

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

Public Meeting held July 14, 2022

Commissioners Present:

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

Andrew Dodson

C-2021-3029814

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Andrew Dodson (Complainant or Mr. Dodson) filed on April 6, 2022, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Gail M. Chiodo, which was issued on March 18, 2022, in the above-captioned proceeding. Replies to Exceptions were filed by PECO Energy Company (PECO or Company) (collectively, Parties) on April 8, 2022. For the reasons stated below, we deny the Exceptions of Mr. Dodson, adopt the ALJ's Initial Decision and dismiss the Complaint, consistent with this Opinion and Order.

I. History of the Proceeding

On November 2, 2021, Mr. Dodson filed a Formal Complaint (Complaint) with the Commission against PECO alleging that there are incorrect charges on his bill, which he indicated was for gas and electric service. Complaint at ¶ 3. Mr. Dodson described his household as comprising two adults and one child. He stated that his bill has “always been extremely high[,]” and described it as “over \$500[,]” which was higher than it was under budget billing. He also asserted that he is now receiving two bills for the same address. *Id.* at ¶ 4. As relief, Mr. Dodson requested a reconciliation of “what billing should have been (off budget billing – the last bill for August \$330[.]” and “a way to make affordable payments.” *Id.* at ¶ 5. Mr. Dodson agreed he owed PECO but questioned the amounts and his receipt of two bills for the same address. *Id.*

On December 20, 2021, PECO timely filed an Answer to Formal Complaint (Answer) denying all material allegations in the Complaint. PECO averred that Mr. Dodson contacted PECO about usage at his property and was advised by a customer service representative about ways to reduce usage. PECO also averred that, at Mr. Dodson’s request, a field technician visited the property and conducted a meter test. According to PECO, the meter was performing within PECO and Commission guidelines, and an appliance analysis justified the potential use of the service. PECO affirmed that the meter was accurate, and Mr. Dodson was accurately billed. Answer at ¶ 4; attached Exhibit 2.

PECO further averred that Mr. Dodson’s service was shut off due to non-payment on November 16, 2021, but was restored on November 30, 2021, after the Parties entered into a payment agreement. As of the time of the Answer, Mr. Dodson remained on a payment agreement and had an arrearage in the amount of \$7,909.51. Answer at ¶ 4; attached Exhibit 3.

On December 21, 2021, the Office of Administrative Law Judge (OALJ) issued a Call-In Telephone Hearing Notice to the Parties (Hearing Notice). The Hearing Notice provided contact information for the ALJ and a toll-free call-in number for the hearing, established a hearing date of February 17, 2022, and provided instructions on how to participate in the hearing, specifically including information on how to request a continuance and the consequences of failing to appear.

The Commission issued the ALJ's Prehearing Order for Telephone Hearing (Prehearing Order) on December 28, 2021. The Prehearing Order affirmed the February 17, 2022 hearing date and again provided hearing instructions, including how to request a continuance and the consequences of failing to appear.

On February 17, 2022, the hearing convened as scheduled. Counsel for PECO appeared, accompanied by two witnesses prepared to testify. Mr. Dodson did not appear. The ALJ opened the hearing, confirmed the Commission's service of the Hearing Notice and Prehearing Order on the Complainant with neither having been returned as undeliverable, affirmed through PECO's counsel that PECO had also been in contact with Mr. Dodson and confirmed the hearing date, and received an oral motion to dismiss from PECO on the basis of the Complainant's failure to prosecute. No testimony was taken, and no exhibits were introduced. The record closed at the conclusion of the hearing pursuant to 52 Pa. Code § 5.431(a).¹ February 17, 2022 Transcript at 1-7.

