa. 1973). 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 Pennsylvania v. Pa. PUC*, 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). Notice mailed to a party's last known address and not returned by the

post office is presumed to have been received. See *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531, 317 A.2d 584 (Pa. 1974) (*Mayflower*); *Chartiers Industrial and Commercial Development Authority v. Allegheny County Board of Property Assessment Appeals and Review*, 645 A.2d 944, 946 (Pa. Cmwlth. 1994), *appeal denied*, 539 Pa. 696, 653 A.2d 1234 (1994); *Geary v. Verizon Pennsylvania Inc.*, Docket No. C-2009-2118625 (Order entered September 16, 2010) (*Geary*).

Once a hearing is scheduled and the parties are duly notified by the Commission, 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) (*Mumma*); *Sentner v. Bell Tel. Co. of PA*, Docket No. F-00161106 (Order entered October 25, 1993) (*Sentner*).

A party to a proceeding has the right to request a continuance of the hearing, which may be considered and granted by the presiding officer “only for good cause shown.” See 52 Pa. Code § 1.15(b). The party making the request must file a motion at least five days prior to the hearing date stating the facts on which the request is made, except that during a hearing, an oral request for hearing continuance may be made before the presiding officer in the hearing room. 52 Pa. Code § 1.15(b).

If a party fails to appear at a scheduled and duly notified hearing, the party will be deemed to have waived the opportunity to participate in a hearing in the matter. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). However, waiver is not applied to the party if the presiding officer determines that the party’s failure to appear was “unavoidable” and the interests of the other party (or parties) and the public will not be “prejudiced” by permitting the reopening or further examination. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). Also, this result may not be applied if the presiding officer or Commission determines that the complainant demonstrated a good faith attempt to attend the hearing. See, e.g., *Yomari Then v. Philadelphia Gas Works*, Docket No.

F-2012-2318264 (Order entered June 13, 2013) (*Yomari Then*); *see also* *Windell C. Wiggins v. PECO Energy Company*, Docket No. C-2010-2190335 (Order entered October 27, 2011) (*Wiggins*).

The public interest is prejudiced by the wasteful use of the agency'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., Charles Nichols III v. Bell-Atlantic-Pennsylvania*, Docket No. C-00956667 (Opinion and Order entered August 4, 1995) (*Nichols III*).

A complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa. C.S. § 332(a). The burden of proof in actions before the Commission is the "preponderance of the evidence" standard. *Suber v. Pennsylvania Commn on Crime and Delinquency*, 885 A. 2d 678, 682 (Pa. Cmwlth. 2005) (*Suber*); *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992) (*Lansberry*); *see also North American Coal Corp. v. Air Pollution Commission*, 279 A.2d 356 (Pa. Cmwlth. 1971).

B. The ALJ's Initial Decision

ALJ Long made eleven Findings of Fact and reached three Conclusions of Law which are incorporated herein by reference and are adopted without comment, unless they are either expressly or by necessary implication, rejected or modified by this Opinion and Order. I.D. at 5-6 and 8.

Due to the Complainant's failure to appear at the scheduled hearing to present evidence on the merits of the Complaint, the ALJ's Initial Decision was based on whether the Complainant's failure to appear constituted a waiver of the claims raised in the Complaint which warranted dismissal of the Complaint. Noting that the Complaint

had been brought by Mr. Elliott without the assistance of counsel, the ALJ also engaged in an analysis of whether the *pro se* Complainant had been fully afforded due process in the proceeding. I.D. 6-8.

Specifically, the ALJ found that the Commission sent the Hearing Notices to the Complainant by regular first-class mail to the mailing address stated on the Complaint, and such notices were not returned to sender as undeliverable. I.D. at 8. The ALJ recognized that under such circumstances, the presumption is that the Hearing Notices had been received by the Complainant. I.D. at 6-7. (citing *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974)).

