

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

Public Meeting held November 10, 2022

Commissioners Present:

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

Amanda Polk Herr

C-2021-3028202

v.

West Penn Power Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration is the Petition for Reconsideration, Rehearing, Clarification, or Rescission (Petition), filed by Amanda Polk Herr (Complainant or Ms. Herr) on September 30, 2022, seeking reconsideration of the Commission's Opinion and Order entered September 15, 2022 (*September 2022 Order*), in the above-captioned proceeding. On October 21, 2022, West Penn Power (West Penn or the Company) filed its Answer to the

Petition (Answer).¹ For the reasons stated below, we shall deny the Complainant's Petition.

I. History of the Proceeding

On August 20, 2021, Ms. Herr filed a Formal Complaint (Complaint) against West Penn averring that the utility is threatening to terminate her service and that she would like a payment arrangement. The Complainant also checked the box noting that a court has granted her a Protection from Abuse (PFA) Order for her personal safety or welfare.

On September 20, 2021, West Penn filed an Answer and New Matter to the Complaint in which it denied any pending termination action. The Company averred that the Commission awarded Ms. Herr a payment arrangement on July 16, 2020, and opposed a further Commission-ordered payment arrangement. In its New Matter, West Penn contended that the Commission should decline to order any further payment arrangements to Ms. Herr and that the Complainant has abused the complaint process. For relief, West Penn requested the Commission bar Ms. Herr from filing any further complaints until she pays her balance in full. Answer and New Matter at 10-11.

The Answer and New Matter included a notice to plead which notified Ms. Herr that she should file a response to the New Matter within twenty days. The Complainant did not file a response to the New Matter. By Interim Order dated

¹ The Petition does not contain a Certificate of Service. In its Answer, West Penn avers that it was not served with the Petition and was only advised of the filing after the Commission entered an Order on October 13, 2022, granting the Petition pending review of, and consideration on, the merits of the Petition (*October 2022 Order*). Answer at 2. Pursuant to 52 Pa. Code § 1.2(a) and (d), and in light of the fact that the Complainant is appearing *pro se* and that the substantive rights of the Company do not appear to be affected, we will disregard the Complainant's apparent failure to properly serve her Petition.

October 26, 2021, ALJ Long directed Ms. Herr to provide a copy of any PFA currently in effect, on or before November 15, 2021.

Thereafter, the Complainant requested and received a continuance of the initial hearing originally scheduled for December 1, 2021. By Interim Order dated November 22, 2021, ALJ Long rescheduled the hearing for December 14, 2021, and renewed the direction to file any currently effective PFA.²

On the evening prior to the scheduled hearing, ALJ Long received an email from Ms. Herr stating that she no longer wished to have a hearing. The ALJ responded by email stating that the hearing would convene as scheduled in order to provide West Penn with an opportunity to respond to her request to withdraw her Complaint. Ms. Herr also contacted the Office of Administrative Law Judge (OALJ) Scheduling Unit by telephone on the morning of December 14, 2021, stating that she would not attend the hearing. I.D. at 3 (citing Tr. at 6-7).

The hearing convened as scheduled at which counsel for the Company appeared with one witness, but the Complainant did not appear. At the hearing, West Penn's counsel asserted that she and Ms. Herr had been in settlement negotiations consistently in the days leading up to the hearing and had negotiated a joint settlement agreement for the Commission's approval. However, West Penn's counsel stated that Ms. Herr was unclear regarding her intention to continue pursuing a settlement. Thus, the Company requested a short continuance to finalize settlement negotiations with Ms. Herr. I.D. at 3.

West Penn's counsel also requested leave to present the testimony of the Company's witness to authenticate documents related to Ms. Herr's account history in

² The ALJ stated Ms. Herr did not provide a copy of a PFA. I.D. at 3.

support of the New Matter allegations seeking to preclude Ms. Herr from filing further complaints until her substantial past due balance is paid in full. The ALJ granted the leave to present the testimony of the witness who offered nine exhibits, which were admitted into the record. The ALJ also took official notice of the initial decision and our prior Opinion and Order entered on July 16, 2020, at Docket C-2019-3009143, resolving a formal complaint that Ms. Herr filed in 2019.