By electronic mail (email) dated March 1, 2022, Mr. Dodson contacted the ALJ, explaining his absence from the hearing as due to his having had Covid in late June or August of 2021 and that his minor son was home with the flu on the date of the hearing. He stated he was in no shape to present a defense that day. Acknowledging its

¹ Section 5.431(a) provides that "[t]he record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission." 52 Pa. Code § 5.431(a).

untimeliness, Mr. Dodson requested a continuance. By email reply that same date, the ALJ provided a copy of Mr. Dodson's email to PECO, who had not been copied, and requested a response. PECO responded immediately, calling into question Mr. Dodson's explanation by referencing a February 25, 2022 voice mail message from Mr. Dodson in which Mr. Dodson stated he missed the hearing because his son had Covid, that he was in a car accident, and that he had a new operating system in his telephone and had just missed the hearing, which he had scheduled in his phone. PECO also recited its own expenditure of resources in preparation for and attendance at the hearing and opposed the continuance for failing to show good cause as noted in the instructions in the Prehearing Order. Mr. Dodson further responded by email restating that his son was home from school and that he himself had had Covid and has a failing memory. Mr. Dodson denied knowledge of the appearance of counsel for PECO but apologized for not including the Company on his communication. See March 1, 2022 email exchange included in the Commission's docket on March 17, 2022, and identified as Complainant's Petition to Reopen the Record and PECO's Reply (collectively Petition to Reopen).

By Order issued March 18, 2022 (March 18th Order), the ALJ denied Mr. Dodson's Petition to Reopen.² The ALJ recited the procedural history of the proceeding, including the notices provided to Mr. Dodson informing him of the hearing, the instructions for requesting a continuance, and the consequences of failing to appear. The ALJ also noted that having received no prior communication from Mr. Dodson, the hearing was conducted as scheduled.

² The ALJ accepted the March 1, 2022 chain of email exchanges and deemed it to be the Complainant's Petition to Reopen the Record under authority of 52 Pa. Code § 1.2, which authorizes the liberal construction of a procedural regulation in order to secure a just, speedy, and inexpensive determination, particularly for *pro se* complainants. The Commission's Secretary's Bureau included the document as part of the docketed case record on March 17, 2022.

The ALJ identified oral communications from Mr. Dodson to the OALJ on February 22, 2022, in which the Complainant explained that he missed the February 17th hearing because he was “dealing with a car accident” and his minor son was home sick. March 18th Order at 2. In response to her review of the notes of this oral message, the ALJ stated that an OALJ staff attorney called Mr. Dodson back and informed him of the procedure to file a petition to reopen the record and what information to include, and to do so as soon as possible. It was this discussion that eventually resulted in Mr. Dodson’s March 1, 2022 email exchange. March 18th Order at 3-4.

The ALJ cited our Regulation at 52 Pa. Code § 5.571, which provides that the standard for reopening a record prior to the issuance of a final decision is the existence of “reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires” reopening. The ALJ found that Mr. Dodson was provided due process by the Commission and did not aver that he had not received the Hearing Notice and Prehearing Order from the Commission, each of which provided clear instructions on how to request a continuance and the consequence of failing to appear. The ALJ recited the reasons Mr. Dodson cited for missing the hearing in his Petition to Reopen and PECO’s opposition. March 18th Order at 5-6.

On consideration of Mr. Dodson’s failure to appear and the explanations and response he and PECO provided, the ALJ found herself “constrained to conclude that Complainant’s reasons for missing the hearing are inconsistent and insufficient.” March 18th Order at 6. The ALJ particularly noted several inconsistencies in Mr. Dodson’s explanations – to OALJ, to her, and to PECO – that supported her decision to deny his request, stating in full as follows:

Initially, Complainant verbally claimed to OALJ staff that he missed the hearing because he thought it was scheduled for a week later; then he acknowledged in writing that he did know that the hearing was scheduled for February 17, 2022 but that

he could not participate in the hearing due to his son's illness and Complainant's Covid-19 that he contracted last year. He also verbally claimed to OALJ staff and PECO's counsel that a car accident prevented his appearance, but that reason was not put in writing in his petition. Further, Complainant claimed in his follow-up emails that he was not aware that PECO was represented by counsel; however, an OALJ staff attorney made sure Complainant had the email address of PECO's counsel, and prior to submitting his petition to reopen the record, he apparently contacted attorney Scott to see if PECO would agree to reopening the record.

Id., citing *Howell v. Phil. Gas Works*, Docket No. C-2014-2457079 (Final Order entered August 25, 2015) (*Howell*) with the added parenthetical note "complainant's variety of reasons to justify failure to appear diminished the credibility of his statements."

