

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

Public Meeting held August 25, 2022

Commissioners Present:

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

Colin Brown

C-2021-3027779

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 Colin Brown (Complainant or Mr. Brown) filed on May 30, 2022, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Marta Guhl, which was issued on May 11, 2022, in the above-captioned proceeding. Replies to Exceptions were filed by PECO Energy Company (PECO or Company) (collectively, Parties) on June 9, 2022. For the reasons stated below, we deny the Exceptions of Mr. Brown, adopt the ALJ's Initial Decision, and dismiss the Complaint, consistent with this Opinion and Order.

I. History of the Proceeding

On August 9, 2021, the Complainant filed a Formal Complaint (Complaint) with the Commission against PECO alleging that there were incorrect charges on his bills, and that the utility is threatening or had already shut off his service.

PECO filed an Answer and New Matter on August 19, 2021, in which it denied all material allegations of fact.¹

On September 7, 2021, the Complainant filed a reply to the Answer and New Matter.

On September 10, 2021, an Initial Call-In Telephonic Hearing Notice was served upon all of the Parties, setting an Initial Telephonic Hearing for November 2, 2021, at 10:00 a.m. and the matter was assigned to the ALJ. The Hearing Notice indicated the following:

[y]ou 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.

A Prehearing Order was served upon the Parties on September 13, 2021, that, again, informed the Complainant of the date and time of the hearing and provided procedural information. Also, in the second paragraph, the Prehearing Order advised that:

¹ The Complaint was served on PECO by the Secretary’s Bureau on August 11, 2021.

CONTINUANCES. You may request a continuance of the hearing if you have a good reason. Continuances will be granted only for good cause. To request a continuance, you must submit a written request (a “motion”) at least five (5) days before the hearing.

See Prehearing Order.

On October 25, 2021, the Complainant sent an electronic message requesting a continuance of the hearing in the matter due to a conflict in the schedule because his wife is a witness in the case and has an obligation to the Board of Elections on November 2, 2021. PECO did not oppose the continuance request and the ALJ found good cause to grant the continuance via an Order dated October 29, 2021.

On October 29, 2021, a Cancellation Notice² was issued for the November 2, 2021, hearing date.

On November 15, 2021, a new Initial Telephonic Hearing Notice was issued and served on the Parties. The notice indicated that the initial hearing was rescheduled for December 16, 2021, at 10:00 a.m.

On December 13, 2021, the Complainant faxed a continuance request to PECO² and requested that the December 16, 2021, hearing be rescheduled because his wife was undergoing a medical procedure and would not be able to attend the hearing. The Respondent did not oppose the request. The ALJ granted the request.

² PECO forwarded the correspondence to the ALJ’s office on the same date.

By Cancellation/Reschedule Notice³ served on December 15, 2021, the December 16, 2021, telephonic hearing was cancelled and rescheduled for February 1, 2022, at 10:00 a.m.

The hearing began on February 1, 2022, as scheduled. The Complainant and his wife, Vanessa James Brown, called-in for the hearing. Khadijah Scott, Esquire, called in on behalf of PECO.

The record closed on February 14, 2022, upon the filing of the transcript (Tr.) with the Secretary's Bureau.

As noted, the Initial Decision was issued on May 11, 2022. The Complainant refused to participate in the hearing. Consequently, the presiding ALJ dismissed the Complaint for failure to prosecute. On May 31, 2022, Mr. Brown filed Exceptions. On June 9, 2022, PECO filed its Replies to Exceptions.

II. Background

At the time of the hearing, the Complainant and his wife requested another continuance of the matter so they could obtain counsel. *See* Tr. at 4. Counsel for PECO

³ The Notice contained the following information:

REPRESENTATION. If you are an individual, you may represent yourself or you may have an attorney represent you. All others, including a partnership, corporation, trust, association, or governmental agency or subdivision, must be represented by an attorney licensed to practice law in Pennsylvania, or admitted pro hac vice. Only an attorney may represent someone else.

