

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

Public Meeting held May 12, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
John F. Coleman, Jr., Vice Chairman
Ralph V. Yanora

Stephen and Nancy J. Ulishney

C-2021-3024487

v.

West Penn Power Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Conrad A. Johnson, issued on March 8, 2022, in the above-captioned proceeding. No Exceptions have been filed. However, we have exercised our right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall adopt the Initial Decision, as modified, consistent with this Opinion and Order.

History of the Proceeding

On February 16, 2021, Stephen and Nancy J. Ulishney (Complainants) filed a Formal Complaint (Complaint) against West Penn Power Company (West Penn or Company). As reasons for the Complaint, the 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. The Complainants explained that starting in the fall of 2019, power surges occurred at 813 Everview Lane, Derry, Pennsylvania 15627 (Service Address), “causing the power to snap off and on quickly.” Complaint Attachment, unnumbered pages 1 and 2. According to the 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, the Complainants claimed the mini power surges, which West Penn referred to as “recloser operations” continued. *Id.* The Complainants alleged that a recloser operation that occurred on August 26, 2020, caused damage to their refrigerator’s compressor. *Id.* The Complainants asserted that a repairman informed them the cost of a new compressor was \$1,000. *Id.* The Complainants elected to buy a new refrigerator at a cost of \$2,200. Complaint ¶ 5. The Complainants claimed the original cost of their damaged refrigerator was \$1,200, and the repairman charged them \$127. As relief, the Complainants requested monetary damages for their original refrigerator plus the repairman’s charges for a total claim in the amount of \$1,327. Complaint ¶ 5.

On May 5, 2021, West Penn filed an Answer and New Matter and Preliminary Objections.¹ West Penn admitted in part and denied in part, the material allegations of the Complaint. Answer ¶ 4. West Penn admitted that the Complainants were seeking a Commission-ordered payment (PAR); however, West Penn alleged their account is current. Thus, West Penn argued a Commission PAR was not warranted. *Id.*

¹ The Complaint was served on West Penn on March 9, 2021.

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 the Complainants. West Penn further argued that under the Code “. . . the Commission possesses no jurisdiction to consider any implied request for reimbursement for property damage.” *Id.*

In its 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 Preliminary Objections upon the 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 Preliminary Objections within ten days of service. The Complainants did not file a reply to West Penn’s New

Matter as provided for under the Commission's Regulations,² nor did the Complainants file an Answer to the Preliminary Objections.³

On June 7, 2021, the Commission served an initial telephonic hearing notice setting a formal call-in telephonic hearing for this matter for July 13, 2021. The ALJ was assigned as the presiding officer. Also on June 7, 2021, the Commission 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.

On June 9, 2021, a *First Interim Order Sustaining Respondent's Preliminary Objections (First Interim Order)* was issued. The *First Interim Order* explained that to the extent the 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.⁴ 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." *First Interim Order* at 8.

On July 8, 2021, the Complainants requested a continuance of the July 13, 2021 hearing via email 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 the Complainants'

² "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).

³ "*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).

⁴ See *In Re: Melograne*, 812 A. 2d 1164 (Pa. 2002); *Feingold v. Bell Tele. Co. of Pa.*, 383 A.2d 791(Pa. 1977).

continuance request was denied, and that the hearing would be converted into a prehearing conference to discuss the issues in the case. I.D. at 4.

On July 13, 2021, the prehearing conference convened as scheduled. The Complainants together with their daughter, Karen Ulishney and their neighbor, Sandy Kocian, were present for the conference. Margaret A. Morris, Esquire, representing the Company, was present for the conference together with West Penn's witnesses: Cenist Holmes, a Claims Manager; Shawn Hindman, a Reliability Engineer; and Tammy Taylor, a Compliance Analyst. The prehearing conference resulted in West Penn agreeing to conduct an on-site investigation of the recloser issue occurring on the 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.

On November 1, 2021, via email, the 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 the Complainants' continuance request would be granted, and a rescheduled hearing notice would be issued to them. I.D. at 5.

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.

By email dated December 23, 2021,⁵ West Penn's counsel, Attorney Morris, served the Complainants with a Motion to Compel Discovery (Motion). By email dated

⁵ For a complete record, the Parties' relevant emails were docketed in this case. I.D. at 5.

December 24, 2021, and addressed to Attorney Morris, with a copy to the ALJ, the 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 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

I.D. at 5-6 (citing Complainants' Email dated December 24, 2021. (All caps in original)).