The ALJ concluded as follows:

Significantly, Complainant has not offered any explanation, either orally or in writing, as to why he could not request a continuance prior to the hearing, why he waited five days after the hearing to call OALJ, and why he waited an additional seven days to submit his petition in writing, after having [been] instructed to put his request in writing as soon as possible. Both the Hearing Notice and Prehearing Order clearly stated the potential consequences of failure to appear. Thus, Complainant was afforded notice and an opportunity to be heard with respect to the allegations in his complaint.

I recognize that Complainant is appearing *pro se* in this proceeding. Traditionally, the Commission has been hesitant to rule unfavorably against *pro se* litigants based on technical grounds and has stated that all litigants, particularly *pro se* litigants, should be afforded a meaningful opportunity to be hear[d]. Compliance with the terms of a hearing Notice and Prehearing Order is, however, more than just a technical issue. Those directives are not a nullity, and compliance with clearly set forth procedural rules and directives is an essential part of affording due process of law to both parties. The orderly resolution of the many cases that come before the

Commission depends on reasonable diligence by the parties to litigation.

March 18th Order at 7 (citations omitted).

Finding that neither the public interest nor any change in law or fact required reopening of the record, the ALJ denied the Complainant's request. *Id.*

On March 18, 2022, the Commission also issued the ALJ's Initial Decision in which the ALJ granted PECO's oral motion to dismiss the Complaint for failure of Mr. Dodson to appear at the hearing and prosecute the Complaint. On April 6, 2022, Mr. Dodson filed Exceptions (Exc.) to the Initial Decision; PECO filed Replies to Exceptions (R. Exc.) on April 8, 2022.

II. Discussion

A. Legal Standards

1. Burden of Proof

As the party seeking affirmative relief from the Commission, Section 332(a) of the Public Utility Code (Code) provides that a complainant has the burden of proof. 66 Pa. C.S. § 332(a). Before the Commission, the standard by which the burden of proof is satisfied is measured by the "preponderance of the evidence." *Suber v. Pennsylvania Com'n 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*). To establish a fact or claim by a preponderance of the evidence means to offer the greater weight of the evidence, or stated differently, to provide evidence that outweighs, or is

more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof comprises two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. 2000). The burden of production, also called the burden of going forward with the evidence, determines which party must come forward with evidence to support a particular claim or defense. *Scott and Linda Moore v. National Fuel Gas Distribution*, Docket No. C-2014-2458555 (Final Order entered August 25, 2015) (*Moore*). The burden of production goes to the legal sufficiency of a party's claim or affirmative defense. *Id.* It may shift between the parties during a hearing. If a complainant introduces sufficient evidence to establish the legal sufficiency of the claim, also called a *prima facie* case, the burden of production shifts to the utility to rebut the complainant's evidence. *See id.* If the utility introduces evidence sufficient to balance the evidence introduced by the complainant, that is, evidence of co-equal value or weight, the complainant's burden of proof has not been satisfied and the burden of going forward with the evidence shifts back to the complainant. The complainant then must provide some additional evidence favorable to the complainant's claim. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001) (*Milkie*); *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983) (*Burleson*).

The party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See Moore*. While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; it always remains on a complainant as the party seeking affirmative relief from the Commission. *Milkie; Burleson*. It is entirely possible for a party to carry the burden of production but not be entitled to a favorable ruling because the party did not carry the burden of persuasion. *See Moore*. In determining whether a complainant has met the burden of

persuasion, the ultimate factfinder may engage in determinations of credibility, may accept or reject testimony of any witness in whole or in part, and may accept or reject inferences from the evidence. *See Moore*, citing *Suber*.

Finally, adjudications by the Commission must be supported by substantial evidence in the record. 2 Pa. C.S. § 704. “Substantial evidence” is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Company of New York v. National Labor Relations Board*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1983). 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); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Comm. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

2. Due Process

As an administrative agency of the Commonwealth, the Commission is required to provide due process to parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10 (Pa. Cmwlth. 1984) (*Schneider*), citing *Fusaro v. Pa. PUC*, 382 A.2d 794 (Pa. Cmwlth. 1978). Due process is satisfied when parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d at 15, 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).

