

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

Public Meeting held April 20, 2023

Commissioners Present:

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

Leona McCarthy

C-2018-3000472

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 Leona McCarthy (Complainant), on September 17, 2018, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Angela T. Jones, which was issued on August 29, 2018. Philadelphia Gas Works (PGW or the Company) filed its Reply to Exceptions on

September 26, 2018.¹ For the reasons stated below, we shall deny the Exceptions of the Complainant and dismiss the Formal Complaint (Complaint).

I. History of the Proceeding

On March 13, 2018, the Complainant filed the instant Complaint with the Commission against PGW. The Complainant alleged that PGW was threatening or had already terminated her gas service and requested a payment arrangement. Complaint at 2-3.

On April 4, 2018, PGW filed an Answer which admitted, in part, and denied, in part, various material allegations of the Complaint. PGW averred that the Complainant defaulted on a payment arrangement issued by the Commission on May 7, 2013. PGW's Answer included an exhibit which referenced the Commission's Bureau of Consumer Services (BCS) written decision at Case No. 3542897 issued on December 12, 2017, which denied a payment arrangement requested by the Complainant because a previous Commission-issued payment arrangement was not satisfied. PGW requested that the Commission find against the Complainant and dismiss the Complaint. Answer at 1-2.

¹ On September 18, 2018, 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 28, 2018, to file its Reply Exceptions. Based upon our review of the Commission's case management system, InfoMAP, this case was recently re-opened to address the Exceptions; it is not clear why the case was previously closed prior to the Commission addressing Exceptions.

By Hearing Notice dated April 6, 2018,² an initial hearing was scheduled for May 22, 2018, at 9:30 a.m., and the matter was assigned to the ALJ.³ The Hearing Notice advised the Parties of the date, time, and location of the scheduled hearing and warned of the consequences of failing to appear, which includes the dismissal of the case if a Party is not present and prepared to go forward with the case when it is called. Hearing Notice at 1-2.

On April 9, 2018, the ALJ issued a Prehearing Order which reminded the Parties of the date, time, and location for the scheduled hearing. The Prehearing Order informed the Parties about the applicable procedural rules and guidelines for the proceeding, including the procedure to request a change of the scheduled hearing date. Furthermore, the Prehearing Order warned of the consequences of a Party failing to appear; specifically, that a Party may lose the case if it does not take part in the hearing and present evidence on the issue raised. Prehearing Order at 1-2.

The evidentiary hearing convened on May 22, 2018. Counsel for PGW was present along with one potential witness. The Complainant did not appear. Also, the Complainant did not communicate a reasonable excuse as to why she was unable to appear timely. Counsel for PGW moved to dismiss the Complaint with prejudice. The ALJ stated that she would rule on the motion in writing and adjourned the hearing. I.D. at 2-3.

² The Commission's case management system, InfoMAP, shows that the Hearing Notice was added to the case on April 11, 2018.

³ This matter was scheduled in call-of-the-docket fashion where multiple cases are scheduled for the same date and time and the presiding officer calls each case and hears the complaints in succession.

The record closed on June 25, 2018, upon the ALJ's receipt of the seven-page transcript. At the time of the issuance of the ALJ's Initial Decision, there had been no further communication from the Complainant. I.D. at 3.

On August 29, 2018, the Commission issued the Initial Decision of ALJ Jones which dismissed the Complaint for failure of the Complainant to appear at the hearing and prosecute the Complaint. I.D. at 1, 7, 9.

As noted, *supra*, the Complainant filed Exceptions on September 17, 2018. PGW filed its Reply to Exceptions on September 26, 2018.

II. Discussion

A. Legal Standards

1. Due Process

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

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); *see also, e.g., Charles Nichols III v. Bell-Atlantic-Pennsylvania*, Docket No. C-00956667 (Order entered August 4, 1995).

2. Burden of Proof

As the party seeking affirmative relief from the Commission, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code). 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant, as the party seeking relief, must show that PGW 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 PGW. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. 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).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, to rebut the evidence of the Complainant, shifts to PGW. If the evidence presented by PGW is of

co-equal weight, the Complainant has not satisfied her burden of proof. The Complainant now has to provide some additional evidence to rebut that of PGW. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

B. Initial Decision

The ALJ made nine Findings of Fact and reached eight Conclusions of Law. I.D. at 3-4, 7-8. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

In dismissing the Complaint, the ALJ found that the Complainant was unable to sustain her burden of proof because she failed to participate in the hearing. The ALJ stated that the Commission sent a Hearing Notice to the Complainant and the ALJ issued a Prehearing Order, both mailed to the Complainant at the address shown on the Complaint, but which were never returned as undeliverable. Therefore, the ALJ presumed that the mailings, done through the ordinary course of business, were received by the Complainant. Accordingly, the ALJ concluded that the Complainant is deemed to have received these documents and had sufficient notice of the day, date, and time of the scheduled hearing, as well as how to contact the ALJ. The ALJ stated that the Complainant made no attempt whatsoever to notify the presiding officer that she did not plan to participate in the scheduled hearing, and the ALJ concluded that the Complainant

had ample opportunity to appear and be heard in this proceeding but chose not to do so. I.D. at 4-6.

Furthermore, the ALJ found that the failure of the Complainant to appear at the scheduled hearing is unexcused; therefore, the Complainant failed to sustain her burden of proof. Concluding that the Complainant's due process rights were protected in this matter, and that the Complainant waived the opportunity to participate in the hearing by failing to appear, the ALJ dismissed the Complaint with prejudice. *Id.* at 6-7.