Language to this effect was also contained in the prior hearing notices and the Prehearing Order.

objected to the request and noted that the matter had already been continued twice at the Complainant's request, and that PECO had its witnesses present and ready to move forward with the hearing. Tr. at 5. PECO's counsel also stated that the Complainant had ample time to find an attorney and have them enter an appearance on their behalf. PECO's counsel further stated that the Complainant did not have good cause for requesting a continuance on the day of the hearing. *Id.*

The ALJ noted that the hearing notice was sent to the Parties on December 15, 2021, and the Complainant had ample time to obtain counsel in this matter as the formal complaint was filed in August 2021. Tr. at 6. The Complainant and his wife responded that they were focusing on health issues and did not provide an explanation as to why they failed to request a continuance prior to the hearing as they had done previously. Tr. at 5. The ALJ, on consideration of the positions of the Parties, denied the request for a further continuance and advised the Parties that the hearing would move forward. Tr. at 6. The ALJ explained that the Complainant and his wife could present testimony at the hearing and cross-examine PECO's witnesses. Tr. at 9. The Complainant and his wife indicated that they would not participate in the hearing but would stay on the line to listen. Tr. at 13-14.

Counsel for PECO requested that they be allowed to present their witnesses and exhibits since the witnesses were present and prepared to testify. The ALJ allowed counsel to do so and provided the Complainant with an opportunity to cross-examine the witnesses. PECO presented the testimony of James Jones, who works for Grid One Solutions as a meter technician; Richard King, a Billing Manager; and Deda Ather, a Regulatory Assessor; and submitted eight exhibits which were entered into the record.

III. Discussion

A. Legal Standards

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Company is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Company. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

The burden of proof comprises two distinct burdens: (1) the burden of production and (2) the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283 (Pa. Super. Ct. 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.* The party with the burden of proof must also carry the burden of persuasion to be entitled to a favorable ruling. *See Moore*.

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, also referred to as the burden of persuasion, to rebut the evidence of the customer shifts to the

Company. If the evidence presented by the Company is of co-equal value or “weight,” the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of the Company. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d*, 501 Pa. 433, 461 A.2d 1234 (1983) (*Burleson*); *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001) (*Milkie*).

While the burden of production may shift back and forth during a proceeding, the burden of persuasion never shifts; the burden of persuasion always remains on a complainant as the party seeking affirmative relief from the Commission. *Milkie; Burleson*.

Additionally, this Commission's decision must be supported by substantial evidence in the record. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982). 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).

Section 5.245 of the Commission Regulations, 52 Pa. Code § 5.245, provides, in pertinent part:

§ 5.245. Failure to appear, proceed or maintain order in proceedings.

- (a) After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will:
 - (1) Be deemed to have waived the opportunity to participate in the conference or hearing.
 - (2) Not be permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing.

- (3) Not be permitted to recall witnesses who were excused for further examination.

52 Pa. Code § 5.245(a); *see also*:

§ 5.245. Failure to appear, proceed or maintain order in proceedings.

(b) Subsection (a)(1)-(3) does not apply if the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitting the reopening or further examination. Counsel shall be expected to go forward with the examination of witnesses at the hearing under § 5.242 (relating to order of procedure), or as has been otherwise stipulated or has been directed by the presiding officer.

52 Pa. Code § 5.245(b).

B. ALJ's Initial Decision

ALJ Guhl made twenty-two Findings of Fact and reached five Conclusions of Law. I.D. at 4-6, 8. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Additionally, any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

The ALJ found that the Complaint should be dismissed on the grounds that the Complainant failed to sustain his burden of proof because, although he appeared for the hearing, he refused to participate and proffer any evidence to support the Complaint. I.D. at 1, 8.

C. Exceptions and Replies

In his Exceptions, the Complainant contends that the court [Commission] violated his due process rights by denying his request to continue the proceeding so he could obtain an attorney. Exc. 1-4. The Complainant noted that he asked the court three or more times that he needed a lawyer to represent him and he was rejected all three times. *Id.* at 3.