Once the Commission has scheduled a hearing and provided notice and an opportunity to be heard, it is the responsibility of the parties to appear and participate. *Strydio v. PPL Elec. Utils. Corp.*, Docket No. C-2017-2633043 (Order entered July 18, 2018); *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. *Id.*

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); *Windell C. Wiggins v. PECO Energy Company*, Docket No. C-2010-2190335 (Order entered October 27, 2011).

At any time after the record is closed in a proceeding but before a final decision is issued, a party may file a petition to reopen for the purpose of taking additional evidence. The petition must set forth clearly the facts supporting reopening, including material changes of fact or law alleged to have occurred since the conclusion of a hearing. If there is reason to believe conditions of fact or law have changed so as to require, or that the public interest requires, the reopening of the proceeding, the ALJ, or the Commission (if the record has been certified to the Commission) may reopen the record. 52 Pa. Code § 5.571.

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).

B. ALJ's Initial Decision

In her Initial Decision, the ALJ dismissed Mr. Dodson's Complaint for failure to appear for the hearing and prosecute his Complaint. The ALJ made ten Findings of Fact and seven Conclusions of Law. I.D. at 4-5, 7. The proceeding also resulted in the creation of a transcript (Tr.) comprising eight pages. No testimony was taken; no exhibits were offered or entered into evidence. We adopt and incorporate

herein by reference the ALJ's factual findings and legal conclusions without comment unless they are either expressly or by necessary implication rejected or modified herein.

The ALJ commenced with a summary of the underlying pleadings. As she noted, Mr. Dodson complained that there were incorrect charges on his bill, his bill was too high, he was receiving two bills for the same address, and he requested a billing reconciliation and affordable payment plan. The ALJ noted PECO's Answer that after performing tests and analyses, PECO determined that Mr. Dodson's bills were correct, that his service was shut off and then reconnected when he entered into a payment agreement, that his balance was \$7,909.51, and that the Complaint should be dismissed. I.D. at 1-2. Due to the status of the proceeding, the remainder of the ALJ's Initial Decision focused on whether by his actions Mr. Dodson had waived the claims in his Complaint, warranting dismissal of the Complaint.

In her recitation of the procedural history, the ALJ affirmed that on December 21, 2021, and on December 28, 2021, a Call-In Hearing Notice and Prehearing Order, respectively, were served on the Parties. Both documents provided information about the hearing, including how to request a continuance and the consequences for failing to appear. Mr. Dodson was served at the email address he provided in his Complaint, and neither document was returned as undeliverable. The ALJ also noted that PECO had reached out to Mr. Dodson on February 3, 2022, when the Company emailed to both the ALJ and Mr. Dodson its proposed hearing exhibits, including a cover letter that also prominently displayed the upcoming hearing date. *Id.* at 2.

The ALJ recounted how on February 17, 2022, she convened the hearing, as scheduled, with PECO and its two witnesses prepared to proceed but with the Complainant absent. After recessing the hearing to allow time for Mr. Dodson to appear, the ALJ reconvened the hearing and proceeded in the Complainant's absence. While no testimony was taken or exhibits introduced, the ALJ also affirmed on the record PECO's

statement that the Company had also contacted Mr. Dodson prior to the hearing and, while a settlement was not achieved, the Complainant was aware of the upcoming hearing. I.D. at 2, citing Tr. at 5-6. Before the record was closed, and in light of the Complainant's failure to appear, PECO moved to dismiss the Complaint for failure to appear and prosecute, which the ALJ took under advisement. *Id.* at 2-3.

The ALJ described attempts by Mr. Dodson after the fact to address his failure to appear. This included a summary of a phone call on February 22, 2022, five days after the hearing, from Mr. Dodson to OALJ staff in which Mr. Dodson indicated that he mistook the February 17th hearing date for February 23, 2022, he had been dealing with a car accident, and his minor child was home sick on the date of the scheduled hearing. Upon her review of this information, the ALJ noted that an OALJ staff attorney immediately called Mr. Dodson and informed him how to proceed, as quickly as possible, with filing a request to reopen the record explaining the circumstances that led to his missing the hearing and failing to request a continuance. The ALJ explained that a week later, on March 1, 2022, Mr. Dodson emailed the ALJ what was later deemed to be the Complainant's Petition to Reopen. The ALJ noted that in this exchange, Mr. Dodson acknowledged he knew the hearing date was February 17, 2022, but that he was "in no shape to present his case at a hearing" because his minor child was home sick with the flu and the Complainant himself had contracted Covid-19 in late June or August 2021. I.D. at 3.

