

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

Public Meeting held June 16, 2022

Commissioners Present:

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

Mary Morrow

F-2022-3030427

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Mary Morrow (Complainant or Ms. Morrow) on May 4, 2022, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Christopher P. Pell, served on April 22, 2022, in the above-captioned proceeding. PECO Energy Company (PECO or Company) filed Replies to Exceptions on

May 31, 2022.¹ For the reasons stated below, we shall deny the Complainant's Exceptions and adopt the ALJ's Initial Decision, consistent with this Opinion and Order.

History of the Proceeding

On December 27, 2021, Ms. Morrow filed a Formal Complaint (Complaint) against PECO with the Commission. In the Complaint, Ms. Morrow placed a checkmark in the box indicating that "[i]ncorrect charges are on my bill." As relief, the Complainant indicated that she wants a credit on her bill for a \$112.00 bill she received in the summer of 2020.

On February 3, 2022, PECO filed an Answer denying all material allegations of fact in the Complaint. In its Answer, PECO averred that the Company investigated the Complainant's billing and meter concerns during two separate visits in October 2021, and that the Complainant's bills and balance are correct.

By Initial Telephonic Hearing Notice dated February 8, 2022, an initial call-in telephonic hearing was scheduled for March 15, 2022 at 10:00 a.m., and the matter was assigned to the ALJ. The Hearing Notice advised the Parties of the date and time of the scheduled hearing as well as how to call in for the hearing and warned of the following:

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.

¹ On May 20, 2022, the Secretary's Bureau served the Exceptions on PECO stating that its review of the filing revealed that no Certificate of Service or other indication that the Parties of Record to the case were served with the Exceptions. Therefore, PECO was given until May 31, 2022, to file its Replies to Exceptions.

On February 8, 2022, the ALJ issued a Prehearing Order which reminded the Parties to call on March 15, 2022, at 10:00 am for the scheduled hearing. The Prehearing Order also provided the Toll-Free Bridge Number as well as directed the Parties to enter the PIN to participate in the telephonic hearing. Furthermore, the Prehearing Order repeated in full the **FAILURE TO APPEAR** warning mentioned above. Additionally, the Prehearing Order informed the Parties about the applicable procedural rules, including the procedure to follow to request a hearing continuance. The Prehearing Order warned both Parties of the potentially serious consequences if they failed to obtain a continuance and failed to attend the hearing. It also explained that Ms. Morrow bears the burden of proof to establish that PECO violated its tariff, the Public Utility Code (Code), or a Commission Order or Regulation, and that she is entitled to the relief requested in the Complaint.

The Hearing Notice and Prehearing Order were mailed to the address Ms. Morrow provided in her Complaint. Neither the Hearing Notice nor the Prehearing Order served upon the Complainant were returned as undeliverable.

On March 15, 2022, by 10:00 a.m. the hearing convened as scheduled. Counsel for PECO and the ALJ dialed into the telephonic proceeding. The court reporter was also present. However, the Complainant did not call into the telephonic proceeding. Counsel for PECO was prepared to proceed with two witnesses. The ALJ noted that the Complainant did not contact the Office of Administrative Law Judge (OALJ) to explain she would be late or that she would be absent prior to the hearing. Since the Complainant failed to appear for the scheduled hearing, the hearing proceeded without the Complainant. Counsel for PECO then moved for dismissal of the Complaint, with prejudice, for lack of prosecution. The ALJ informed counsel that the motion would be taken under advisement and an Initial Decision would be issued. The hearing was adjourned at 10:11 a.m. on March 15, 2022. Tr. at 1-2.

On March 21, 2022, the transcript for the hearing was filed with the Commission and the record was closed.

On March 23, 2022, the Complainant contacted the OALJ to advise that she did not call in for the scheduled hearing because she was not aware that she was required to call in for the hearing.

On April 22, 2022, the Commission issued the Initial Decision of ALJ Pell which dismissed the Complaint with prejudice, for failure of the Complainant to prosecute the matter. I.D. at 1, 6.

On May 4, 2022, the Complainant filed Exceptions. On May 31, 2022, PECO filed Replies to Exceptions.

Discussion

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). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d at 15 (Pa. Cmwlth. 1984). 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); *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 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); *Sentner v. Bell Tel. Co. of PA*, Docket No. F-00161106 (Order entered October 25, 1993).