By Interim Order dated December 14, 2021 (*December 2021 Interim Order*), the ALJ granted a continuance of the proceedings and directed the Company to file a status report on or before December 29, 2021, regarding the settlement agreement. The ALJ also provided Ms. Herr with an opportunity to object to the exhibits that were admitted into the record and to object to the official notice of the prior Commission-related decisions. I.D. at 4.

On December 28, 2021, the Company's counsel filed a status report (Status Report) stating that she sent the settlement documents to Ms. Herr for her signature on December 17, 2021. According to the Company, its counsel attempted to follow-up with Ms. Herr on December 23, 2021. Thereafter, Ms. Herr texted a lab report which noted that she had tested positive for COVID-19, and that she was unable to sign anything. In addition, the Company's counsel stated that she received an email from Ms. Herr's son on December 28, 2021, stating that Ms. Herr was in the hospital and that she would "take care of this" at a later time. Status Report at 1.

The hearing produced a transcript of fifty-four pages and the ALJ closed the record by Interim Order dated January 10, 2022.

In the Initial Decision issued on March 21, 2022, the ALJ dismissed the Complaint and barred the Complainant from filing further informal or formal Complaints regarding her electric utility account balance until she pays that balance in full. The ALJ

reasoned that the Complainant failed to appear for the hearing and failed to prove that the Commission should grant her a further payment arrangement for her unpaid balance in excess of \$20,000. According to the ALJ, the Complainant's conduct of filing numerous complaints, breaking payment arrangements, and other behavior constitutes an abuse of the administrative process calculated to avoid or delay the termination of her utility service. I.D. at 1.

The Complainant filed Exceptions on April 8, 2022. West Penn filed Replies to Exceptions on April 29, 2022.

On September 15, 2022, the Commission entered the *September 2022 Order* which denied the Complainant's Exceptions and adopted the ALJ's Initial Decision.

As noted previously, Ms. Herr filed her Petition on September 30, 2022. On October 13, 2022, the Commission issued the *October 2022 Order*. West Penn filed its Answer on October 21, 2022.

II. Discussion

A. Legal Standards

Initially, we note that any arguments not specifically discussed shall be deemed to have been duly considered and denied without further discussion. 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).

The Pennsylvania Public Utility Code (Code) establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. § 703(f) and § 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

The standards for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553 (1982):

A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. In this regard, we agree with the court in the *Pennsylvania Railroad Company* case, wherein it was stated that “[p]arties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them” What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission.

Duick, 56 Pa. P.U.C. at 559 (quoting *Pennsylvania Railroad Co. v. Pennsylvania Public Service Commission*, 179 A. 850, 854 (Pa. Super. 1935)).

Under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed by the Commission. *Duick*, 56 Pa. P.U.C. at 559.

As we proceed in our review, we note that the considerations of *Duick*, on application, essentially, require a two-step analysis. *See, e.g., SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Philadelphia Gas Works*, Docket No. C-2012-2304183 (Order entered May 19, 2019) (discussing *Application of La Mexicana Express Service, LLC, to transport persons in paratransit service, between points within Berks County*, Docket No. A-2012-2329717; A-6415209 (Order entered September 11, 2014)). The first step is that we determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. *Id.* The second step of the *Duick* analysis is to evaluate the new or novel argument, or overlooked consideration that is alleged, in order to determine whether to modify our previous decision. *Id.* We will not necessarily modify our prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked or not addressed by the Commission in its previous order. *Id.*

B. The September 2022 Order

In our *September 2022 Order*, we denied the Complainant's Exceptions, adopted ALJ Long's Initial Decision and dismissed the Complaint.

Regarding the Complainant's failure to appear at the hearing we noted that 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. We explained that whether the complainant's failure to appear at the hearing was "unavoidable" is a fact-based question and, under such circumstances, the ALJ has the discretion to reschedule the hearing. However, we noted that 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. *September 2022 Order* at 14 (citing 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b); and *Alice Anderson v. PECO Energy Company*, Docket No. F-2017-2614241 (Order entered July 18, 2018)).

Furthermore, we stated that at the exceptions stage of a proceeding before the Commission, the record is closed, and the complainant filing exceptions has the responsibility of challenging the findings and conclusions of the Initial Decision. We added that the complainant filing exceptions must provide, in a timely fashion, a compelling explanation of why he or she neglected to raise with the presiding officer the excuse for failing to appear at the hearing so that the presiding officer can determine whether rescheduling the hearing is appropriate. *September 2022 Order* at 14 (citing 52 Pa. Code § 5.533; and *Clem Marable v. PECO Energy Company*, Docket No. C-2017-2609460 (Order entered July 18, 2018)).

