

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Stephen and Nancy J. Ulishney	:	
	:	C-2021-3024487
v.	:	
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Conrad A. Johnson
Administrative Law Judge

INTRODUCTION

This decision dismisses with prejudice the Complaint filed in this matter for Complainants’ failure to appear for the hearing to prosecute their Complaint.

HISTORY OF THE PROCEEDING

Complaint, Answer and New Matter

Complainants Stephen and Nancy J. Ulishney (Complainants) filed a Formal Complaint, on February 16, 2021, with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn, Respondent or Company). As reasons for the Complaint, Complainants checked three boxes on the Commission’s complaint form: (1) I would like a payment agreement; (2) I am having a reliability, safety, or quality problem with my utility service (See attached Documents); and (3) Other (explain). Complaint ¶ 4. Complainants explained that starting in the fall of 2019, power surges occurred at their service address, 813 Everview Lane, Derry, Pennsylvania 15627, “causing the power to snap off and on quickly.” Complaint Attachment, unnumbered pages 1 and 2. According to

Complainants, the power surges became so frequent that they complained to West Penn in the late spring of 2020. *Id.* West Penn responded by servicing a nearby substation; however, Complainants claimed the mini power surges, which West Penn referred to as “recloser operations” continued. *Id.* Complainants alleged that a recloser operation occurring on August 26, 2020, caused damage to their refrigerator’s compressor. *Id.* Complainants asserted a repairman informed them the cost of a new compressor was \$1,000.00. *Id.* Complainants elected to buy a new refrigerator at a cost of \$2,200.00. Complaint ¶ 5. Complainants claimed the original cost of their damaged refrigerator was \$1,200.00, and the repairman charged them \$127.00. As relief, Complainants requested monetary damages for their original refrigerator plus the repairman’s charges for a total claim in the amount \$1,327.00. Complaint ¶ 5.

West Penn filed an Answer and New Matter and Preliminary Objections (PO) on May 5, 2021. West Penn admitted in part and denied in part the material allegations of the Complaint. Answer ¶ 4. West Penn admitted that Complainants were seeking a Commission-ordered payment (PAR); however, West Penn alleged the account is current. Thus, West Penn argued a Commission PAR was not warranted. *Id.*

West Penn denied that there was a power surge; instead, West Penn averred the service address experienced a recloser operation. West Penn further asserted the following:

A recloser is a protective device installed on the Circuit that detects a fault on the line (i.e., breaks circuit) and causes a loss of power, albeit momentarily, if the fault clears the line. In that case, it is referred to as a “blink” of the lights; power goes out then resets itself. If the fault does not clear after three operations, the recloser will interrupt power completely. The Respondent avers that the recloser device operated as designed. The Respondent specifically denies that a recloser operation caused a “power surge.”

Id. West Penn alleged remedial action was taken on September 10, 2020, and the Company argued it provided reasonable and adequate service to Complainants. West Penn further argued that under the Public Utility Code (Code) “. . . the Commission possesses no jurisdiction to consider any implied request for reimbursement for property damage.” *Id.*

In New Matter, West Penn reiterated its argument: “The Code does not confer jurisdiction upon the Commission to award monetary damages.” New Matter ¶ 11. For relief, West Penn requested that the Complaint be dismissed with prejudice or denied in its entirety.

West Penn served its Answer and New Matter and POs upon Complainants on May 5, 2021, together with a Notice to Plead to the New Matter within twenty days of service and a Notice to Plead to the POs within ten days of service. Complainants did not file a reply to Respondent’s New Matter as provided for under the Commission’s regulations,¹ nor did Complainants file an answer to Respondent’s POs.²

Evidentiary Telephonic Hearing

By Telephonic Hearing Notice (Hearing Notice) dated June 7, 2021, the Parties were informed that this case was assigned to me, as the presiding officer, for the convening of an evidentiary telephonic hearing (hearing) on July 13, 2021. The Hearing Notice provided the Parties with the Toll-Free Bridge Number and the PIN to dial on the morning of the hearing to participate in the hearing and included the procedure to follow to request a hearing continuance. The Hearing Notice further warned as follows:

FAILURE TO APPEAR: You may lose the case if you do not take part in this hearing and present evidence on the issue(s) raised. Your case may be dismissed “with prejudice” which means that you will be barred from filing another complaint raising the same claim(s) and issue(s) presented in the dismissed complaint.

