

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Erika and Brendan Kelley	:	
	:	
v.	:	F-2021-3029920
	:	
Duquesne Light Company	:	

INITIAL DECISION

Before
Emily I. DeVoe
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by Erika and Brendan Kelley against Duquesne Light Company for failure to prosecute this matter.

HISTORY OF THE PROCEEDING

On November 17, 2021, Erika and Brendan Kelley (Complainants) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Duquesne Light Company (DLC, Company, or Respondent) alleging that DLC had not properly or accurately calculated, credited, and reimbursed them for their electric generation.¹ Complainants claimed they had generated more than they consumed and were due monetary compensation for a “substantial surplus.” They further requested DLC provide them information on how to transfer their electric account to another company.

¹ This Formal Complaint is a timely appeal from a determination by the Commission’s Bureau of Consumer Services at No. 3805393, in response to Complainants’ informal complaint. Review of informal complaint determinations are heard *de novo*. 52 Pa. Code § 56.403(a).

On December 27, 2021, DLC filed an Answer, denying the material allegations set forth in the Complaint. DLC also requested this matter be assigned to the Office of Administrative Law Judge's Mediation Unit.

On December 29, 2021, Chief Administrative Law Judge Charles E. Rainey, Jr. issued an Interim Order Setting Resolution Conference. Mediation was not successful, and this matter was assigned to the undersigned for an evidentiary hearing and initial decision.

On January 13, 2022, a Hearing Notice was issued, scheduling an evidentiary hearing for February 17, 2022.

On January 18, 2022, a Corrected Hearing Notice was issued, correcting the Toll-free Bridge Number and PIN number for the conference bridge.²

On January 21, 2022, a Prehearing Order was issued.

An evidentiary hearing convened on February 17, 2022, as scheduled. Brendan Kelley (Mr. Kelley) was present and represented himself. Erika Kelley (Ms. Kelley) was not present. Emily Farah, Esq., (Ms. Farah) was present on behalf of the Company. Three witnesses were present on behalf of DLC: Roxanne Morris, Regulatory Consumer Relations Supervisor; Gregory Murphy, Billing Analyst; and Charles Stoltenberg, Senior Meter Engineer.

Mr. Kelley began, but did not finish, his direct testimony. During his direct testimony, Complainants' Exhibit A was conditionally admitted into the record. Two other exhibits, Complainants' Exhibits B and C, were offered by Mr. Kelley, but were not admitted. During his direct testimony and prior to any cross-examination by the Company, Mr. Kelley requested a continuance to give him an opportunity to obtain a witness from his solar panel company to authenticate and lay an appropriate foundation for his proposed exhibits.³ Ms. Farah

² Shortly after the initial Notice was issued, the undersigned discovered her original conference bridge number had expired. After a new bridge account was created, a new Notice was issued with the new call-in information.

³ Tr. 26.

agreed to a sixty (60) day continuance.⁴ The undersigned advised the parties she was willing to reconsider her rulings on Complainants Exhibits B and C at the second day of hearing if Mr. Kelley was able to offer an appropriate witness.⁵

Both Mr. Kelley and the Company agreed to a second day of hearing on April 19, 2022, at 10:00 a.m.,⁶ and the parties received oral notice on the record of this date and time.⁷

On February 18, 2022, a Further Hearing Notice was issued, memorializing the agreed upon further hearing, scheduling the second day of hearing for April 19, 2022, at 10:00 a.m. The Notice provided instructions on how to call into the hearing and provided the parties with the bridge number and PIN number. The Notice warned the parties that they may lose their case if they failed to take part in the hearing and present evidence on the issues raised. The Notice was electronically served upon Complainant, as had the Notices for the first day of hearing.

On April 4, 2022, Mr. Kelley emailed the undersigned, copying Ms. Farah, advising he was unable to secure a representative from his solar panel company to speak to a DLC representative. He advised he had made multiple attempts to coordinate communication between his solar panel company and DLC, but he had been unsuccessful. He requested an additional continuance until he secured “a way to verify the solar output values that would substantiate [his] dispute.”

On April 5, 2022, Ms. Farah emailed the undersigned, copying Mr. Kelley, advising that DLC did not consent to a second continuance.

⁴ *Id.*

⁵ Tr. 27.

⁶ Tr. 29-33.

⁷ *Id.*

Later on April 5, 2022, Mr. Kelley emailed the undersigned, copying Ms. Farah, requesting the undersigned order DLC to contact his solar panel company and offering to provide the undersigned proof of his correspondence with his solar panel company to verify his efforts.