In our disposition, we reasoned that the Complainant provided no explanation in her Exceptions as to why she missed the scheduled hearing. Rather, Ms. Herr stated generally that she had COVID-19 and almost died and that all the Parties were advised of this by email. However, we acknowledged that the Complainant's medical situation appeared to have been diagnosed after the scheduled hearing and Ms. Herr did not contend that her medical condition prevented her from appearing at the scheduled hearing. Rather, we noted that the emails regarding her medical condition were in response to the status of the proposed settlement agreement. *September 2022 Order* at 15 (citing R. Exc. at 6-7 and Status Report).

Further, we emphasized that prior to the scheduled hearing, Ms. Herr simply stated via an email to the ALJ that she no longer wanted to pursue her Complaint and telephoned the OALJ Scheduling Unit stating that she would not attend the hearing. *September 2022 Order* at 15 (citing Tr. at 6-7). Thus, we

concluded that there was no basis to support a contention that Ms. Herr's absence from the hearing was unavoidable. Moreover, we cited to the ALJ's issuance of the *December 2021 Interim Order* following the hearing which afforded Ms. Herr the opportunity to object to the exhibits admitted at the hearing. The Complainant did not reply to the *December 2021 Interim Order* nor did she offer any explanation to the ALJ for failing to attend the scheduled hearing. Under the circumstances, we found that the ALJ properly exercised her discretion to decline to reschedule the hearing after the receipt of the Status Report. *September 2022 Order* at 15.

We also noted that a Complainant has a responsibility to establish contact with the presiding officer, either by phone or written correspondence, to explain the reason for a hearing absence prior to the issuance of the Initial Decision, citing to *Shenik Harvey v. PECO*, Docket No. C-2018-3002514 (Order entered December 20, 2018). Again, we discerned that, other than Ms. Herr's expressed intention not to pursue her Complaint, the Complainant provided no reason for failing to attend the hearing. *September 2022 Order* at 15.

Despite the available opportunities, the Complainant failed to make any good faith attempt to explain her absence from the December 14, 2021, hearing. Moreover, her Exceptions did not request a reopening of the record or the rescheduling of the hearing. Even if such a request could have been construed from the filing, we opined that it would not serve the public interest to remand this case for further proceedings, as it would require the expenditure of administrative and judicial resources. Further, we reasoned that the interests of West Penn would be prejudiced by giving the Complainant another opportunity to present her case. We acknowledged that the Company's counsel and witness were present on the date of the scheduled hearing and were prepared to proceed. Therefore, we found that the Complainant did not satisfy the conditions under 52 Pa. Code § 5.245(b) for reopening this proceeding. *Id.* at 16.

Accordingly, we concluded that the ALJ correctly dismissed the Complaint because Ms. Herr failed to appear at the hearing and to present any evidence in support of her Complaint.³ Thus, we determined that the Complainant failed to meet her burden of proof and the ALJ appropriately dismissed the Complaint with prejudice. *Id.* at 16.

Regarding the allegations of abuse of the administrative process, we noted the Company's request to bar Ms. Herr from filing further formal or informal complaints until her balance is paid in full. We explained that pursuant to the Opinion and Order, which dismissed the Complaint, Ms. Herr will have no legal authority to file future informal or formal complaints which contain allegations of a similar nature to those that have been dismissed with prejudice in this proceeding, *i.e.*, allegations pertaining to her arrearages for electric service and requests for any further payment arrangements pertaining to such arrearages. *Id.*

Nonetheless, we acknowledged West Penn's additional request for a directive to both the Commission's Bureau of Consumer Services and the Secretary's Bureau to refuse the filing of any future informal or formal complaints from Ms. Herr related to the current balance on her account for electric service until all of her arrearages are paid in full. We noted that this is an extraordinary request which would effectively bypass the Commission's normal administrative litigation procedure. There, we recognized that the Commission has taken similar steps in cases involving egregious abuses of our administrative process. *September 2022 Order* at 16-17 (citing *Hogan v. West Penn Power Company*, Docket F-2019-3012920 (Final Order entered March 10, 2020) and *Potora v. UGI Penn Natural Gas, Inc.*, Docket No. C-2018-3003485 (Order entered August 8, 2019)).

