

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

Public Meeting held October 27, 2022

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Irena Porter

C-2022-3031693

v.

Philadelphia Gas Works

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Irena Porter (Complainant or Ms. Porter) on September 5, 2022, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Conrad A. Johnson, served on August 15, 2022, in the above-captioned proceeding. Philadelphia Gas Works (PGW or Company) filed Replies to Exceptions on September 16, 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.

¹ On September 6, 2022, the Secretary's Bureau served the Exceptions on PGW 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, PGW was given until September 16, 2022, to file its Replies to Exceptions.

History of the Proceeding

On March 28, 2022, Ms. Porter filed a Formal Complaint (Complaint) with the Commission against PGW alleging there were incorrect charges on her bill and that there were false allegations on her account. Complaint ¶ 4. A PGW Hazard Warning directed to Ms. Porter and dated February 12, 2015, was attached to the Complaint. The Hazard Warning listed conditions that need to be corrected including a fuel line leak and a control valve bypass. For relief, Ms. Porter requested that the Commission order PGW to fix her bill as soon as possible because she could not receive help from the Low-Income Home Energy Assistance Program with false allegations on her account. Complaint ¶ 5.

On April 20, 2022, PGW filed an Answer and New Matter (Answer) and Preliminary Objection.² PGW denied that there were incorrect charges on the Complainant's bill for gas service at 5351 Grays Avenue, Philadelphia, PA (Grays Avenue). PGW alleged that when Ms. Porter established gas service at Grays Avenue as of December 15, 2021, PGW transferred the Complainant's theft balance from her account at 219 N. 53rd Street, Philadelphia, PA (53rd Street) to her account at the Grays Avenue. Answer at 1.

In its New Matter, PGW alleged that on February 12, 2015, PGW visited 53rd Street and discovered a tampered meter bypass. PGW further alleged that on March 2, 2015, PGW billed Ms. Porter \$2,477.59 in theft charges based on historical usage at 53rd Street. According to PGW, on March 2, 2015, Ms. Porter filed an informal complaint with the Commission's Bureau of Consumer Services (BCS) at BCS

² PGW served Ms. Porter with a copy of the Preliminary Objection on April 20, 2022, together with a Notice to Plead to the Preliminary Objection within ten days of the date of service. The Complainant did not file a response to the Preliminary Objection or the New Matter.

No. 3322700 challenging the theft charges. PGW attached a copy of the informal complaint to its Answer as Exhibit A and attached as Exhibit B a copy of the BCS decision dismissing the informal complaint. PGW asserted that Ms. Porter did not appeal the decision at BCS No. 3322700 or in any other way further contest the theft bill. Answer at 1-2.

PGW further asserted that the statute of limitations of the Public Utility Code (Code) at 66 Pa. C.S. § 3314 provides that no action for recovery of penalties or forfeitures, or any prosecution, may be maintained unless brought within three years from the date the liability arose. Accordingly, PGW argued that the provisions of Section 3314 of the Code divested the Commission of jurisdiction over any theft charges levied against the Complainant, which dated back to 2015. Answer at ¶¶ 15-16. For relief, PGW requested that the Commission deny all relief requested in the Complaint, dismiss the Complaint, and grant any other relief in favor of PGW as deemed appropriate. Answer at 2.

PGW's Preliminary Objection incorporated the averments of its New Matter. PGW reiterated its jurisdictional argument that any claim of the Complainant relating to the theft charges from 2015 were barred by the statute of limitations by Section 3314 of the Code. Preliminary Objection ¶¶ 9-12. For relief, PGW requested that the Commission: (1) grant PGW's preliminary objections; (2) dismiss the Complaint; and (3) grant PGW any other relief deemed to be reasonable and appropriate. Preliminary Objection at 4.

By First Interim Order dated June 23, 2022 (First Interim Order), PGW's Preliminary Objection was sustained. However, the First Interim Order denied PGW's request to dismiss the Complaint. According to the Order, there were questions of fact as to the Complainant's allegation that there were incorrect charges on her current bill and that this allegation could not be resolved on a preliminary motion.

The First Interim Order further stated in pertinent part as follows:

Complainant is cautioned that as the party seeking relief from the Commission, she has the burden of showing that the named utility is responsible or accountable for the problem described in the complaint to prevail on her Complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990); *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). This must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (1990), alloc. den., 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Marquilies*, 70 A.2d 854 (1950).