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). This result is not applied to the party, however, 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 of the 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); *see also Windell C. Wiggins v. PECO Energy Company*, Docket No. C-2010-2190335 (Order entered October 27, 2011).

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 (Order entered August 4, 1995). Out of concern for the waste of the Commission's (and respondent's) time and resources, we have, on many occasions, dismissed *pro se* complaints with prejudice for failure to appear at a hearing. *See e.g., Cynthia Santore Smith v. PECO Energy Company*, Docket No. F-2014-2446204 (Order entered September 3, 2015); *Marilyn Day v. PECO Energy Company*, Docket No. C-2010-2181515 (Order entered June 10, 2011); and *Geary*.

ALJ's Initial Decision

ALJ Pell made nine Findings of Fact and reached four Conclusions of Law. I.D. at 3-4, 5-6. 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 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. I.D. at 4, citing *Schneider v. Pa. PUC*, 479 A.2d 10 (Pa. Cmwlth. 1984). The ALJ noted that on February 8, 2022, the Hearing Notice and the Prehearing Order were both mailed to the address the Complainant provided in her Complaint. According to the ALJ, neither the Hearing Notice nor the Prehearing Order served upon the Complainant were returned as undeliverable. Accordingly, the ALJ presumed that the Complainant received notice of the hearing and

elected not to participate in the hearing. I.D. at 4, citing *Morella v. PECO Energy Company*, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016); *Zirkel v. Philadelphia Gas Works*, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017). Therefore, the ALJ concluded that the Complainant's due process rights have been fully protected. I.D. at 4.

The ALJ further noted that the Complainant did not contact the OALJ until March 23, 2022, more than one week after the scheduled hearing and after the record had closed, to explain that she did not call in for the hearing because she was not aware that she was required to call in for the hearing. The ALJ, however, stressed that both the Hearing Notice and the Prehearing Order advised the Parties that they must call in for the scheduled hearing. According to the ALJ, the Complainant, moreover, waited more than one week after the scheduled hearing date to contact the OALJ to explain why she failed to attend the hearing. The ALJ stated that the Complainant's misunderstanding, coupled with her delay in contacting the OALJ to explain her failure to call in for the scheduled hearing, did not constitute good cause for missing the scheduled hearing. I.D. at 4-5.

Additionally, the ALJ stated that under the circumstances, the Complainant had ample opportunity to appear and be heard in this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of the Complainant have been fully protected. I.D. at 5, citing *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993); 52 Pa. Code § 5.245(a).

Finally, the ALJ noted that 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. According to the ALJ, in this proceeding, the Complainant as the proponent of a rule or order had the burden of proving she was entitled to the relief requested in her Complaint. The ALJ noted that PECO was present for the hearing through its attorney and witnesses. However, the Complainant was not present for the hearing. The ALJ stated that by

failing to participate and proffer any evidence to support her Complaint, the Complainant has failed to meet her burden. Therefore, the ALJ recommended that the Complaint be dismissed. I.D. at 5, citing *Jefferson; El-Ayazra v. W. Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa. Code § 5.245.

Exceptions and Replies

In her handwritten Exceptions, the Complainant avers she had a doctor's appointment on April 25, 2022, and was given two prescriptions.² She further states "I have an appointment on 4/29 at Nazareth Hospital where I'll ask the registration department to copy the scripts. I will send both you and counselor a copy of the scripts." Exc. at 1. The Complainant, *inter alia*, highlights her difficulty sending mails stating that she hopes to receive a letter with date, time and pin and that the Secretary should text her phone number (included), if possible. *Id.* at 1-2. The Complainant concludes by requesting: (1) monetary compensation; (2) removal of her phone number from PECO's electric bill; and (3) the date, time and phone number to communicate with the ALJ and PECO's counsel. *Id.* at 2.

In its Replies to Exceptions, PECO contends that the Complainant failed to show good cause to warrant a further hearing. Specifically, PECO argues that: (1) the Complainant failed to appear for her March 15, 2022, hearing; (2) the Complainant does not allege that the ALJ made an error of law or abused his discretion in any manner; (3) the Complainant does not allege that the ALJ utilized an incorrect mailing address to notify her of the hearing date; (4) the Complainant does not state any show of good cause as to why the record should be reopened and a further hearing granted as the Complainant merely references a series of medical appointments which occurred in late

² Attached to the Complainant's Exceptions is Ms. Morrow's "Imaging Order Information" dated April 25, 2022.