On April 7, 2022, the undersigned emailed both Mr. Kelley and Ms. Farah, advising that Mr. Kelley's request for the undersigned to order DLC to contact the solar panel company was denied and Mr. Kelley's request for a second continuance was denied.⁸

On April 11, 2022, Mr. Kelley emailed the undersigned, copying Ms. Farah, advising he wanted to withdraw the Complaint. The undersigned responded to his email, directing his attention to 52 Pa. Code § 5.94, the rule governing withdrawals of pleadings.

The second day of hearing convened on April 19, 2022, as scheduled. The undersigned, court reporter, and Ms. Farah were present on the conference bridge at 10:00 a.m. Neither of the Complainants were present. The undersigned contacted her legal assistant and directed him to contact Complainants to remind them of the hearing and provide them the call-in information. The undersigned's legal assistant did so and advised there was no answer at Complainants' number, and he left a voicemail message.

The undersigned went on the record at 10:11 a.m. DLC offered no evidence but made a Motion to Dismiss the proceeding due to Complainants' failure to appear and prosecute their Complaint. The undersigned took said Motion under advisement.

The transcript for the first day of hearing was filed March 2, 2022, and the transcript for the second day of hearing was filed May 4, 2022. An Interim Order was entered on May 5, 2022, closing the hearing record.

Mr. Kelley did not file any petition for leave to withdrawal prior to the closure of the record on May 5, 2022.

⁸ The undersigned incorrectly advised the parties the second day of hearing would convene on April 14, 2022. However, the undersigned did not receive any indication Mr. Kelley called into the conference bridge on April 14, 2022.

It is now appropriate to rule on the Company's Motion to Dismiss.

FINDINGS OF FACT

1. Complainants are Erika and Brendan Kelley.
2. Respondent is Duquesne Light Company, a jurisdictional public utility providing electric service in the Commonwealth of Pennsylvania.
3. On January 13, 2022, a Hearing Notice was issued, scheduling an evidentiary hearing for February 17, 2022.
4. On February 18, 2022, a Corrected Hearing Notice was issued, correcting the Toll-free Bridge Number and PIN number for the conference bridge.
5. On January 21, 2022, a Prehearing Order was entered.
6. Complainants registered for e-service at the time they filed their Complaint.
7. The January 13, 2022 Notice, January 21, 2022 Prehearing Order, and February 18, 2022 Corrected Hearing Notice were e-served upon Complainants.
8. The first day of hearing convened on February 17, 2022.
9. Mr. Kelley appeared for the February 17, 2022 hearing.
10. Mr. Kelley began but did not finish his direct examination during the proceeding on February 17, 2022.
11. Complainants' Exhibit A was conditionally admitted into the record during Mr. Kelley's testimony.

12. The admission of Complainants' Exhibit A was conditional upon Mr. Kelley completing his direct examination and being subject to cross-examination.

13. Prior to completing his direct examination, Mr. Kelley requested and was granted a continuance.

14. The date and time of the second day of hearing, April 19, 2022, at 10:00 a.m., was agreed to by the parties on the record at the first day of hearing.

15. Mr. Kelley was not subject to cross-examination at any point during the first day of hearing.

16. On February 18, 2022, a Further Hearing Notice was e-served upon Complainants, scheduling the second day of hearing for April 19, 2022, at 10:00 a.m., as agreed upon.

17. The February 18, 2022 Notice included instructions on how to call into the hearing and provided the parties with the correct bridge number and PIN number.

18. The February 18, 2022 Notice warned the parties that they may lose their case if they failed to take part in the hearing and present evidence on the issues raised.

19. On April 4, 2022, Mr. Kelley emailed the undersigned requesting, *inter alia*, an additional continuance.

20. On April 7, 2022, the undersigned advised the parties by email that Mr. Kelley's request for a continuance of the second day of hearing was denied.

21. Mr. Kelley emailed the presiding officer on April 11, 2022, indicating his desire to withdraw the Complaint.

22. The presiding officer responded to Mr. Kelley's email by referring him to the Commission's rules regarding the filing of a petition to withdraw the Complaint.

23. The undersigned convened the hearing on April 19, 2022, at 10:11 a.m. and waited for Complainants to call into the hearing until approximately 10:21 a.m.