The utility company's offense must be a violation of the Public Utility Code, the Commission's regulations, or an outstanding order of the Commission. 66 Pa. C.S. § 701. Complainant is responsible for proving that the utility has acted improperly, by providing testimony and documentary evidence, such as expert reports, photographs, and any other relevant materials necessary to support that finding, and that the Commission has the jurisdiction to provide the remedy.

Accordingly, this case will be scheduled for hearing on the issues of incorrect billing charges and reasonableness of service.

The parties are directed to attempt to resolve this matter themselves and are strongly encouraged to engage in settlement discussions. Settlement discussions are consistent with the Commission's regulations at 52 Pa. Code §§5.231.

First Interim Order at 8.

Accordingly, on June 24, 2022, a Call-In Telephone Hearing Notice was electronically served upon the Parties, informing them that a call-in telephonic hearing on the Complaint and Answer would be convened on July 21, 2022, at 10:00 a.m.

The Hearing Notice provided the Parties with the Toll-Free Bridge Number and the PIN to dial on the morning of the hearing to participate in the telephonic hearing. The Hearing Notice further stated as follows:

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.

CONTINUANCES. You may request a continuance of the hearing if you have a good reason. All 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. Your motion should include: 1) The case name, number, and hearing date; 2) The reason for the request; and 3) Whether the other party agrees (or if you do not know).

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.

PRESENTING EXHIBITS. If you intend to present any documents or exhibits at the hearing, you must email one (1) copy to Legal Assistant, Nicholas Miskanik at nmiskanik@pa.gov and one (1) copy each must be sent to every other party. All copies must be received at least five (5) business days before the hearing. Proposed exhibits should be properly pre-marked for identification purposes.

(emphasis in original).

The Hearing Notice informing the Parties of the manner, date, and time of the hearing, was electronically served upon the Parties in the ordinary course of the Commission's business to the email addresses provided by them to the Commission. The Commission did not receive a return electronic message that delivery of the Hearing Notice to Ms. Porter's email address had failed.

On July 14, 2022, PGW in accordance with the Hearing Notice emailed copies of its proposed exhibits to Ms. Porter and Legal Assistant Nicholas Miskanic.

On July 21, 2022, the hearing convened as scheduled. Counsel for PGW and the ALJ dialed into the telephonic proceeding. The court reporter was also present. However, the Complainant did not call into the telephonic proceeding when the hearing convened at 10:25 a.m. The ALJ briefly recessed the hearing to permit additional time for Ms. Porter to appear or to contact the Office of Administrative Law Judge (OALJ) to explain her absence. The telephonic proceeding remained open with counsel for PGW and the court reporter in the telephonic hearing, and the ALJ waited for Ms. Porter to join the hearing. When the hearing reconvened, Ms. Porter had not dialed into the hearing nor contacted the OALJ to explain her absence. Tr. at 4-5.

Counsel for PGW was prepared to proceed with one witness, a senior customer review unit officer. Since the Complainant failed to appear for the scheduled hearing, the hearing proceeded without the Complainant. Counsel for PGW 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 10:39 a.m. on July 21, 2022. Tr. at 6-9.

On August 15, 2022, the Commission issued the Initial Decision of ALJ Johnson which dismissed the Complaint with prejudice, for failure of the Complainant to prosecute the matter. I.D. at 1, 10.

On September 5, 2022, the Complainant filed Exceptions. On September 16, 2022, PGW 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) (*Berkowitz*); *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) (*Chartiers*); *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).

ALJ’s Initial Decision

ALJ Johnson made thirteen Findings of Fact and reached three Conclusions of Law. I.D. at 6-7, 9. 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 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. In this proceeding, the Complainant is the proponent of a rule or order. Therefore, Ms. Porter had the burden of proving she was entitled to the relief requested in her Complaint. According to the ALJ, PGW was present for the hearing through its attorney and witness. However, Ms. Porter was not present for the hearing. I.D. at 8.

The ALJ further stated that Section 332(f) of the Code, 66 Pa. C.S. § 332(f), 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,

I.D. at 8. According to the ALJ, since Ms. Porter failed to appear and participate in the scheduled hearing by telephone, her Complaint may be dismissed with prejudice.