Via email dated January 7, 2022, West Penn requested that the hearing scheduled for January 11, 2022, be converted to a prehearing conference to discuss its Motion. On January 7, 2022, the ALJ emailed the Parties and informed them that the hearing would proceed as scheduled, and West Penn's Motion would be addressed at the hearing. Later the same day, via email, the 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

I.D. at 6 (citing Complainants' Email dated January 7, 2022).

On January 11, 2022, by 10:00 a.m., counsel for West Penn, three witnesses for West Penn, the court reporter and the ALJ dialed into the hearing scheduled for that day. However, the Complainants did not call into the hearing. Accordingly, the hearing convened at 10:02 a.m., and the ALJ recessed the hearing at 10:05 a.m., to permit additional time for the 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 the ALJ waited for the Complainants to join the hearing. The hearing reconvened at approximately 10:21 a.m. When the hearing reconvened, the Complainants had not dialed into the hearing nor contacted the OALJ to explain their absence. Consequently, the hearing proceeded in the Complainants' absence. As a result, counsel for West Penn moved for dismissal of the Complaint with prejudice for lack of prosecution. The ALJ 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 was adjourned at 10:30 a.m. on January 11, 2022. I.D. at 6-7.

On March 8, 2022, the Commission issued the Initial Decision of ALJ Johnson which dismissed the Complaint with prejudice, for the Complainants' failure to appear for the hearing to prosecute their Complaint. I.D. at 1, 10-11.

Discussion

Section 5.94(a) of the Commission's Regulations provides that a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon other parties. 52 Pa. Code § 5.94(a). Section 5.94 further provides that the petition must set forth the reasons for the withdrawal and that a party may object to the petition to withdraw within 10 days. *Id.*

ALJ's Initial Decision

ALJ Johnson made twelve Findings of Fact and reached four Conclusions of Law. I.D. at 7-8, 10-11. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law except as reversed or modified by this Opinion and Order, either expressly or by necessary implication.

The ALJ stated that the Commission satisfied the requirement of affording the Complainants 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). The ALJ also stated that the Complainants did not meet their burden of proof by failing to appear and participate in the scheduled hearing by telephone. *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. I.D. at 8-9. The ALJ noted that the Complainants were on notice that their failure to attend the hearing would result in dismissal of their Complaint. According to the ALJ, the history of this proceeding reveals that 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. The ALJ also noted that the 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, the ALJ granted West Penn’s Motion and dismissed the Complaint with prejudice. I.D. at 10.

Disposition

As a preliminary matter, any argument that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. We are not required to consider expressly or at length each contention or argument raised by 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). On exercise of our independent review of the Parties’ positions in their pleadings in this case, we shall adopt the Initial Decision, as modified, consistent with the following discussion.

As earlier indicated, Section 5.94(a) of the Commission’s Regulations provides that a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon other parties. 52 Pa. Code § 5.94(a). Section 5.94 further provides that the petition must set forth the reasons for the withdrawal and that a party may object to the petition to withdraw within 10 days. *Id.*

We note that the Complainants’ December 24, 2021 and January 7, 2022 correspondence clearly communicated that they did not intend to pursue their Complaint

before the Commission. We believe that the Complainants' emailed correspondence should have been deemed a Petition to Withdraw their Complaint (Petition).⁶

Having considered the Petition, we find there is no harm to the public interest in granting the Complainants' request to withdraw their Complaint. Since the Commission must also consider any objections to the Petition, it is appropriate to establish a 10-day objection period as set forth in Section 5.94. Therefore, we shall grant the Petition and establish a 10-day objection period as set forth in Section 5.94 of the Commission's Regulations.

Conclusion

Based on the foregoing, we shall adopt the Initial Decision of ALJ Johnson, as modified, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Initial Decision of Administrative Law Judge Conrad A. Johnson issued on March 8, 2022, is adopted as modified, consistent with this Opinion and Order.

2. That the Complainants' December 24, 2021 and January 7, 2022 emails shall be deemed a Petition to Withdraw their Complaint (Petition to Withdraw) consistent with 52 Pa. Code § 5.94.

⁶ The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party. 52 Pa. Code § 1.2(c).

3. That if no objection to the Petition to Withdraw is received within ten days of the entry date of this Opinion and Order, the Petition to Withdraw shall be deemed granted and this docket shall be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: May 12, 2022

ORDER ENTERED: May 19, 2022