The ALJ described PECO's opposition to Mr. Dodson's Petition to Reopen as being based on, *inter alia*, inconsistent and insufficient reasons, and therefore failing to present good cause, to schedule a further hearing to reopen the record. The ALJ stated that PECO averred that on February 25, 2022, Mr. Dodson had called PECO requesting agreement for a continuance for reasons other than those stated in the petition. The ALJ concluded her restatement of the case by noting her March 18th Order denying

Mr. Dodson's request to reopen the record and referring to that Order for a full discussion of its merits. I.D. at 3-4.

In granting PECO's motion to dismiss, the ALJ recited the standards for due process to which the Commission is held in administrative proceedings as requiring notice of a hearing and an opportunity to be heard. She also noted that as the proponent of a request for relief, the burden of proof was on Mr. Dodson to provide a preponderance of evidence supporting his request. I.D. at 5.

Relying on her affirmation of service and presumed delivery of the Hearing Notice and Prehearing Order on Mr. Dodson, and Mr. Dodson's failure to request a timely continuance or appear at the hearing, the ALJ concluded that Mr. Dodson was deemed to have waived his opportunity to appear at a hearing under authority of Section 5.245(a) of our Regulations, 52 Pa. Code § 5.245(a), and Section 332(f) of the Code, 66 Pa. C.S. § 332(f). While these provisions themselves would not apply if a presiding officer determines that the failure was unavoidable and the interests of other parties or the public would not be prejudiced by permitting reopening, the ALJ restated her evaluation and rejection of Mr. Dodson's Petition to Reopen. Consequently, the ALJ found that Mr. Dodson had waived his opportunity to participate in the hearing to address his Complaint, and his absence was not unavoidable. In turn, by failing to appear, Mr. Dodson did not meet his burden of proof. I.D. at 6.

On these bases, the ALJ granted PECO's motion to dismiss and dismissed Mr. Dodson's Complaint. The ALJ specifically noted that PECO did not request dismissal with prejudice, thus her decision granted PECO's motion as it was made. *Id.* at 6, n.4. Citing our decision in *James E. Elliott v. Pa. Elec. Co.*, Docket No. F-2018-3003502 (Order entered February 6, 2020) (*Elliott*), the ALJ concluded that where a complainant fails to appear for a schedule hearing without good cause, the public

interest is prejudiced by the wasteful use of the agency's and the respondent's time and resources. *Id.* at 6.

C. Exceptions and Replies

1. Mr. Dodson's Exceptions

Mr. Dodson submitted two pages of Exceptions that reference the Initial Decision by page and paragraph. While these Exceptions do not conform to our Regulation at 52 Pa. Code § 5.533, because the Complainant appears *pro se*, and PECO was provided a meaningful opportunity to reply, in the interest of justice we exercise our discretion to liberally construe our Regulations and accept the Exceptions as properly filed. *See* 52 Pa. Code § 1.2(a) and (d); *see also Carlock v. The United Telephone Company of Pennsylvania*, Docket No. F-00163617 (Order entered July 14, 1993).

In his Exceptions to page one, paragraphs one and two, and to page two, paragraph three³ of the Initial Decision, Mr. Dodson restates the substance of his Complaint and adds new facts. Exc. at 1.

In his Exception to page two, paragraph one of the Initial Decision, Mr. Dodson restates, and provides additional information explaining, why he missed the hearing. This includes his claims that: (1) "emails from municipalities that [he] was

³ In his Exception to page two, paragraph three, Mr. Dodson states "See Exception Page One Paragraph One," which addresses the merits of his Complaint. Exc. at 2. We interpret this as an incorporation of his Exception restating and augmenting the facts underlying his Complaint and address it in our disposition accordingly. In his Exception to page three, paragraph two, Mr. Dodson also appears to incorporate prior argument by reference, stating "See Exception Page One Paragraph Five." Exc. at 2. However, Mr. Dodson presents no substantive argument in his Exceptions that addresses page one, paragraph five. With no means to construe this purported Exception or any point behind it, it is not considered herein.

dealing with” were going to his junk folder and problems with his Gmail account affecting correspondence from municipal entities and clients; (2) he missed the hearing “due to what is called COVID Fog,” and that while he visited the emergency room in August 2021, the symptoms of “Long COVID,” including “remarkable forgetfulness and memory disorders,” were not yet well known; and (3) at the time of the hearing his son was home with the flu and when his “[n]ew [p]hone alerted [him] to the hearing it was 10:30 am on the 17th and [he] was on [his] way to get meds for him and get to [his] desk. At that point it was too late.” Exc. at 1.