³ Additionally, we concluded that by failing to appear at the hearing and to offer any evidence, the Complainant had not shown that the Commission should authorize a further payment arrangement. *Id.* at 16, n.6.

Under the facts and circumstances of this case, we agreed with the ALJ that the Complainant's actions constitute a history of abusing the Commission's process, noting Ms. Herr's accrual of a substantial unpaid balance of \$20,334.40 with only ten payments made to her account over a seven-year period. Additionally, we cited to Ms. Herr's tendering of unpayable checks in the amount of \$101,767.37 and not complying with the Commission-issued payment arrangement, or any of the Company payment arrangements or Customer Assistance Program (CAP) payment plans. We explained that, since 2015, Ms. Herr has filed eight informal complaints and two formal complaints seeking relief from the Commission in the form of payment arrangements. Moreover, we found the Complainant's actions of disregarding the directives of the ALJ in this proceeding to be troubling. Thus, we agreed with the ALJ that this pattern of behavior is similar to behavior the Commission has considered inappropriate and determined that the customer was attempting to improperly avoid termination of utility service. *September 2022 Order* at 17.

Accordingly, we adopted the ALJ's recommendation pertaining to abuse of our process. However, we encouraged the Company to continue to work with Ms. Herr to offer all available Universal Service Program resources – such as continued participation in the Company's CAP, the Low Income Usage Reduction Program, the Customer Assistance and Referral Evaluation Services, and the Hardship Fund resources – to help her address the substantial unpaid account balance and her circumstances. *Id.*

C. The Petition and West Penn's Answers

In her Petition, the Complainant asserts generally the following six arguments which justify reconsideration of our *September 2022 Order*: (1) that West Penn will not in any way work with her to resolve her balance; (2) that she lives well below the poverty line; (3) that she has been making payments; (4) that it is very unfair to ask her to make an \$11,000 payment; (5) that she has a medically sick child; and (6) that

she was never mailed the order as requested. Petition at 3-4. We note that the Complainant does not provide any further explanation in support of these contentions.

In its Answer to four of the Complainant's arguments – pertaining to West Penn not working to resolve her balance, that she lives below the poverty line, that she has a medically sick child, and that the Order was not mailed to her – the Company asserts that these issues are irrelevant to the Petition. Answer at 4-5.

Regarding Ms. Herr's argument that she has been making payments, West Penn proffers that this issue was raised as Complainant's Exception No. 6 and was denied in the *September 2022 Order. Id.* at 5.

As to the argument that it is unfair to require the Complainant to make an \$11,000 payment, the Company argues that this issue was raised in Complainant's Exception Nos. 2 and 8 and denied in the *September 2022 Order. Id.*

In summary, the Company contends that the Petition clearly fails to satisfy the standards for granting reconsideration. West Penn objects to the Complainant's attempt to simply re-raise the same or irrelevant arguments that were considered and rejected by the Commission. *Id.*

D. Disposition

Before we address our disposition on the issues, we note, as stated previously, that Petitions for Reconsideration are governed by *Duick*, which essentially requires a two-step analysis. First, we determine whether a party has offered new and novel arguments or identified considerations that appear to have been overlooked or not addressed by the Commission in its previous order. The second step is to evaluate the new or novel argument, or overlooked consideration, in order to determine whether to

modify our previous decision. However, we will not necessarily modify our prior decision just because a party offers a new and novel argument or identifies a consideration that was overlooked or not addressed by the Commission in its previous order. Based upon our evaluation of the record and the Parties' positions in each particular case, we will determine if there is a sufficient basis for us to exercise our discretion to amend or rescind a prior Order, in whole or in part.

Upon consideration of the record evidence in this proceeding, we will deny the Complainant's Petition on the grounds that it fails to meet the *Duick* standards. We note initially that we are constrained by the fact that the Complainant has not provided any citations to the record or any additional explanation in support of the general allegations.

We begin by addressing the Complainant's issues in which she avers that she has been making payments and that it is unfair to ask her to make an \$11,000 payment. As noted by West Penn these matters were previously raised in the Complainant's Exceptions and were rejected by the Commission. *See September 2022 Order* at 16. Specifically, by not appearing at the hearing and not offering any evidence, the Complainant failed to meet her burden of proof to show that the Commission should offer a further payment arrangement. We, therefore, agree with West Penn that the Complainant has not demonstrated any new or novel arguments or evidence on these matters which warrant reconsideration as to these issues.