The ALJ found that the Complainant failed to appear at the scheduled hearing on December 7, 2019 at 11:00 a.m. I.D. at 5. The ALJ further found that the Complainant did not contact the Commission to explain his reason for failure to appear. *Id.*

The ALJ concluded that the medical reasons asserted by Charlene Elliot as a basis for the Complainant's failure to appear were not credible, since the photographs provided did not substantiate a severe injury, a medical emergency or a requirement for surgery. I.D. at 6. The ALJ also pointed out that this is not the first time the Complainant has claimed to be unavailable for a hearing due to a medical condition. *Id.*

The ALJ found that the Complainant had failed to comply with the December 7, 2018 Interim Order that afforded the Complainant with an opportunity to provide supporting evidence to substantiate the claim of a medical emergency and

surgery and directed the Complainant to provide a medical certification of the asserted medical emergency and surgery by December 17, 2018.² *Id.* at 7.

The ALJ concluded that the Complainants' due process rights have been fully protected. I.D. at 8 (citing *Schneider v. Pa. PUC*, 479 A2d. 10 (Pa. Cmwlth. 1984); *see also* 52 Pa. Code § 5.245(a)).

Finally, the ALJ also ruled that by not appearing for the scheduled hearing, the Complainant waived his claims and failed to sustain his burden of proof. I.D. at 8-9. The ALJ granted Penelec's motion to dismiss for failure to prosecute and dismissed the Complaint. *Id.* (citing 66 Pa. C. S. § 332; 52 Pa. Code § 5.245).

C. Exceptions and Replies to Exceptions

1. The Complainant's Exceptions

The Complainant's Exceptions³ are not set forth in numbered paragraphs and do not identify specific findings to be challenged, therefore, we shall summarize the claims raised in the Exceptions.

² Following the close of the record, on December 19, 2018, Complainant submitted a written request for continuance and Doctor's note excusing Mr. Elliot from "... all activities...from 12/7 until further notice due to *health complications regarding dental pain and right knee pain.*" The Doctor's note did not state that the Complainant had a medical emergency or surgery on December 7, 2018 (emphasis added).

³ We note that Complainant's Exceptions consist of nine handwritten pages which are not set forth in numbered paragraphs and do not identify the finding of fact or conclusion of law to be challenged, and therefore do not conform with our Regulations at 52 Pa. Code § 5.533, governing format. However, because the Complainant appears *pro se*, in the interest of justice, we shall exercise our discretion to liberally construe our regulations, to treat the Exceptions as properly filed. *See*, 52 Pa. Code § 1.2(a) and (d).

On Exception, the Complainant states that he disagrees with ALJ Long's Initial Decision. The Complainant contends, *inter alia*, that he complied with ALJ Long's December 7, 2018 Interim Order to submit a written request for continuance and provide a medical certificate to verify the asserted medical emergency and surgery which precluded his attendance at the scheduled hearing, to be submitted by December 17, 2018. Exc. at 2-4. As supporting documentation, the Complainant submits a copy of the doctor's note which had been included with the Complainant's written request for continuance, filed on December 19, 2018.

For relief, the Complainant requests a new hearing. Exc. at 9.

2. Penelec's Replies to Exceptions

In its Replies to Exceptions, Penelec generally asserts that the Complainant fails to adequately raise any factual or legal errors upon which to reverse the ALJ's Initial Decision. R. Exc. at 3. Penelec notes that the Complainant's Exceptions are a general statement of disagreement with the ALJ's Initial Decision and do not meet the requirement that exceptions must include "supporting reasons for the exceptions," per the Commission's Regulations. *Id.*

Penelec asserts that the Exceptions contain evidence and arguments which were not part of the record below which should be rejected. Specifically, Penelec references the ALJ's December 7, 2018 Interim Order which directed the Complainant to provide a written request for continuance by December 17, 2018, including a supporting medical certificate to substantiate the claimed medical emergency and surgery which precluded the Complainant's appearance at the scheduled hearing. Penelec summarizes the Exceptions to raise only two relevant legal issues, which are timeliness of the Complainant's filing in response to the ALJ's December 7 Interim Order, and the legal sufficiency of that filing. R. Exc. at 3.