In his Exception to page three, paragraph three of the Initial Decision, Mr. Dodson again restates the merits of his underlying Complaint, including the presentation of new facts. Exc. at 2.

In his Exception to page four, paragraph one of the Initial Decision, Mr. Dodson challenges the sufficiency of PECO’s “evidence” to justify his bills. Exc. at 2.

Finally, in his Exception to the ALJ’s Findings of Fact, generally, on page six of the Initial Decision, Mr. Dodson states as follows:

Yes. I agree. I missed the hearing, but for good cause. This whole process has been an exercise in frustration. I simply cannot afford to continue to accept the regular meter readings let alone the paymen[t] plan on top. I disagree with PECO’s records. Therefore I humbly request this matter be re-visited, re-opened and that I may represent myself.

Exc. at 2.

2. PECO's Replies

In its Replies to Mr. Dodson's Exceptions,⁴ PECO states that Mr. Dodson appears to "attempt to litigate the facts of his case before the Commission." R. Exc. at 2. PECO asserts that the Complainant was provided ample opportunity to pursue the substance of his Complaint but failed to appear at the hearing. PECO requests, therefore, that the Exceptions be denied. R. Exc. at 2.

In response to the ALJ's Initial Decision, PECO largely presents legal argument supporting the ALJ's dismissal of Mr. Dodson's Complaint. The Company backs up its argument with references to Mr. Dodson's behavior not just in missing the scheduled hearing but also in his proffered explanations after the fact, as addressed by the ALJ on the record at the convened hearing, in her analysis denying the Petition to Reopen, and in her Initial Decision's disposition dismissing the Complaint. R. Exc. at 1-2.

In addressing Mr. Dodson's failure to appear at the hearing and failure to support his request to reopen the record, PECO asserts that the December 21, 2021 Hearing Notice provided clear direction on the date of the hearing and manner of proceeding. The information provided specifically included directions about requesting continuances and the consequences of failing to appear, which PECO repeated verbatim in its Replies. R. Exc. at 4.

PECO contends that Mr. Dodson does not allege that the ALJ made an error of law or abused her discretion. Similarly, PECO hones in on the fact that Mr. Dodson also did not allege that an incorrect email address was used to notify him of the hearing

⁴ Given the imprecision of Mr. Dodson's numbering of his Exceptions, PECO's Replies are more in the form of the narrative of a brief.

date. Rather, PECO describes Mr. Dodson’s lack of good cause shown to support reopening the record as “a plethora of inconsistencies” that the Complainant attributes to “what he identifies as ‘Covid fog.’” R. Exc. at 4.

PECO notes that after missing the hearing, Mr. Dodson said he was aware of its date but was in a car accident. PECO adds that Mr. Dodson also stated that his phone’s operating system caused him to miss the hearing. PECO repeats Mr. Dodson’s various statements as his being aware of the hearing, but that his son had Covid, then that his son had the flu not Covid, then that he had Covid, then that he had Covid the prior summer which caused the Covid fog that caused him to miss the February 17, 2022 hearing. PECO closes with reference to Mr. Dodson’s statement that by the time his phone alerted him to the hearing at 10:30 a.m., it was “too late” to join. R. Exc. at 4-5. Nevertheless, PECO contends that Mr. Dodson “did not contact PECO nor ALJ Chiodo on February 17, 2022, stating that he wished to pursue a hearing, nor did he follow proper protocol to request a continuance[.]” R. Exc. at 5.

According to PECO, the ALJ correctly concluded that Mr. Dodson did not meet his burden of proving that PECO violated any statute, regulation or order. As PECO asserts, Mr. Dodson’s efforts to circumvent the hearing and litigate the issues in his Complaint in his Exceptions should be dismissed, and the ALJ’s decision should be affirmed. R. Exc. at 6.