(Emphasis in original).

¹ “Unless otherwise ordered by the Commission, replies to answer seeking affirmative relief or to new matter shall be filed with the Commission and served within 20 days after date of service of the answer, but not later than 5 days prior to the date set for the commencement of the hearing.” 52 Pa. Code § 5.63(a).

² “*Notice to plead.* A preliminary objection must contain a notice to plead which states that an answer to the objections shall be filed within 10 days of service of the objection.” 52 Pa. Code § 5.101(b).

Also on June 7, 2021, I issued a Prehearing Order advising the Parties about the applicable procedural rules for the July 13, 2021 hearing, including the procedure to follow to request a hearing continuance. The Prehearing Order reminded the Parties to call on the date and at the time of the hearing the Toll-Free Bridge Number and enter the PIN to participate in the hearing. The Prehearing Order repeated the **FAILURE TO APPEAR** warning set forth in the Hearing Notice.

Ruling on Preliminary Objections

On June 9, 2021, I issued a *First Interim Order Sustaining Respondent's Preliminary Objections (First Interim Order)*. The *First Interim Order* explained that to the extent Complainants were seeking damages for their refrigerator, West Penn's objection was sustained because the Commission lacked authority, that is jurisdiction, to award monetary damages.³ However, the *First Interim Order*, further stated, "That this case shall proceed to a telephonic hearing on July 13, 2021, on the remaining issues of the Complaint."

Hearing Continuances and Prehearing Conference

Via email on July 8, 2021, Complainants requested a continuance of the July 13, 2021, hearing on the grounds that the original problem alleged in their Complaint was again occurring, and West Penn needed time to assess and fix the issue. By email dated July 9, 2021, the Parties were informed that Complainants' continuance request was denied, and that the hearing would be converted into a prehearing conference to discuss the issues in the case.

A prehearing conference convened in this case on July 13, 2021. Complainants together with their daughter, Karen Ulishney and their neighbor, Sandy Kocian, were present for the conference. Margaret A. Morris, Esquire, representing Respondent, was present for the conference together with Respondent's witnesses: Cenist Holmes, a claims manager; Shawn Hindman, a reliability engineer; and Tammy Taylor, a compliance analyst. The prehearing

³ See *In Re: Melograne*, 812 A. 2d 1164 (Pa. 2002); *Feingold v. Bell Tele. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

conference resulted in West Penn agreeing to conduct an on-site investigation of the recloser issue occurring on Complainants' electric service, and the rescheduling of the hearing. By Notice dated July 15, 2021, the Parties were informed that the hearing was rescheduled for October 5, 2021. Due to a scheduling conflict, the Parties were informed by Notice dated September 27, 2021, that the October 5, 2021, hearing was rescheduled to November 3, 2021.

Via email on November 1, 2021, Complainants requested a continuance of the November 3, 2021, hearing because one of their expert witnesses had tested positive for COVID-19. West Penn did not object to the continuance request. By email on the same date, the Parties were informed that Complainants' continuance request would be granted, and a rescheduled hearing notice would be issued to them.

By Hearing Notice dated November 2, 2021, the Parties were informed that the initial telephonic hearing in this case was rescheduled for January 11, 2022, at 10:00 a.m. Again, the Notice contained the **FAILURE TO APPEAR** warning. The Hearing Notice informing the Parties of the manner, date, and time of the rescheduled hearing, was emailed in the ordinary course of the Commission's business to the email address provided by Complainants to the Commission. The Commission did not receive a return electronic message that delivery of the Notice to Complainants' email address had failed.