Penelec notes that the Complainant's written request for continuance and supporting doctor's note were received by the Commission on December 19, 2018, after the close of the record, and two days beyond the date ALJ Long ordered them to be filed on December 17, 2018. Therefore, Penelec asserts the filing is untimely. R. Exc. at 3.

Penelec asserts that, even if treated as timely filed, the doctor's note is insufficient to satisfy the ALJ's order to submit a medical certification of the asserted medical emergency and surgery which occurred on December 7, 2018, which would have precluded the Complainant's appearance at the scheduled hearing. Penelec avers that the doctor's note states nothing to confirm the asserted reasons for the Complainant's failure to appear, and therefore, should be found to be insufficient to establish that the Complainant's failure to appear was "unavoidable." R. Exc. 3-4.

Accordingly, Penelec asserts that the Exceptions are without merit and requests that the Complainant's Exceptions be denied. R. Exc. at 4.

D. Disposition

Upon consideration of the Exceptions and Replies thereto, we agree with Penelec, that the Complainant's Exceptions fail to assert any factual or legal error upon which to reverse the ALJ's Initial Decision. Where a party fails to appear at a hearing, the failure to appear is deemed to be a waiver of the right to present evidence on the claims raised in the Complaint, provided the party has been afforded due process, and where the reason for failure to appear was not established to be unavoidable.

With respect to the Complainants' failure to appear at the hearing, we note that it is within the sound discretion of the ALJ to decide whether the Complainant's failure to appear was unavoidable and whether permitting a hearing would prejudice the public interest or the interest of the other party. *See* 66 Pa. C.S. § 332(f); *see also* 52 Pa.

Code § 5.245(a)-(b)(pertaining to failure to appear). Upon a party's failure to appear, it is for the ALJ to weigh whether the Complainants' failure to appear should be deemed the Complainant's waiver of the opportunity to participate in a hearing in a complaint proceeding, pursuant to 66 Pa. C.S. § 331(d) (pertaining to authority of the ALJ as presiding officer).

In weighing whether a Complainant's failure to appear constitutes waiver of the right to participate and present evidence on the claims raised on the Complaint, the ALJ must, as a preliminary matter, ensure that the Complainant has been afforded due process. *Schneider*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984). The ALJ must ensure that notice and opportunity to be heard has been afforded, both in the proceeding in general and specifically, with respect to the hearing at which the Complainant has failed to appear. See, *Mayflower*, 455 Pa. 531, 317 A.2d 584 (Pa. 1974).

As a general matter, we conclude that the Complainants' due process rights to notice and opportunity to be heard were preserved throughout the present proceeding. The ALJ made numerous adjustments to the proceeding schedule to accommodate the Complainant for medical reasons. The Complainant, however, repeatedly failed to timely respond to the ALJ's communications related to the case, and repeatedly failed to comply with explicit orders to submit written requests for continuance and to serve Penelec's counsel with all communication. We note with approval that ALJ Long consistently established an explicit record of providing the Complainant written notice and reasonable opportunity to be heard.

Specifically, with respect to notice of the hearing scheduled for December 7, 2018, the Complainant received sufficient notice of the hearing requiring his attendance. All documents, including the October 31, 2018 Hearing Notice establishing the date and time of the December 7, 2018 hearing, had been sent to the Complainant's mailing address listed on the Complaint and were not returned by the post office as

undeliverable. Therefore, the legal presumption arises that all documents were received by the Complainant. No evidence was submitted in the record or the Complainant's Exceptions to overcome this presumption. Therefore, we agree with the ALJ that the Complainant received sufficient notice of the hearing scheduled for December 7, 2018.

Having established sufficient notice of hearing, the next question is whether the ALJ's denial of a continuance and finding of waiver constituted legal error or was an abuse of discretion. In the present circumstances, we find no basis to conclude the ALJ committed either legal error or abuse of discretion.