D. Disposition

Any issue or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. It is well settled that 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). Initially, we also note that the ALJ did not reach the merits of Mr. Dodson's Complaint due to her conclusion that PECO's motion to dismiss was justified and should be granted. Consequently, as the merits of the underlying Complaint are not properly before us, and Exceptions are not the proper place to raise new facts, we reject Mr. Dodson's substantive assertions in his Exceptions regarding his Complaint.

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 to support claims in the complaint if the party was afforded due process, and the reason for failing to appear was not established as unavoidable. We also note that it is within the sound discretion of the ALJ to decide whether a 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); 52 Pa. Code § 5.245(a), (b). Upon a complainant's failure to appear, it is for the ALJ to weigh whether that failure 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 so doing, the ALJ must, as a preliminary matter, ensure that the complainant has been afforded due process. 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 Schneider, Mayflower*.

On this point, we agree with the ALJ that Mr. Dodson's due process rights to notice and opportunity to be heard were accommodated and preserved throughout the underlying proceeding. The ALJ correctly found that both the Hearing Notice and the Prehearing Order were served on Mr. Dodson, and neither was returned as undeliverable. Further, as PECO noted, at no time did Mr. Dodson claim that he did not receive these documents or that they were erroneously served.

Each of these documents contained prominent instructions on how to contact the ALJ, how to call in to and proceed during the hearing, and how to obtain a continuance by presenting in writing a good reason at least five days before the scheduled hearing date. Further, the instructions also clearly identified that as a consequence of failing to appear the Complainant could lose the case through dismissal “with prejudice,” meaning it could be barred from being refiled.

Mr. Dodson was reminded of the hearing date on several different occasions and, ultimately, affirmed his understanding that it was to be February 17, 2022. Despite all this, on February 17, 2022, Mr. Dodson was neither present for the hearing nor had he attempted to contact PECO, the ALJ, or the OALJ. Hearing nothing from Mr. Dodson before the hearing, the ALJ convened it in the Complainant’s unexplained absence. Having heard nothing from Mr. Dodson during the hearing, which the ALJ recessed to afford Mr. Dodson additional time to join, the ALJ then entertained an oral motion from PECO to dismiss the Complaint, which she took under advisement. With no reason to hold the record open, the ALJ closed the hearing and the record, as our Regulation allows. Mr. Dodson’s due process rights were provided and preserved.

The ALJ described in substantial detail in both her Initial Decision and her March 18th Order denying the Complainant’s Petition to Reopen, Mr. Dodson’s efforts to explain his absence and justify the Commission’s reopening the record to revive his opportunity to prosecute his Complaint. PECO contended, and the ALJ agreed, that Mr. Dodson’s explanation was insufficient and inconsistent. *See* I.D. at 2-4; March 18th Order at 2-7.

For the above reasons, we agree with the conclusion the ALJ reached in her March 18th Order that Mr. Dodson’s reasons presented to reopen the record did not satisfy our standard. His various explanations involving his phone, his own health, and the health of his son are inconsistent, as are his explanations of his overall activities on or

around the hearing date. While, if timely presented, it is possible that those explanations could have been addressed more favorably in a motion for a continuance, none was timely forthcoming. Having been provided instructions on how to proceed with relief following close of the record, the ALJ found, based on what Mr. Dodson ultimately presented, that he failed to demonstrate a “reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of the proceeding.” 52 Pa. Code § 5.571.

The ALJ also properly found that, having been provided notice and an opportunity to be heard, but failing to offer any explanation for not seeking a continuance and failing to justify reopening the record, Mr. Dodson failed to meet his burden of proof on his Complaint. We agree with this as well. Relying on our decision in *Elliott* and the cases cited therein, the ALJ dismissed the Complaint. As she explained in her decision, PECO did not request that the dismissal be with prejudice, thus her decision granted PECO’s motion as made. I.D. at 6, n.4. We also agree with this, and on this basis, affirm and adopt the ALJ’s Initial Decision without modification.

