

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Norman Johnson	:	
	:	
v.	:	C-2022-3033484
	:	
PECO Energy Company	:	

**INITIAL DECISION**

Before  
Arlene Ashton  
Administrative Law Judge

**INTRODUCTION**

This Initial Decision dismisses the Formal Complaint of Norman Johnson against PECO Energy Company because he failed to appear for the scheduled hearing and prosecute his Complaint.

**HISTORY OF THE PROCEEDING**

On June 29, 2022, Norman Johnson (Complainant or Mr. Johnson) filed a Formal Complaint (Complaint) against PECO Energy Company (PECO or Respondent) with the Pennsylvania Public Utility Commission (Commission). In the Complaint, the Complainant indicated that PECO was threatening to shut off his service or had already done so and that he wanted a payment agreement. As relief, he indicated that he wished to have his payment agreement reinstated and adjusted to provide a way for him to make payments on his account given his fixed income.

On July 20, 2022, the Respondent filed an Answer with New Matter (Answer) averring that the Complainant had enrolled in the Respondent's Customer Assistance Program (CAP) and that his balance consists of CAP arrears. In the Answer and in New Matter PECO also averred that because the Complainant's balance is comprised of CAP arrears, he is not entitled to a PUC ordered payment agreement under the Public Utility Code.<sup>1</sup> Specifically, PCO averred that pursuant to 66 Pa.C.S. §1405 (c), the Commission has no jurisdiction to give the Complainant a payment agreement and the Complaint should be dismissed. The New Matter was endorsed with a Notice to Plead advising the Complainant that if he did not file a written response denying or correcting the New Matter, a decision may be rendered against him. The Complainant did not file a response to the New Matter.

By Hearing Notice dated September 26, 2022, a call-in telephonic hearing was scheduled for November 22, 2022, at 10:00 a.m., and the matter was assigned to me. The Hearing Notice advised the parties of the date and time of the scheduled hearing as well as how to call in and warned of the following:

**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.

I issued a Prehearing Order on September 26, 2022. The Prehearing Order also advised the parties of the date and time of the scheduled hearing as well as how to call in for the hearing. Additionally, the Prehearing Order directed the parties to comply with various procedural requirements. Paragraph 2 of the Prehearing Order directed that a request to change the scheduled hearing should be sent to me at least five days prior to the hearing date, be in writing and state the agreement or opposition of the other party.

Furthermore, the Prehearing Order warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to attend the hearing. It also

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<sup>1</sup> Public Utility Code (Code), 66 Pa.C.S. § 101-3316.

explained that the Complainant bears the burden of proof to establish that the Respondent violated its tariff, the Code or a Commission Order or regulation, and that he is entitled to the relief requested in the Complaint.

On November 8, 2022, the Complainant contacted my office via telephone and informed my legal assistant that he had undergone surgery and was recuperating in a nursing facility. Although he did not explicitly request a continuance, he stated that he probably would be unable to participate in the hearing scheduled for Tuesday, November 22, 2022.

On November 9, 2022, my legal assistant contacted Mr. Johnson to determine if he wished to request a continuance and, if so, whether he could submit a written request as directed by the Notice of Hearing and Prehearing Order. The Complainant did not request a continuance and indicated to my legal assistant that he could try to participate in the hearing from the nursing facility.

Shortly after the conversation between Mr. Johnson and my legal assistant, a document on the letterhead of Providence Rehabilitation & Healthcare Center signed by Amiran Guerrero, Director of Social Service sent via facsimile was received by my office. The document described Mr. Johnson's medical condition. It also indicated that "due to his current condition, Mr. Johnson does not have a discharge date [and] not having a discharge date Mr. Johnson will not be able to attend his court hearing." The document did not indicate an anticipated discharge date. There is nothing in the record indicating that the person sending the document is an attorney authorized to represent Mr. Johnson as counsel in this matter<sup>2</sup> or otherwise authorized to represent Mr. Johnson in any other legal capacity. Moreover, Mr. Johnson did not change the contact information he provided when filing the Complaint i.e.,

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<sup>2</sup> Commission regulations provide that individuals may represent themselves in Commission proceedings; however, . . . an attorney licensed to practice law in Pennsylvania or admitted *pro hac vice* . . . may represent someone else. Any attorney representing a party must file a written notice of appearance with the Secretary of the Commission. 52 Pa. Code §§ 1.21-1.23. There is no indication in the record that Mr. Johnson was represented by counsel in this matter.

address or telephone number.<sup>3</sup> In the absence of a valid request for a continuance by the Complainant or his authorized representative, the hearing schedule was not changed.