The Parties' Emails⁴

By email dated December 23, 2021, West Penn's counsel, Attorney Morris, served Complainants with a Motion to Compel Discovery (Motion). By email dated December 24, 2021, and addressed to Attorney Morris, with a copy to me, Complainants stated as follows:

Dear Ms. Morris:

I AM NOT SURE WAY (sic) YOU SENT THIS LAST EMAIL TO US, FOR IN MY LAST EMAIL TO YOU, MY CLOSING STATEMENT SAID WE WERE MOVING ON AND HAD NO

⁴

For a complete record, the Parties' relevant emails were docketed in this case.

FURTHER USE FOR THE PUC, THE HEARING ETC.
PLEASE DO NOT CONTACT US AGAIN.

YOU JUST PROVED MY POINT MENTION IN AN EARLY
EMAIL, THAT THE PUC IS NOTHING BUT ANOTHER
GOVERNMENT AGENCY, THAT PUSHES PAPER AND
ACCOMPLISHES NOTHING. DIFFENTLY (sic) WILL
SPREAD THE WORD NEVER TO GO TO THE PUC.

SINCERELY,

KAREN ULISHNEY

Complainants' Email dated December 24, 2021. (All caps in original).

Via email date January 7, 2022, Respondent requested that the hearing scheduled for January 11, 2022, be converted to a prehearing conference to discuss its Motion. On January 7, 2022, I emailed the Parties and informed them that the hearing would proceed as scheduled, and Respondent's Motion would be addressed at the hearing. Later the same day, via email, Complainants responded to the January 7, 2022, emails and stated in part as follows:

Ms. Morris was sent an email on 12/24/21 that clearly stated we had no further use for the PUC, the scheduled hearing, etc. and that we were going to go another option. . . . Based on the facts that more information has come to light on the issue, and the PUC cannot get monetary payments to the claimants, we have chosen to go a different avenue.

Sincerely,
Stephen and Nancy Ulishney

Complainants' Email dated January 7, 2022.

Complainants' Failure to Appear for the Hearing

On January 11, 2022, by 10:00 a.m., Attorney Morris for West Penn, three witnesses for West Penn, the court reporter and I had dialed into the hearing scheduled for that day. However, Complainants had not called into the hearing. Accordingly, the hearing convened at 10:02 a.m., and I recessed the hearing at 10:05 a.m., to permit additional time for

Complainants to appear or to contact the Office of Administrative Law Judge (OALJ) to explain their absence. The telephonic proceeding remained open with counsel for West Penn, the West Penn witnesses, and the court reporter in the telephonic hearing, and I waited for Complainants to join the hearing. The hearing reconvened at approximately 10:21 a.m. When the hearing reconvened, Complainants had not dialed into the hearing nor contacted the OALJ to explain their absence.

Consequently, the hearing proceeded in Complainants' absence. As a result, counsel for West Penn moved for dismissal of the Complaint with prejudice for lack of prosecution. I informed counsel that the dismissal motion would be taken under advisement and an Initial Decision would be issued. The record was closed, and the hearing adjourned at 10:30 a.m. on January 11, 2022.

FINDINGS OF FACT

1. Complainants in this proceeding are Stephen and Nancy Ulishney.
2. Respondent West Penn Power Company is a jurisdictional public utility providing electric service to Complainants and Pennsylvania customers.
3. On February 16, 2021, Complainants filed a Complaint against Respondent with the Commission.
4. On May 5, 2021, West Penn filed an Answer and New Matter and Preliminary Objections.
5. By an interim order entered on June 9, 2021, the Company's preliminary objections were sustained to the extent that the Commission lacked jurisdiction to award monetary damages, and the case was scheduled to proceed to hearing on the remaining issues of the Complaint.

6. On November 2, 2021, a Hearing Notice was issued to the Parties informing them that a telephonic hearing was scheduled in this matter for January 11, 2022, at 10:00 a.m. and advising the Parties about the procedure to follow to participate in the hearing, including the procedure to request a hearing continuance.

7. The November 2, 2021, Hearing Notice issued to the Parties informed them that failure to participate in the hearing would result in dismissal of their case.

8. The Hearing Notice was electronically served upon Complainants at the email address provided by them to the Commission.

9. There is no indication in the record that there was an electronic failure in the delivery of the Hearing Notice to Complainants.