On the morning of the date of the scheduled hearing, the ALJ received an email communication from a party representing to be the Complainant's wife, Charlene Elliot. The email asserted that the Complainant suffered an accident causing a medical emergency and a need for surgery on the day of the hearing and attached pictures to support the claim. The ALJ was not obligated to accept the filing of a party who had not been substantiated and authorized to appear on behalf of the Complainant. *See* 52 Pa. Code § 1.23 (pertaining to prohibited representation at hearing). Nevertheless, the ALJ conducted a thorough review of the submission which purported to document the medical emergency which precluded the Complainant's appearance at the scheduled hearing. The ALJ concluded that the email and attached photographs were not credible to support the asserted medical necessity for failure to appear. We see no basis upon which to overturn the credibility determination of the ALJ.

Following the scheduled hearing at which the Complainant failed to appear, ALJ Long afforded the Complainant ample opportunity after-the-fact to provide justification for the failure to appear. The ALJ's December 7, 2018 Interim Order directed the Complainant to file a written request for continuance and to submit a medical certification to substantiate the asserted medical emergency and surgery by December 17,

2018 or the Complaint would be dismissed.⁴ The Complainant did not file anything by the December 17, 2018 due date. The Complainant's late-filed request for continuance was docketed on December 19, 2018 after the close of the record.

The Complainant's Exceptions did not present any reason why the Complainant failed to comply with the ALJ's order to file the request for continuance or medical certification of a medical emergency and surgery by the December 17, 2018 due date. Rather, on Exception, the Complainant re-submits the doctor's note which was included in his late-filed submission requesting a continuance, which was received after the close of the record.

Because we will not consider evidence on Exception which was not properly entered into the record of the proceeding below, we will decline from considering the sufficiency of the medical note which the Complainant failed to timely submit to ALJ Long. Thus, on Exception, the Complainant has presented no basis to conclude that ALJ Long erred in concluding that the Complainant's absence from the scheduled hearing was voluntary.

Upon our review, we find no abuse of discretion or error of law in the ALJ's conclusion that the weight of the evidence proffered by the Complainant in support of the asserted medical emergency was insufficient to find that a medical emergency, in

⁴ We note that the Interim Order protected the due process rights of both parties, without prejudice to either party's substantive position. The Complainant was clearly notified of the consequence for failing to appear at the scheduled hearing, unless written documentation to substantiate the alleged unavoidable reason was provided by a date certain. Upon service, opposing counsel would be provided notice and opportunity to respond.

fact, existed.⁵ Therefore, we see no reason to reverse the ALJ's ruling to deny the Complainant's request for continuance of hearing.

Therefore, we also find that the ALJ properly concluded that the Complainant waived the opportunity to participate at the scheduled hearing by his failure to appear, without an unavoidable reason. On that basis, the ALJ properly found that the Complainant failed to present any evidence to support the merits of the claims raised in the Complaint.

Accordingly, for all the foregoing reasons, we shall affirm the Initial Decision and dismiss the Complaint with prejudice. A dismissal "with prejudice" means that the Complainant is barred from filing another complaint with the Commission raising the same issues or claims as raised in the dismissed complaint.

Conclusion

Based upon our review of the record and the applicable law, we shall deny the Complainant's Exceptions and adopt the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed by James E. Elliot, Jr., on January 4, 2019, at this docket, are denied.

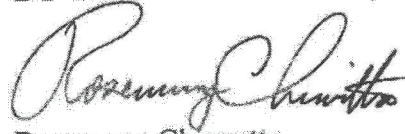
⁵ See *Jo Anna Warren Williamson v. Duquesne Light Company*, Docket No. C-2009-2138578 (Opinion and Order entered February 10, 2011) ("[T]he admission of evidence is generally a matter within the sound discretion of the ALJ, and the ALJ's rulings thereon will not be reversed in the absence of a clear abuse of discretion or error of law.").

2. That the Initial Decision of Administrative Law Judge Mary D. Long issued on December 19, 2018, at this docket, is adopted.