24. Complainants did not call into the hearing on April 19, 2022, and the hearing was adjourned.

25. Complainants did not file a petition to withdraw their Complaint prior to the closure of the record on May 5, 2022.

DISCUSSION

The Complaint filed by Complainants on November 17, 2021, alleged Respondent failed to properly calculate, credit, and reimburse them for their solar power generation. Respondent filed its Answer on December 27, 2021, denying the material allegations set forth in the Complaint.

As the party seeking affirmative relief from the Commission, Complainants bear the burden of proof. 66 Pa.C.S. § 332(a).

To uphold this burden, Complainants must show that the named utility is responsible or accountable for the problem described in the complaint.⁹ Complainants must meet their burden of proof by a preponderance of the evidence.¹⁰ That is, Complainants must present evidence more convincing, by even the smallest amount, than that presented by the other party.¹¹

⁹ *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976).

¹⁰ *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992).

¹¹ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence.¹² More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.¹³

The Commission is required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard.¹⁴

On February 18, 2022, the hearing notice for the second day of hearing was e-served upon Complainants at the email address listed on their Complaint form. Complainants registered for e-service at the time they filed their Complaint. The Notice for the first day of hearing was e-served upon Complainants in the same fashion, and Mr. Kelley appeared for that hearing. Once notice of a hearing and the opportunity to be heard has been provided, it is the responsibility of the parties to appear and participate in the hearing.¹⁵

Mr. Kelley appeared at the first day of hearing. He began his testimony but did not complete it. He was never subject to cross-examination by the Company. Per the Commission's rules, a party shall move the admission of evidence into the record upon presentation of the sponsoring witness, *and after the opportunity of other parties to examine the witness*.¹⁶ As such, the admission of Complainant's Exhibit A was *conditional* upon Complainant being subject to cross-examination.

¹² *Mill v. Pa. Pub. Util. Comm'n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993), 2 Pa.C.S. § 704.

¹³ *Norfolk & W. Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Com. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Dep't of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

¹⁴ *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

¹⁵ *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 24, 1993).

¹⁶ 52 Pa. Code § 5.403(a).

Presiding officers have all necessary authority to control the receipt of evidence, including ruling on the admissibility of evidence, and must actively employ this power consistent with due process.¹⁷ Allowing Mr. Kelley's incomplete testimony to remain in the record violates the Company's due process rights. Therefore, it is stricken from the record, as if it was never offered.

Furthermore, although Mr. Kelley emailed the presiding officer expressing his intent to withdraw, it is appropriate in this matter to dismiss the Complaint with prejudice rather than simply allow the Complaint to be withdrawn without prejudice. In a recent decision, the Commission held that an email to a presiding officer prior to a hearing, but after a prehearing conference, requesting that a complaint be withdrawn was akin to a petition for leave to withdraw a complaint filed under the Commission's rules.¹⁸ The Commission held that the complaint filed in that matter be dismissed without prejudice. In the instant case, however, the request to withdraw was not received until after the first day of hearing and after the Company had expended significant resources preparing for and participating in the first day of hearing. Therefore, it is not appropriate to dismiss the instant complaint without prejudice.

Respondent's motion to dismiss for failure to prosecute shall be granted. Since the utility was present and ready to proceed at both days of hearing, it is unfair to require it to prepare again for the same set of facts. Therefore, the Complaint will be dismissed with prejudice.

CONCLUSIONS OF LAW

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

2. As the party seeking affirmative relief from the Commission, Complainant bears the burden of proof. 66 Pa.C.S. § 332(a).

¹⁷ 52 Pa. Code § 5.403(b).

¹⁸ *Ulishney v. West Penn Power*, Docket No. C-2021-3024487 (Opinion and Order entered May 19, 2022).

3. To uphold this burden, Complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976).

4. The burden of proof must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

5. The Commission is required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

6. Once notice of a hearing and the opportunity to be heard has been provided, it is the responsibility of the parties to appear and participate in the hearing. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 24, 1993).

7. Complainants failed to prosecute their claims by failing to appear for the second day of hearing on April 19, 2022, after receiving notice. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 24, 1993).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the testimony of Brendan Kelley provided at the first day of hearing on February 17, 2022, is stricken from the record in its entirety.
2. That Complainant's Exhibit A is not admitted into evidence.
3. That the Complaint filed by Erika and Brendan Kelley against Duquesne Light Company at Docket No. F-2021-3029920, is dismissed with prejudice.
4. That the Secretary shall mark this docket closed.

Dated: June 21, 2022

_____/s/
Emily I. DeVoe
Administrative Law Judge