The above information was communicated by my legal assistant to counsel for PECO via e-mail on November 9, 2022. The same information was also communicated to Mr. Johnson by a letter dated November 10, 2022, sent via US Mail.<sup>4</sup>

The hearing convened as scheduled on November 22, 2022, at 10:00 a.m. Counsel for PECO and a PECO witness called into the hearing and were prepared to proceed. Mr. Johnson was not present. In light of the Complainant's absence, the hearing was recessed for 10 minutes to allow the Complainant additional time to appear. When the hearing was reconvened at 10:10 a.m., the Complainant still had not appeared for the hearing nor had he contacted my office to indicate that he would or would not appear.<sup>5</sup> Mr. Johnson has not contacted my office to explain his failure to appear at the hearing.

No witnesses were presented, and no exhibits were introduced into the record. Respondent's counsel moved that the Complaint be dismissed for lack of prosecution pursuant to 52 Pa. Code § 5.245. In accordance with Commission policy, I am granting the Motion.

The record closed on November 22, 2022, at the conclusion of the hearing.

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<sup>3</sup> The Complaint advises that: "It is your responsibility to update the Commission with any changes to your address and to where you want documents mailed to you." (Emphasis in original.)

<sup>4</sup> The Complaint indicated that Mr. Johnson does not have an e-mail address.

<sup>5</sup> The hearing concluded at 10:23 a.m. After the conclusion of the hearing, I received an e-mail from a legal assistant in my office indicating that "around 10:20" she had received a call from a woman asking how to call into the hearing. The call-in information was provided. Shortly thereafter, the same person called again stating that: there was no one on the line, Mr. Johnson would undergo surgery later that day and a continuance was necessary. The caller did not identify herself, state her relationship to the Complainant or otherwise provide any information suggesting that she was authorized to act on the Complainant's behalf. In light of the timing of the request, the lack of any proof of authorization to make the request on the Complainant's behalf, and the failure to make the request in accordance with the terms of the Notice of Hearing and the Prehearing Order the request was not granted.

## FINDINGS OF FACT

1. The Complainant is Norman Johnson.
2. The Respondent is PECO Energy Company.
3. On June 29, 2022, Norman Johnson filed a Formal Complaint with the Commission against PECO.
4. On July 20, 2022, the Respondent filed an Answer and New Matter to the Formal Complaint.
5. By Initial Telephonic Hearing Notice dated September 26, 2022, a call-in telephonic hearing was scheduled for November 22, 2022, at 10:00 a.m.
6. On September 26, 2022, I issued a Prehearing Order that also advised the parties of the date and time of the scheduled hearing.
7. The Hearing Notice and the Prehearing Order were served upon the Complainant via US Mail at the address he provided to the Commission.
8. Neither the Hearing Notice nor the Prehearing Order served upon the Complainant was returned to the Commission as undeliverable.
9. On November 22, 2022, counsel for PECO and a witness appeared and were prepared to proceed with the scheduled hearing in this matter.
10. The Complainant did not call in to the hearing at the designated date and time as instructed on the Hearing Notice and the Prehearing Order.

11. A recess was taken to allow Mr. Johnson or a representative an opportunity to call-in; however, neither he nor a representative called into the hearing by the time the hearing adjourned at 10:23 a.m.

12. The Complainant has not contacted the Commission to explain his failure to appear at the hearing.

### DISCUSSION

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984). However, this due process requirement is satisfied when the parties are provided notice and the opportunity to appear and be heard. *Id.* The Complainant had adequate notice of the time and date of the hearing, yet he failed to appear or explain why he could not attend the hearing at the scheduled time. Therefore, it is appropriate to dismiss the Complaint.