In his Exception to page two, paragraph one of the ALJ’s Initial Decision, Mr. Dodson again asserts that his actions surrounding how he handled his opportunity to be heard on his Complaint were related to his experience with Covid. To the extent we have one explanation from Mr. Dodson that is consistent – in that it was consistently raised if not consistently explained or raised as to himself – it is the assertion about his experience with Covid.

On the point of his explanations overall, we note that in discussing the inconsistencies in and insufficiency of Mr. Dodson’s explanation for missing the hearing, the ALJ also noted not only Mr. Dodson’s denials of knowledge of the hearing date but also his failure to acknowledge counsel for PECO. He did this notwithstanding statements on the record to the contrary not only from himself directly but also from his

discussions with PECO as restated by the Company and those referenced on the record by the ALJ. This does not afford a high level of confidence in his record explanations related to his experience with Covid. However, we are also mindful that while the ALJ indirectly raised credibility generally in her parenthetical explanation to *Howell* in her March 18th Order, she made no formal or express credibility finding regarding Mr. Dodson.

Additionally, as the ALJ noted, PECO did not move for dismissal with prejudice. Moreover, PECO neither filed an Exception to this aspect of the ALJ's Initial Decision nor did it address the issue of dismissal with prejudice in its Replies, other than to quote that language from the OALJ's instructions repeated to Mr. Dodson in the Hearing Notice. R. Exc. at 4. We also are unable to conclude on this record that PECO was ambiguous on the issue because the Company expressly requests that the Commission deny Mr. Dodson's Exceptions "and issue an Order upholding the Initial Decision in its entirety." R. Exc. at 6.

In recent cases in which we have dismissed a complaint with prejudice, the utility had moved for dismissal with prejudice. *See, e.g., Elliott; Amir V. Williams v. PECO Energy Co.*, Docket No. C-2018-3000734 (Order entered March 14, 2019). In other cases, the record before us included argument by the utility of abuse of process or a specific finding by the ALJ of the complainant's lack of credibility. *See, e.g., Myesha Brown v. PECO Energy Company*, Docket No. C-2019 (Order entered April 22, 2022) (the utility contended that the complainant was prolonging litigation in order to avoid payment); *Elliott* (the utility asserted that the complainant was relitigating a prior complaint; the ALJ expressly found the complainant's excuse for missing the hearing lacked credibility). These are not the circumstances presented here. While the Complainant's inconsistencies in his explanation were sufficiently disquieting for the ALJ to reference *Howell*, she stopped short of finding him not credible. Further, his inconsistencies are not wholly inconceivable in light of what we continue to learn about

Covid. Finally, neither the ALJ nor PECO has found or asserted that Mr. Dodson has been or is abusing our process. For these reasons, we agree with and will not disturb the ALJ's dismissal as advocated by PECO.

Mr. Dodson presents no Exception that calls into question the ALJ's conclusion to dismiss the Complaint. While Mr. Dodson generally asserts communications difficulties with his email account regarding his municipal contacts, at no time does he allege that he did not receive documents served by the Commission. We find no error or abuse of discretion by the ALJ in her decision. Lacking any justification to reverse the ALJ's Initial Decision, we adopt it in its entirety.

Mr. Dodson was afforded due process. By failing to appear, and then providing insufficient and inconsistent reasons in support of his request to reopen the record, he waived the opportunity to participate in the hearing. By failing to appear and offer any evidence to support his Complaint, Mr. Dodson has failed to meet the burden of proof that is placed on him under the Code to satisfy his request for relief. Consequently, the ALJ's decision to dismiss the Complaint is affirmed.

III. Conclusion

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

IT IS ORDERED:

1. That the Exceptions filed by Andrew Dodson on April 6, 2022, at this docket, are denied.

2. That the Initial Decision of Administrative Law Judge Gail M. Chiodo issued on March 18, 2022, is adopted without modification.
3. That the Motion of PECO Energy Company to dismiss the Formal Complaint of Andrew Dodson at Docket No. C-2021-3029814 is granted.
4. That the Formal Complaint filed by Andrew Dodson on November 2, 2021, at Docket No. C-2021-3029814 is dismissed.
5. That the proceeding at Docket No. C-2021-3029814 be marked closed.

BY THE COMMISSION



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: July 14, 2022

ORDER ENTERED: July 14, 2022