10. Respondent's counsel and witnesses were present by 10:00 a.m. on January 11, 2022, for the telephonic hearing.

11. By 10:30 a.m. on January 11, 2022, Complainants had not appeared for the telephonic hearing.

12. When Complainants did not appear for the telephonic hearing, Respondent moved for dismissal of the Complaint with prejudice for lack of prosecution.

DISCUSSION

Due Process

The Commission satisfies the requirement of affording a complainant with administrative due process, by providing timely notice of the hearing on the complaint and the opportunity to be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

On November 2, 2021, the Hearing Notice was electronically served upon Complainants at the email address they provided to the Commission. The Commission did not receive a return electronic message that delivery of the Hearing Notice to Complainants' email address had failed. Accordingly, I must presume that Complainants received electronic notice of the hearing and elected not to participate in the hearing.⁵ *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). Therefore, Complainant's due process rights have been fully protected.

Burden of Proof

Pursuant to Section 332(a) of the Code, 66 Pa.C.S. § 332(a), the burden of proof is on the proponent of a rule or order. In this proceeding, Complainants are the proponents of a rule or order. Therefore, Complainants had the burden of proving they were entitled to the relief requested in their Complaint by a preponderance of the evidence. *See Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950). Respondent was present for the hearing through its attorney and witnesses. However, Complainants were not present for the hearing.

Section 332(f) of the Code, 66 Pa.C.S. § 332(f), provides in pertinent part:

Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat[.]

Since Complainants failed to appear and participate in the scheduled hearing by telephone, their Complaint may be dismissed with prejudice. *See Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995); *El-Ayazra v. W. Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa. Code § 5.245.

⁵ Complainants' emails, mentioned above, further indicate that they received notice of the scheduled hearing.

“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.” *See Whaumbush v. PECO Energy Co.*, Docket No. C-2017-2622269 (Opinion and Order entered August 23, 2018) (affirming dismissal of complaint with prejudice where complainant was duly notified of hearing but failed to attend). When a complainant fails to attend a duly noticed hearing “further procedural activity in the docket would prejudice the public interest due to the wasteful use of the agency's and the utility/respondent's time and resources in addressing the complaint.” *Sleboznick v. Pa. Elec. Co.*, Docket No. F-2019-3011514 (Opinion and Order entered December 17, 2020) (affirming dismissal of complaint with prejudice where complainant failed to appear at hearing, citing numerous cases).

In the present case, Complainants were on notice that their failure to attend the hearing would result in dismissal of their Complaint. The history of this proceeding reveals, the Commission and West Penn for almost a year have committed significant time and resources to addressing the Complaint of Stephen and Nancy J. Ulishney. Complainants in their emails indicate they “were moving on” and “have chosen to go a different avenue.” Thus, any further proceedings on the issues raised in the Complaint would be unwarranted, wasteful, and inimical to the public interest. Accordingly, in the ordering paragraphs below West Penn’s motion will be granted, and the Complaint will be dismissed with prejudice.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the Parties and subject matter of this proceeding. 66 Pa.C.S. § 701.
2. Complainant as the proponent of a rule or order has the burden of proof. 66 Pa.C.S. § 332(a).
3. Electronic service of a hearing notice to the email address provided by a complainant to the Commission is presumed to have been received by the complainant, absent any indication in the record of an electronic failure of delivery of the hearing notice to the

complainant's email address. *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).

4. When a complainant fails to appear for a scheduled conference or hearing, the complaint may be dismissed with prejudice. *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995); *El-Ayazra v. W. Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa. Code § 5.245.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Respondent West Penn Power Company's motion to dismiss the Complaint of Stephen and Nancy J. Ulishney is granted consistent with reasoning in this decision.

2. That the Complaint of Stephen and Nancy J. Ulishney against West Penn Power Company, at Docket No. C-2021-3024487 is dismissed with prejudice, for the failure of Complainants Stephen and Nancy J. Ulishney to prosecute their Complaint.

3. That the Secretary's Bureau shall mark Docket No. C-2021-3024487 closed.

Date: March 7, 2022

/s/
Conrad A. Johnson
Administrative Law Judge