April 2022, more than a month after the hearing was held; (5) the Complainant did not contact PECO nor the ALJ on March 15, 2022, stating that she wished to pursue a hearing, nor did she follow proper protocol to request a continuance of the scheduled hearing; and (6) it is undisputed that a request for a continuance was not filed five (5) days prior to the hearing date, March 15, 2022. R. Exc. at 4-5.

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).

From an administrative due process standpoint, the question is whether a complainant's failure to appear at a scheduled and duly notified hearing shall be deemed to be the party's waiver of the opportunity to participate in a hearing in the matter. 66 Pa. C.S. § 332(f);³ 52 Pa. Code § 5.245(a)-(b). Whether the complainant's failure to appear at the hearing was "unavoidable" is a fact-based question. Where a complainant's failure to appear at a scheduled hearing is unavoidable, the ALJ has the discretion to

³ Section 332(f) of the Code 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,

66 Pa. C.S. § 332(f).

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

As noted earlier, in his Initial Decision, ALJ Pell noted that on February 8, 2022, the Hearing Notice and Prehearing Order were served upon the Complainant at the address she provided to the Commission in her Complaint. Neither the Hearing Notice nor the Prehearing Order served upon the Complainant were returned as undeliverable. Accordingly, the ALJ presumed that the Complainant received notice of the hearing and elected not to participate in the hearing. In addition, as the proponent of a rule or order in this case, the Complainant bears the burden of proving she was entitled to the relief requested in her Complaint. However, the Complainant was not present for the hearing. I.D. at 4-5. Since the Complainant failed to appear and participate in the scheduled telephonic hearing, her Complaint may be dismissed with prejudice. *See Jefferson; El-Ayazra*; 52 Pa. Code § 5.245.

The Code also provides that a party who fails to attend a scheduled conference and hearing “shall be deemed to have waived the opportunity to participate” and shall not be permitted to later reopen the matter. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245. As noted, the Commission may excuse non-attendance at a hearing where “... the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced.” *Id.*

While the Complainant’s Exceptions appear to make a case for her failure to participate in the March 15, 2022 hearing, the information she provided regarding her doctor’s appointment occurred over a month after the hearing. Further, although the Complainant contacted the OALJ a week after the hearing indicating that she did not call

in for the scheduled hearing because she was not aware that she was required to call in for the hearing, we note that both the Hearing Notice and the Prehearing Order received by the Complainant clearly advised the Parties that they must call in for the scheduled hearing.

Under the circumstances of this case, we find that the ALJ correctly exercised his discretion to dismiss the Complaint with prejudice because the Complainant failed to appear at the hearing as instructed and to present any evidence in support of her Complaint. Furthermore, as noted above while the ALJ may have the discretion to reopen or allow further examination 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" prior to the close of the record, the ALJ does not have that discretion once the record closes. In this instance, the record closed prior to the Complainant providing any reason for her failure to appear, thus the presiding officer could not exercise that discretion on this matter. Accordingly, we will adopt the ALJ's Initial Decision that dismissed the Complaint with prejudice, as required by law and consistent with relevant case precedent.⁴

Conclusion

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

⁴ *Amir Williams v. PECO Energy Company*, Docket No. C-2018-3000734 (Order entered March 14, 2019).

IT IS ORDERED:

1. That the Exceptions of Mary Morrow filed on May 4, 2022, to the Initial Decision of Administrative Law Judge Christopher P. Pell issued on April 22, 2022, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Christopher P. Pell issued on April 22, 2022, is adopted, consistent with this Opinion and Order.

3. That the Motion of PECO Energy Company, made at the hearing on March 15, 2022, to dismiss the Formal Complaint of Mary Morrow at Docket No. F-2022-3030427 with prejudice is granted, consistent with this Opinion and Order.

4. That the Formal Complaint filed by Mary Morrow on December 27, 2021, at Docket Number F-2022-3030427, is dismissed, with prejudice, consistent with this Opinion and Order.

5. That the proceeding at Docket No. F-2022-3030427 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: June 16, 2022

ORDER ENTERED: June 16, 2022