C. Exceptions⁴ and Reply to Exceptions

The Complainant's Exceptions consist of a one-paragraph handwritten letter. The Complainant states that enclosed with the Exceptions is a copy of the decision of her informal complaint with the Commission against PGW dated December 11, 2017. The Complainant avers that this decision states that PGW reported that the Complainant is eligible for another payment arrangement, but PGW refused to give her another payment arrangement when she made several calls to PGW between December 2017 and May 2018. The Complainant requests that the Commission establish a payment arrangement with PGW consistent with the attached decision of her informal complaint. Exc. at 1.

In its Reply to Exceptions, PGW argues that the Complainant's Exceptions fail to address any error in fact or law contained in the Initial Decision refuting the conclusions that the Complainant failed to sustain her burden of proving that she was

⁴ We note that the format of the Exceptions does not strictly comply with Section 5.533(b) of our Regulations, which requires that each exception be numbered and identify the finding of fact and conclusion of law to which exception is taken and cite to the relevant pages of the Initial Decision. 52 Pa. Code § 5.533(b). Nevertheless, recognizing that the Complainant is appearing *pro se*, we will accept the Exceptions as filed, pursuant to Section 1.2(a) of our Regulations, and consider the merits.

entitled to a payment arrangement from the Commission and that she waived the opportunity to participate in the hearing by failing to appear. Moreover, PGW contends that the Exceptions fail to address the Complainant's failure to appear at the evidentiary hearing to prosecute her Complaint. Finally, PGW avers that the record of this matter clearly indicates that the Complainant received the Hearing Notice as well as the Prehearing Order but failed to appear to prosecute her Complaint even though the administrative hearing was still in session over five hours after the time the Complainant was originally scheduled to appear. PGW requests that the Commission deny the Complainant's Exceptions and adopt the ALJ's Initial Decision. R. Exc. at 2.

D. Disposition

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate 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); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

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 the Complainant's due process rights to notice and opportunity to be heard were accommodated and preserved throughout the underlying proceeding. The Hearing Notice dated April 6, 2018, advised the Parties of the date, time, and location of the scheduled hearing and warned of the consequences of failing to appear:

Attention: You must be available in the hearing room when your case is called by the presiding Administrative Law Judge. If you are not present and prepared to go forward with your case when it is called, your case will be dismissed by the Administrative Law Judge.

Hearing Notice at 1-2 (emphasis in original).

In addition, the Prehearing Order issued by the ALJ on April 9, 2018, again reminded the Parties of the date, time, and location for the scheduled hearing. The Prehearing Order also included the following warning to the Parties for failing to appear:

3. YOU MAY LOSE THIS CASE IF YOU DO NOT TAKE PART IN THE HEARING AND PRESENT EVIDENCE ON THE ISSUE RAISED.

Prehearing Order at 1-2 (emphasis in original).

The ALJ correctly found that both the Hearing Notice and the Prehearing Order were served on the Complainant, and neither was returned as undeliverable.

Further, at no time did the Complainant claim that she did not receive these documents or that they were erroneously served. These documents advised the Parties of the date, time, and location of the scheduled hearing, contained instructions on how to contact the ALJ and proceed during the hearing, and informed the Parties how to request a change of the scheduled hearing date. Importantly, each of these documents also identified that the Complainant could lose the case through dismissal as a consequence of failing to appear.

We find that the Complainant had notice and was reminded of the scheduled hearing date on several different occasions. The Complainant failed to appear for the hearing and prosecute her Complaint, nor did she make any attempt to notify the ALJ that she did not plan to participate in the scheduled hearing. The Complainant's due process rights have been preserved and protected.

The ALJ also properly found that, having been provided notice and an opportunity to be heard, but failing to appear and proffer any evidence to support the Complaint, the Complainant failed to meet her burden of proof. We agree with the ALJ's conclusion that the failure of the Complainant to appear at the scheduled hearing is unexcused, and that by failing to attend the hearing and present evidence on the issue raised, the Complainant failed to sustain her burden of proof. Furthermore, we note that the Complainant's Exceptions did not provide any reason for her failure to appear and prosecute her case.

For the reasons set forth above, we agree with the ALJ that the Complainant waived the opportunity to participate in the hearing by failing to appear. By failing to appear and offer evidence to support her Complaint, the Complainant has failed to meet the burden of proof that is placed on her under the Code to satisfy her request for

relief. Consequently, the ALJ's decision to dismiss the Complaint is affirmed.⁵ Accordingly, the Complainant's Exceptions shall be denied.

III. Conclusion

Based on our review of the Exceptions and the Initial Decision, we shall deny the Exceptions of Leona McCarthy and adopt the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Leona McCarthy, filed on September 17, 2018, to the Initial Decision of Administrative Law Judge Angela T. Jones are denied, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Angela T. Jones, issued on August 29, 2018, is adopted, consistent with this Opinion and Order.
3. That the Formal Complaint filed by Leona McCarthy on March 13, 2018, against Philadelphia Gas Works at Docket No. C-2018-3000472, is denied, and dismissed with prejudice, consistent with this Opinion and Order.

⁵ Since the Complainant failed to appear and participate in the scheduled hearing, the ALJ dismissed this Complaint with prejudice. *See Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995); *El-Ayazra v. West Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa. Code § 5.245.

4. That this proceeding be marked closed.

BY THE COMMISSION,

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

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: April 20, 2023

ORDER ENTERED: April 20, 2023