3. That the Formal Complaint filed on July 16, 2018, by James E. Elliott, Jr., at this docket, is dismissed, with prejudice.

4. That this docket shall be marked closed.

BY THE COMMISSION,

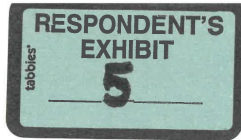


Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: February 6, 2020

ORDER ENTERED: February 6, 2020

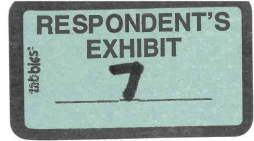


DETAILED STATEMENT OF ACCOUNT

Customer Name: JAMES E ELLIOTT JR Account Number: 100113119695
 Service Address: 15 4TH ST
 LUCERNE MINES PA 15754

Entry Date	Read Date	Cons Type	Meter Reading	Cons Usage	Nbr Days	Daily Average	Read Type	FE Billing Amt	Supplier Billing Amt	Total Billing Amt	Budget Billing Amt	Due Date	Payment Amt	Adj Amt	Adj Type	Account Balance
05/23/19	05/22/19	KWH	54,753	1,164	30	39	Act	175.46		175.46	297.00	06/17/19				10,029.89
05/24/19													-286.00			9,743.89
06/21/19													-285.00			9,458.89
06/24/19	06/23/19	KWH	56,321	1,568	32	49	Act	229.98		229.98	219.00	07/16/19				9,688.87
07/23/19	07/22/19	KWH	58,184	1,863	29	64	Act	269.73		269.73	219.00	08/14/19				9,958.60
08/22/19	08/21/19	KWH	59,754	1,570	30	52	Act	228.94		228.94	219.00	09/16/19				10,187.54
09/23/19													-219.00			9,968.54
09/23/19	09/22/19	KWH	61,032	1,278	32	40	Act	184.13		184.13	197.00	10/15/19				10,152.67
10/24/19	10/23/19	KWH	62,361	1,329	31	43	Act	189.33		189.33	197.00	11/18/19				10,342.00
11/06/19													-251.00			10,091.00
11/06/19														32.00	RF	10,123.00
11/23/19	11/21/19	KWH	63,501	1,140	29	39	Act	163.52		163.52	197.00	12/16/19				10,286.52
12/21/19	12/20/19	KWH	64,522	1,021	29	35	Act	156.02		156.02	164.00	01/15/20				10,442.54
01/22/20	01/21/20	KWH	65,677	1,155	32	36	Act	180.61		180.61	164.00	02/13/20				10,623.15
02/20/20	02/19/20	KWH	66,693	1,016	29	35	Act	160.33		160.33	164.00	03/16/20				10,783.48
03/24/20	03/23/20	KWH	67,782	1,089	33	33	Act	163.85		163.85	140.00	04/15/20				10,947.33
04/15/20													-1,051.00			9,896.33
04/22/20	04/21/20	KWH	68,898	1,116	29	38	Act	164.52		164.52	140.00	05/14/20				10,060.85
05/23/20	05/21/20	KWH	70,010	1,112	30	37	Act	163.95		163.95	140.00	06/16/20				10,224.80
05/29/20													-262.00			9,962.80
06/23/20	06/22/20	KWH	71,779	1,769	32	55	Act	250.94		250.94	188.00	07/15/20				10,213.74
07/22/20	07/21/20	KWH	73,560	1,781	29	61	Act	251.47		251.47	188.00	08/13/20				10,465.21
08/19/20													-160.91			10,304.30
08/23/20	08/20/20	KWH	75,518	1,958	30	65	Act	275.38		275.38	188.00	09/14/20				10,579.68
09/22/20	09/21/20	KWH	77,221	1,703	32	53	Act	241.74		241.74	188.00	10/14/20				10,821.42
10/21/20	10/20/20	KWH	78,211	990	29	34	Act	145.63		145.63	188.00	11/12/20				10,967.05
11/21/20	11/19/20	KWH	79,499	1,288	30	43	Act	186.12		186.12	188.00	12/14/20				11,153.17
12/21/20	12/20/20	KWH	80,482	983	31	32	Act	145.15		145.15	203.00	01/12/21				11,298.32
01/21/21	01/20/21	KWH	81,952	1,470	31	47	Act	209.15		209.15	203.00	02/16/21				11,507.47

**FIRST ENERGY
HIERARCHY OF PAYMENT ARRANGEMENTS**



Name: James Elliott Jr.