In Reply, PECO asserts that the Initial Decision is well reasoned with ample support from the record and the Complaint should be dismissed. PECO contends that it is undisputed that the Complainant refused to participate in the hearing after both Parties received three hearing notices and a prehearing order, all of which cited the date of the hearing, the dial-in information for the hearing and instructions for the Complainant if he wished to be represented by counsel. R. Exc. at 4. Furthermore, PECO argues that it is undisputed that the Complainant had more than one hundred and forty-four days and thus more than ample time to obtain legal representation. *Id.* at 5. In addition, PECO contends that the Complainant did not file a request for continuance five days prior to the hearing date of February 1, 2022. *Id.*

Finally, PECO argues that the Complainant does not state or show any good cause as to why the record should be opened and a further hearing granted. *Id.*

D. 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).

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them, *Schneider v. Pa. PUC*, 479 A.2d 10 (Pa. Cmwlth. 1984), which due process requirement is satisfied when the parties are accorded notice and the opportunity to appear and be heard. *Id.*

In this proceeding, the Office of Administrative Law Judge emailed several notices for the initial and rescheduled telephonic hearing to the Complainant. The notices were not returned as undeliverable. The Prehearing Order was also emailed to the Complainant and not returned as undeliverable.

Although the Complainant appeared at the hearing, he failed to prosecute his Complaint by opting not to participate and to present evidence in the hearing. While the Complainant had requested two prior continuances in accordance with our regulations, the Complainant waited until the day and time of the hearing to request a third continuance which the ALJ denied and explained that the hearing would move forward. In pertinent part, the ALJ reasoned as follows:

As the Commission noted in *Strydio v. PPL Elec. Utils. Corp.*, Docket No. C-2017-2633043, p. 6 (Opinion and Order entered July 18, 2018), “[o]nce notice of a hearing and the opportunity to be heard have been provided by the

Commission, it is the responsibility of the parties to appear and participate in the hearing,” (citing, *Mumma v. PPL Elec. Utils. Corp.*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002)); *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993). The Complainant was notified of the scheduled hearing and called in for the hearing. After I denied the continuance request, I explained that the hearing would move forward and explained the process. Tr. 6. I stated that the Complainant and his wife could present testimony at the hearing and cross-examine PECO’s witnesses. Tr. 9. However, the Complainant refused to participate in the hearing after his continuance was denied. Tr. 13-14.

I.D. at 7-8.

Under these circumstances, it appears the Complainant had ample opportunity to appear and be heard in this proceeding, but voluntarily chose not to do so. Furthermore, the ALJ allowed PECO to present its witnesses and exhibits since the witnesses were present and prepared to testify and provided the Complainant with an opportunity to cross-examine the witnesses. Therefore, the due process rights of the Complainant have been fully protected. *See Sentner v. Bell Telephone Company of Pennsylvania*, Docket No. F-00161106 (Order entered October 25, 1993); and 52 Pa. Code § 5.245(a).

As the party seeking affirmative relief from the Commission, the Complainant bears the burden of proof. 66 Pa. C.S. § 332(a). By failing to proffer any evidence to support his Complaint, the Complainant failed to meet this burden. Therefore, this case must be dismissed with prejudice. 52 Pa. Code § 5.245(a); *Jefferson v. UGI Utilities, Inc.*, at Docket No. Z-00269892 (Opinion and Order entered December 26, 1995).

Conclusion

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

IT IS ORDERED:

1. That the Exceptions of Colin Brown filed on May 30, 2022, to the Initial Decision of Administrative Law Judge Marta Guhl served on May 11, 2022, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Marta Guhl issued on May 11, 2022, is adopted, consistent with this Opinion and Order.

3. That the Formal Complaint filed by Colin Brown on August 9, 2021, at Docket No. C-2021-3027779, is dismissed, consistent with this Opinion and Order.

4. That the proceeding at Docket No. C-2021-3027779 be marked closed.

BY THE COMMISSION,

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

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: August 25, 2022

ORDER ENTERED: August 25, 2022