

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joseph Psut	:	
	:	
v.	:	C-2022-3035383
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Arlene Ashton
Administrative Law Judge

INTRODUCTION

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

HISTORY OF THE PROCEEDING

On September 19, 2022, Joseph Psut (the Complainant or Mr. Psut) filed a Formal Complaint (Complaint) against PECO Energy Company (PECO or the Respondent) with the Pennsylvania Public Utility Commission (Commission). On the Complaint form, the Complainant checked boxes indicating that the utility is threatening to shut off or had already shut off his electric service, that he would like a payment agreement, and that he would like PECO to inspect his home for faulty wiring because his bills are too high.

On October 6, 2022, the Respondent filed an Answer with New Matter denying all material allegations of fact in the Complaint. PECO averred that the Complainant has a delinquent balance on his account, for which PECO may terminate service under Section 1406 of the Public

Utility Code (the Code).¹ The Respondent also averred that the Complainant had defaulted on two payment agreements with PECO and that he is not entitled to a Commission-issued payment agreement under the Code.² Furthermore, the Respondent averred that the bills and balance on the Complainant's account are correct. In New Matter, the Respondent averred that the Complainant's entire balance is comprised of Customer Assistance Program (CAP) arrears and, therefore, the Commission has no jurisdiction to give the Complainant a payment agreement.³

Respondent's Answer and New Matter was endorsed with a Notice to Plead notifying the Complainant that if he did not file a written response answering the New Matter within 20 days of the date of service, the facts set forth in the New Matter may be deemed to be true. The Notice to Plead also provided instructions on how to file a reply to New Matter with the Commission. Mr. Psut did not file a written response answering the New Matter.

By Hearing Notice dated December 27, 2022, a call-in telephonic hearing was scheduled for January 31, 2023, 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 December 29, 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 and directed that a request to change the scheduled hearing should be

¹ 66 Pa.C.S. § 1406.

² Citing 66 Pa. C.S. §1405 (c), (d).

³ Citing 66. Pa.C.S. §1405 (c).

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. It warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to attend the hearing. It also explained that the Complainant bears the burden of proof to establish that the Respondent violated its tariff, the Public Utility Code,⁴ or a Commission Order or regulation, and that Complainant is entitled to the relief requested in the Complaint.

The Hearing Notice and Prehearing Order were electronically served to Complainant in the ordinary course of the Commission's business to the email address he provided to the Commission. Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as undeliverable.

The hearing convened as scheduled on January 31, 2023. Counsel for PECO was present with two witnesses and was prepared to proceed. Mr. Psut was not present. In light of the Complainant's absence, the hearing was recessed for approximately 10 minutes to allow the Complainant additional time to appear. When the hearing reconvened at 10:15 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.

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

The record closed at the conclusion of the hearing pursuant to 52 Pa. Code § 5.431(a) (providing that the record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission).

⁴ Public Utility Code (Code), 66 Pa.C.S. §§ 101–3316.

FINDINGS OF FACT

1. The Complainant is Joseph Psut.
2. The Respondent is PECO Energy Company.
3. On September 19, 2022, Mr. Psut filed a Formal Complaint with the Commission against PECO Energy Company.
4. On October 6, 2022, Respondent timely filed an Answer and New Matter to the Complaint.
5. By Initial Telephonic Hearing Notice dated December 27, 2022, a call-in telephonic hearing was scheduled for January 31, 2023, at 10:00 a.m.
6. On December 29, 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 electronically served upon the Complainant at the email address he provided to the Commission.
8. Neither the Hearing Notice nor the Prehearing Order served upon the Complainant were returned to the Commission as undeliverable.
9. On January 31, 2023, counsel for PECO and two witnesses 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. Psut or his representative an opportunity to call-in.

12. The hearing was reconvened at 10:15 a.m., however, neither the Complainant nor a representative called into the hearing by the time the hearing adjourned at 10:18 a.m.

13. The Complainant has not contacted the Commission to explain why his failure to appear at the hearing was unavoidable.

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). 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.

On December 27, 2022, the Commission electronically served notice of the January 31, 2023, hearing in this case to the Complainant, to the email 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. The notice was not returned as undeliverable.

In addition, I issued a Prehearing Order dated December 29, 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 Order, which was also served on the Complainant electronically at the email address he provided to the Commission, was not returned as undeliverable. Accordingly, I must presume that these documents, which were sent in the ordinary course of business, were received by the Complainant. *See Hu v. PECO Energy Co.*, Docket No. C-2019-3012075 (Order entered

Dec. 19, 2019); *Zirkel v. Phila. Gas Works*, Docket No. C-2016-2561176 (Final Order entered Jan. 27, 2017); *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered Nov. 16, 2016).

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 January 31, 2023.

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 preserved. *Sentner v. Bell Tel. Co. of Pa.* Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993).

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. As the party bringing this Complaint, the Complainant bears the burden of proving by a preponderance of the evidence that he is entitled to his requested relief. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). The Complainant did not appear for the hearing scheduled for January 31, 2023. Thus, by his failure to appear, Complainant did not meet his burden of proof.

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-2018-3003502 (Opinion and Order entered Feb. 6, 2020). Moreover, the party who failed to appear at the hearing has the burden of explaining why his/her failure to appear was unavoidable. 66 Pa.C.S. § 332(a); *Herr v. West Penn Power Co.*, Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022). When there are no facts in the record that the party's failure to appear was unavoidable, the complaint should be dismissed with prejudice. *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered Apr. 22, 2022); *Williams v. PECO Energy Co.*, Docket No. C-2018-300734 (Opinion and Order entered Mar. 14, 2019) (citing *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995)).⁵ Consequently, while PECO's motion to dismiss Mr. Psut's Complaint will be granted, the Complaint will be dismissed without prejudice.⁶

Accordingly, Respondent's Motion to dismiss the complaint will be granted.

⁵ Notwithstanding the aforementioned, on April 20, 2023 the Commission adopted an order that determined it is inconsistent with due process to dismiss a formal complaint with prejudice in which a pro se complainant fails to appear at a hearing when complainant has not affirmatively agreed to accept service via email. *Hoyt v. Columbia Gas of Pa., Inc.*, Docket No. F-2022-3032680 (Order adopted Apr. 20, 2023).

⁶ *Id.*

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).
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. The due process rights of the Complainant have been fully preserved. *Sentner v. Bell Tel. Co. of Pa.* Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993).
6. After being notified, a party who fails to appear at a scheduled conference or hearing shall be deemed to have waived the opportunity to participate in the hearing, not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).
7. 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).

8. 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 Joseph Psut at Docket No. C-2022-3033882, for lack of prosecution is granted.

2. That the Complaint of Joseph Psut at Joseph Psut v. PECO Energy Company at Docket C-2022-3035383, is dismissed, without prejudice.

3. That the Secretary mark the proceeding at Docket C-2022-3035383 closed.

Date: April 28, 2023

/s/

Arlene Ashton
Administrative Law Judge