Next, we shall address the Complainant's four remaining assertions: (1) that West Penn will not work with her to resolve her balance; (2) that she is living below the poverty line; (3) that there is a medically sick child at the address; and, (4) that she was never mailed the Order.

We find that the Complainant's allegations of West Penn not working with her to resolve her balance and that she was never mailed the Order were addressed and rejected. Specifically, the record shows, that West Penn and the Commission have provided her with payment arrangements in order to resolve her balance. However, as the ALJ stated Ms. Herr did not comply with the Commission-issued payment arrangement, or any of the Company payment arrangements or CAP payment plans. *See September 2022 Order* at 10 (citing I.D. at 9-10). Regarding the assertion that she was never mailed the Order, we note that the ALJ explained in her Initial Decision that Ms. Herr subscribed to the Commission's e-filing service, but later complained she could not receive filings in that manner. However, Ms. Herr did not contact the Secretary's Bureau to unsubscribe from e-filing and to make other arrangements to receive service from the Commission. *See September 2022 Order* at 10-11 (citing I.D. at 10). The Complainant having initiated the Complaint has the obligation to pursue her burden of proof in the matter. Under our Regulations, the Complainant is required to inform the Commission of any change in address or contact information. *See e.g.*, 52 Pa. Code § 1.53(d). Here, the Complainant failed to comply with our Regulations and the procedures pertaining to Commission filings.

We will now consider the remaining assertions that the Complainant lives below the poverty line and that there is a medically sick child at the service address. At the outset we note that although these arguments appear new, we are not constrained to revisit our *September 2022 Order*. While these arguments might be new, they actually support the fact that the Complainant should have appeared for the hearing but did not despite Commission-issued orders reminding her of the consequences for failing to do so. Furthermore, the Complainant has not offered any explanation regarding the fact that prior to the scheduled hearing the Complainant simply stated via an email to the ALJ that she no longer wanted to pursue her Complaint and telephoned the OALJ Scheduling Unit stating that she would not attend the hearing. In addition, the Complainant offered no explanation as to why she did not comply with the ALJ's directive to appear at the

hearing so that West Penn could provide its position on her request. Without some argument or explanation as to how these assertions support her request for reconsideration, we see no reason to disturb the *September 2022 Order*.

Regarding the Complainant's allegation of having a medically sick child, we note that during the hearing West Penn presented evidence pertaining to Ms. Herr's Medical Certificate History. Tr. at 38; Exh. 5. According to the Company's testimony, Ms. Herr presented two medical certifications to restore service on September 20, 2012, and April 27, 2016. The Company's witness also testified that a third certificate was presented on June 27, 2016. Tr. at 39. However, neither the Initial Decision nor our *September 2022 Order* directly addressed the issue of the validity of any medical certificate or the entitlement of a renewal any such certificate. *See e.g.*, 52 Pa. Code § 56.114(2). Accordingly, we clarify here that the *September 2022 Order* was not intended to, nor does it operate to preclude, the presentation or consideration of any future medical certificate to the extent authorized under our Regulations at 52 Pa. Code §§ 56.111, *et seq.*

Moreover, we again urge the Company to continue to work with Ms. Herr to offer all available Universal Service Program resources – such as continued participation in the Company's CAP, the Low Income Usage Reduction Program, the Customer Assistance and Referral Evaluation Services, and the Hardship Fund resources – to help her address the substantial unpaid account balance and her circumstances.

Accordingly, for all of the above-mentioned reasons, we shall decline to exercise our discretion to disturb the *September 2022 Order*, consistent with this Opinion and Order.

Conclusion

Upon our review and consideration of the Petition, the Company's Answer, and the record evidence in this proceeding, we shall deny the Petition because the Complainant has not provided sufficient grounds under the *Duick* standards to support her request for reconsideration or rehearing, consistent with this Opinion and Order;

THEREFORE,

IT IS ORDERED:

1. That the Petition for Reconsideration, Rehearing, Clarification, or Rescission of Amanda Polk Herr, filed on September 30, 2022, is denied, consistent with this Opinion and Order.

2. That a copy of this Opinion and Order shall be provided to the Commission's Bureau of Consumer Services.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: November 10, 2022

ORDER ENTERED: November 10, 2022