I.D. at 9, citing, *Stephen Little v. Pittsburg Water and Sewer Authority*, Docket No. F-2021-3027107 (Opinion and Order entered Feb. 7, 2022); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995) (*Jefferson*); *El-Ayazra v. W. Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016) (*El-Ayazra*); 52 Pa. Code § 5.245.

The ALJ concluded that there is nothing in the record to indicate that Ms. Porter's failure to appear for the telephonic hearing was unavoidable. Accordingly, the ALJ dismissed the Complaint with prejudice. I.D. at 9, citing *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered April 22, 2022).

Exceptions and Replies

In her Exceptions, the Complainant disagrees with the ALJ's Initial Decision stating that the decision is based on inaccurate information regarding her account and proper protocol was not followed to arrive at the ALJ's conclusion in this matter. Exc. at 1. The Complainant reiterates her allegations in the Complaint and states, *inter alia*, that she did not receive the Hearing Notice. According to the Complainant, she had been waiting for months to present her case in the hearing only to find out she missed the hearing when she contacted the Commission. *Id.* at 1-2.

In Reply, PGW avers that the Complainant's Exceptions fail to demonstrate that the Initial Decision is unsupported by substantial evidence. According to PGW, there is nothing in the record to indicate that the Complainant's failure to appear for the telephonic hearing was unavoidable. Noting the Complainant's claims that she did not receive notice of the hearing and that she found out she missed her hearing when she contacted the Commission, PGW retorts that the Complaint was filed in March of 2022 and the hearing did not take place until July of 2022. PGW explains that the Complainant's Exceptions provide no explanation as to why she did not contact the Commission sooner if she was not receiving correspondence relating to her Complaint. PGW asserts that moreover, the Complainant fails to address how she received the Initial Decision but failed to receive the Hearing Notice despite both being electronically served by the Commission to the only email address provided by Complaint. R. Exc. at 3.

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); 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 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).

In her Exceptions, the Complainant claims she did not receive the Hearing Notice. However, we agree with PGW that the Complainant's Exceptions fail to address how she received the Initial Decision but failed to receive the Hearing Notice despite both being electronically served by the Commission to the only email address provided by the Complaint. R. Exc. at 3. Also, the Complainant did not indicate when she contacted the Commission about the hearing as claimed in her Exceptions. Further, as earlier indicated, in his Initial Decision ALJ Johnson noted that on June 24, 2022, the Call-In Telephone Hearing Notice was electronically served upon the Complainant at the email address she provided to the Commission and the Commission did not receive a return electronic message that delivery of the Hearing Notice to the Complainant's email address had failed. Accordingly, the ALJ presumed that the Complainant received electronic notice of the hearing and elected not to participate in the hearing. We agree. In addition, on July 14, 2022, PGW in accordance with the Hearing Notice emailed copies of its proposed exhibits to Ms. Porter and Legal Assistant Nicholas Miskanic.

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 8. 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.

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. The Code 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.* No determination was made that the non-attendance was unavoidable, and there are no facts in the record that would allow the Commission to reach this conclusion. Accordingly, we will adopt the ALJ’s Initial Decision and dismiss the Complaint with prejudice, as required by law and consistent with relevant case precedent.³

Conclusion

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

IT IS ORDERED:

1. That the Exceptions of Irena Porter filed on September 5, 2022, to the Initial Decision of Administrative Law Judge Conrad A. Johnson served on

³ *Amir Williams v. PECO Energy Company*, Docket No. C-2018-3000734 (Order entered March 14, 2019).

August 15, 2022, are denied, consistent with this Opinion and Order.

2. That the Initial Decision of Administrative Law Judge Conrad A. Johnson issued on August 15, 2022, is adopted, consistent with this Opinion and Order.

3. That the Motion of Philadelphia Gas Works, made at the hearing on July 21, 2022, to dismiss with prejudice, the Formal Complaint of Irena Porter at Docket No. C-2022-3031693, is granted, consistent with this Opinion and Order.

4. That the Formal Complaint filed by Irena Porter on March 28, 2022, at Docket Number C-2022-3031693, is dismissed with prejudice, consistent with this Opinion and Order.

5. That the proceeding at Docket No. C-2022-3031693 be marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: October 27, 2022

ORDER ENTERED: October 27, 2022