The Commission served notice of the November 22, 2022, hearing in this case to the Complainant on September 26, 2022, via US Mail, to the address he provided in his Complaint. The notice informed the parties of the date and time of the hearing, as well as how to call in for the hearing. To my knowledge the notice was not returned as undeliverable.

In addition, I issued a Prehearing Order dated September 26, 2022, which, *inter alia*, warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to appear and participate in the hearing. The Prehearing Notice was also served to the Complainant on September 26, 2022, via US Mail, to the address he provided in his Complaint. The Prehearing Order was never returned as undeliverable. Moreover, by contacting my office to discuss his participation in the hearing, Mr. Johnson demonstrated that he had received the Notice of Hearing and Prehearing Order and was aware of the scheduled hearing.

Accordingly, it may be presumed that these documents, which were sent in the ordinary course of business, were received by the Complainant. *See Berkowitz v. Mayflower*

*Sec., Inc.*, 317 A.2d 584 (Pa. 1974); *Chartiers Indus. & Com. Dev. Auth. v. Allegheny Cnty. Bd. of Prop. Assessment Appeals & Review*, 645 A.2d 944 (Pa. Cmwlth. 1994), appeal denied, 653 A.2d 1234 (Pa. 1994); *Geary v. Verizon Pa. Inc.*, Docket No. C-2009-2118625 (Opinion and Order entered Sept. 16, 2010).

A customer who files a complaint before the Commission has an affirmative duty to make himself or herself available to participate in hearings on the complaint. *Mumma v. PPL Elec. Utils. Corp.*, Docket No. C-00014869 (Opinion and Order entered Jan. 28, 2002); *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993). The Complainant did not call in for the scheduled hearing on November 22, 2022.

Commission regulations address circumstances when a party fails to appear in a proceeding. Section 5.245 provides:

**§ 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).

By failing to participate and proffer any evidence to support his Complaint, the Complainant has failed to meet his burden. Under the circumstances, it appears the Complainant had ample opportunity to appear and be heard in this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of the Complainant have

been fully protected. *Sentner v. Bell Tel. Co. of Pa.* Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993); 52 Pa. Code § 5.245(a).

Finally, Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of any request for relief. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). The Complainant did not appear for the hearing scheduled for November 22, 2022. Thus, by his failure to appear, Complainant did not meet his burden of proof.

Consequently, it is appropriate to grant PECO's motion to dismiss the Complaint<sup>6</sup> and to dismiss Mr. Johnson's Complaint. As the Commission has explained, where the complainant fails to appear for a scheduled hearing without good cause, the public interest is prejudiced by the wasteful use of the agency's and the respondent's time and resources. *See, e.g., Elliott v. Pa. Elec. Co.*, F-618-3003502 (Opinion and Order entered Feb. 6, 2020).

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of the dispute. 66 Pa.C.S. § 701.
2. The party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).
3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

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<sup>6</sup> PECO did not request that the dismissal be with prejudice; hence, this decision grants PECO's motion as made by PECO. Tr. 10.

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

5. After being notified, a party who fails to appear at a scheduled conference or hearing in a proceeding shall be deemed to have waived the opportunity to participate in the conference or hearing, not be permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing, and not be permitted to recall excused witnesses. 52 Pa. Code § 5.245(a).

6. The due process rights of the Complainant have been fully protected. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

7. As the party seeking relief, Complainant bears the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a).

8. By failing to appear for the hearing and proffer any evidence to support the Complaint, the Complainant has failed to meet his burden of proving that he is entitled to the relief that he seeks from the Commission. 66 Pa.C.S. § 332(a).

9. The Respondent's Motion that the Complaint be dismissed for lack of prosecution may be granted. 52 Pa. Code § 5.245

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss the Complaint of Norman Johnson at Docket No. C-2022-3033484 for lack of prosecution is granted.
2. That the Complaint filed by Norman Johnson at Norman Johnson v. PECO Energy Company, Docket C-2022-3033484, is dismissed.
3. That the Secretary mark the proceeding at Docket No. C-2022-3033484 closed.

Date: February 2, 2023

\_\_\_\_\_/s/\_\_\_\_\_  
Arlene Ashton  
Administrative Law Judge