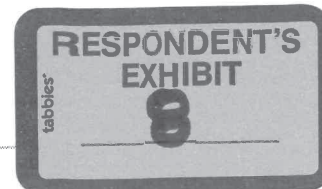
Account Number: 100113119695

Service Address: 15 4th St
Lucernemines, Pa. 15754

Type of Agreement	Date	Agreement Amount	Income	Agreement Terms/Remarks
PCAP	3/21/2008	\$518.76	\$769.00	\$51.64 Monthly PCAP credit, \$14.41 potential forgiveness
PCAP	4/19/2021	\$0.00	\$1,159.50	\$92.50 Monthly PCAP credit

Remarks:

PCAP – Pennsylvania Customer Assistance Program



Assigned To

Assigned Analyst
Webb, Max S

Customer Information

Case Number

3356845

Account Number

100113119695

Service Address

First Name

JAMES

Last Name

ELLIOTT

Address1

15 4TH STREET

Address2

Service City

LUCERNE MINES

Service Class

Service State

PA

Work Phone

Service Zip

15754-0

Home Phone

(724) 9158222

Mailing Address

Address1

Address2

City

State

Mail Zip

Family

Family Size

2

Adults

2

Children

0

Age

General

PUC Date Opened

6/17/2015

PUC Date Closed

12/18/2015

Case Information

Prior Case Number

3171715

Case Origin

TELEPHONE

Source

Term Date

6/30/2015

Universal Service

No

Business Name

Arrearage

849

Income

SSI - \$1125

ADULT 2 - \$0

Reason For Contact

ON

- PAR WITH DISPUTE (#63)

Case Problem

Company Position

06/17/2015 PENELEC IS REQUESTING \$849.18 TO KEEP SERVICES ON.

Related Information

PAR W DISPUTE CUSTOMER WOULD LIKE TO DISPUTE \$500 SECURITY DEPOSIT CUSTOMER CLAIMS THAT HE WAS NEVER QUALIFIED ABOUT OWING A DEPOSIT. CUSTOMER WANTS AMOUNT WAIVED HE SATISFIED PRIOR PUC AGREEMENT TO A ZERO

BAL. ALSO IS SEEKING PREVENTION OF SERVICES FROM BEING TERMINATED AND TO BE PLACED ON A PAYMENT AGREEMENT. NO EMAIL ADDRESS.

Misc. Info.

Hot Issue

PUC Investigator / Intaker

Investigator First Name	Investigator Last Name	Investigator Phone
BCS	CASE POOL	(717)
Intaker First Name	Intaker Last Name	
RAJEIA	BYARD	
Status		

Status

Closed

History

Click To Expand

<
>

Is Archived

Customer Information

Case Number

3356845

Customer First Name

JAMES

Customer Last Name

ELLIOTT

Account Number

100113119695

Service Address

Address 1

15 4TH STREET

Address 2

City

LUCERNE MINES

Service State

PA

Zip

15754

Home Phone

(724) 9158222

Work Phone

Mailing Address

Address 1

Address 2

City

State

Zip

Family

Adults

2

Family Size

2

Children

0

Age

General

PUC Date Opened

6/17/2015

PUC Sent Date

12/18/2015

PUC Date Closed

12/18/2015

Assigned To

Assigned Analyst

Webb, Max S

Case Information

PUC Violation

NO

PUC Chapter

Section Rule

Balance Date

12/18/2015

Head Date

12/18/2015

Bill Date

PUC Service Continue Date

Messages (Continued)

Explanation of Terms

Customer Charge - Monthly charge that offsets costs for billing, meter reading, equipment, service line maintenance, and assessing and deploying Smart Meter Technology.

Default Service Support Charge - Charge to recover new and deferred costs associated with serving customers in a competitive market.

Distribution Charge - Charge for Universal Service Program and Energy Efficiency Program costs, and for the use of local wires, transformers, substations and other equipment used to deliver electricity to consumers from high-voltage transmission lines.

Distribution System Improvement Charge - This charge recovers costs incurred to repair, improve or replace infrastructure that the Company uses to deliver electricity to its customers.

Estimated Reading - On the months we do not read a meter, we calculate the bill based on past electrical usage.

KWH (Kilowatt Hour) - A unit of measure for electricity usage equal to 1,000 watts used for one hour.

Late Payment Charge - A charge added to the bill on balances owed after the Due Date.

Non-Utility Generation Charge - Charges to cover an electric utility's costs associated with contracts with non-utility-owned generation.

Price to Compare (PTC) - Price per kilowatt hour to be used when comparing to the price of a generation supplier.

Price to Compare Default Service - Charges for costs to provide energy, capacity, compliance with Alternative Energy Portfolio Standards, transmission and ancillary services for customers receiving Default Service.

Prorated Reading - Reading calculated by multiplying the daily average electric usage between two recent readings by the number of days in the billing period.

Service Charge - Charge for opening an account.

Solar Requirements Charge - Charge to acquire Solar Photovoltaic Alternative Energy Credits to comply with the Alternative Energy Portfolio Standards Act.

State Tax Surcharge - An adjustment to the state taxes recovered through Penelec's basic charges.

TCJA Voluntary Surcharge - This surcharge adjusts customer rates for the reduction to corporate federal income tax under the Tax Cuts and Jobs Act.

General Information

If you have billing questions or complaints about your Penelec account, please contact us before the due date.

Call Customer Service at 1-800-545-7741 Monday - Friday, from 8 a.m. - 6 p.m. Our representatives can answer your questions, describe the charges on your bill, explain how to make sure your bill is correct, and provide information on rate schedules and energy efficiency.

Call Payment Options at 1-800-962-4848 Monday - Friday, from 8 a.m. - 6 p.m.

Visit our website at www.firstenergycorp.com

Write to us at Penelec, 76 S. Main St., A-RPC, Akron, OH 44308-1890

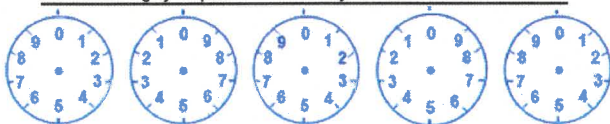
Customers with hearing or speech impairments can contact the Telecommunications Relay Service (TRS) at 711.

For your protection, all of our employees wear Photo I.D. badges.

Electronic Check Conversion - Your check authorizes us either to make a one-time electronic funds transfer (EFT) from your account or process as a check. If you have questions about this program, call 1-866-283-8081.

To provide a customer meter reading, use the dials provided and enter the reading on-line at www.firstenergycorp.com/aboutyourbill or by calling 1-800-545-7741. Say "Meter Reading" when asked "Which of these can I help you with today?" Have the date you took the reading available. If this is to avoid a scheduled estimate, please check the front of the bill for entry dates.

Provide reading by telephone or on-line only: DO NOT MAIL



Draw hands on the dials exactly as they appear on your electric meter. When reading your meter, if the hand falls between two numbers, always report the lower number.

If you have a DIGITAL METER write the numbers here:

Messages (Continued)

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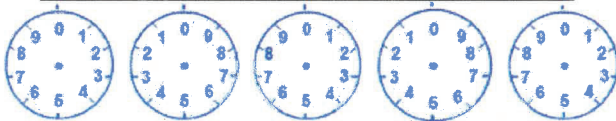
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