

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Lashawn Lucke	:	
	:	
v.	:	C-2022-3036581
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint of Lashawn Lucke due to the Complainant’s failure to appear at the initial hearing and to prosecute his Complaint. For the reasons set forth herein, the Decision also dismisses the Motion for Summary Judgment filed by PPL Electric Utilities Corporations and denies PPL’s request that the Complaint be dismissed with prejudice.

HISTORY OF THE PROCEEDING

On November 4, 2022, the Complainant, Lashawn Lucke (Complainant), filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission against PPL Electric Utilities Corporation (PPL or Respondent). Complainant stated that he has been denied a payment arrangement in an informal complaint,¹ stated that PPL was threatening to disconnect his electric service, and he requested a payment arrangement.

¹ Identified by PPL in its Answer as BCS Case No. 3738903.

On November 28, 2022, PPL filed an Answer to the Complaint. In its Answer, PPL stated that it had sent a disconnection notice to Complainant for payment delinquency but denied all other allegations.

On December 5, 2022, the Commission sent to the parties a telephonic hearing notice by which it scheduled an initial telephonic hearing for January 31, 2023, at 10:00 a.m., and assigned me as the Presiding Officer.

On December 14, 2022, I issued a prehearing Order in which I set forth certain procedural requirements pertaining to the hearing. The prehearing Order also provided the date and time of the hearing. The prehearing Order stated, “You may lose this case if you do not take part in this hearing and present evidence on the issues raised.”

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

On January 10, 2023, PPL filed a Motion for Summary Judgment, properly endorsed with a Notice to Plead, asserting that Complainant’s account had been terminated, leaving the Commission without authority to consider Complainant’s case. An Answer or responsive pleading to the Motion was due from Complainant by January 30, 2023, the day before the evidentiary hearing.

The hearing convened, as scheduled, at 10:00 a.m. on January 31, 2023. Nicholas A. Stobbe, Esquire appeared on behalf of PPL. Complainant did not appear. Accordingly, the hearing proceeded in his absence. PPL’s counsel moved to dismiss the Complaint due to the Complainant’s failure to appear at the hearing and prosecute his case.

The hearing concluded and a transcript of ten pages was filed on February 17, 2023. The record closed on that date. This Initial Decision grants PPL’s Motion to Dismiss the

Complaint for failure to appear and to prosecute the same, denies the Motion for Summary Judgment, and denies PPL's request that the Complaint be dismissed with prejudice.

FINDINGS OF FACT

1. The Complainant in this proceeding is Lashawn Lucke.
2. The Respondent in this proceeding is PPL Electric Utilities Corporation.
3. On November 4, 2022, Complainant filed a Formal Complaint against PPL.
4. On November 28, 2022, PPL filed an Answer in which it denied the allegations in the Complainant.
5. On December 14, 2022, a standard form prehearing Order was issued.
6. The Hearing Notice and the Prehearing Order were electronically served upon the Complainant at the email address provided by the Complainant.
7. Neither the Hearing Notice nor the Prehearing Order served upon the Complainant were returned to the Commission as undeliverable.
8. On January 10, 2023, PPL filed a Motion for Summary Judgment, properly endorsed with a Notice to Plead.
9. The Complainant failed to appear at the scheduled date and time for the hearing.
10. The Complainant did not file an Answer to the Motion for Summary Judgment.

11. Complainant failed to appear at the hearing on January 31, 2023.

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

DISCUSSION

Disposition of PPL's Motion to Dismiss

Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a). "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). As the party seeking relief from the Commission, Mr. Lucke bears the burden of proof in this case.

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 with notice and an opportunity to be heard. *Id.*

The hearing Notice and the prehearing Order were served electronically upon Mr. Lucke at the email address provided by him on his Complaint form.² Neither document was returned to the Commission as undeliverable. Accordingly, it must be presumed that the documents sent to the Complainant in the ordinary course of business were received by him. *See Hu v. PECO Energy Co.*, Docket No. C-2019-3012075 (Order entered Dec. 19, 2019); *Zirkel v.*

² Service was made in accordance with *Waiver of Regulations Regarding Service Requirements*, Docket No. M-2021-3028321 (Order entered Sept. 15, 2022) (This Order extended the waiver of service requirements first adopted in September 2021 and extended in March 2022. These Orders permitted electronic service by the Commission on all parties, regardless of whether a particular party had agreed to electronic service) (*September 2022 Order*); *See Waiver of Regulations Regarding Service Requirements*, M-2021-3028321 (Order entered Sept. 15, 2021); *See also Waiver of Regulations Regarding Service Requirements*, Docket No. M-2021-3028321 (Order entered March 10, 2021).

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). As noted above, the prehearing Order stated that the parties may lose the case if they fail to appear and present evidence on the issues raised. No request for a postponement or continuance of the hearing was received by my office. Mr. Lucke had notice of the hearing and an opportunity to be heard in this proceeding but chose not to appear. Therefore, the Complainant's due process rights have been fully preserved. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993); see also, 52 Pa. Code § 5.245(a).³

No one appeared on behalf of Mr. Lucke on the date and at time set for the hearing in his case, despite notice of the hearing having been sent to him at the email address provided by him.

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 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).

³ I also note that Counsel for PPL made repeated attempts by email and voicemail to contact Complainant to confirm with him the date of the hearing. Complainant made no response to Counsel. Tr. at 3-4.

By failing to appear and present any evidence in support of his Complaint, Mr. Lucke failed to carry his burden. PPL's Motion to Dismiss the Complaint is, therefore, granted on the basis of failure by the Complainant to appear and to prosecute the Complaint.

Disposition of PPL's Motion for Summary Judgment

This case is, however, somewhat procedurally complicated by the filing of a Motion for Summary Judgment by PPL. Counsel for PPL did not renew that Motion at hearing, but neither did he withdraw it.⁴ PPL's Motion to Dismiss did not render the Motion for Summary Judgment moot; thus, some resolution must be had for that Motion.

In his Complaint, Mr. Lucke averred that PPL was threatening to disconnect his electric service and stated that he had been denied a payment arrangement in an informal complaint proceeding and was renewing his request in the Formal Complaint.

In its Motion for Summary Judgment, PPL asserted that that Complainant's case was beyond the authority of the Commission to consider as Complainant's account with PPL was closed and had terminated and that service at the address had been placed in another person's name.⁵ Motion for Summary Judgment at 5, ¶ 11.

Complainant did not file an Answer or any responsive pleading to the PPL Motion.⁶

Respondent's Motion for Summary Judgment is subject to the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Chapters 1, 3 and 5, providing for the filing of motions for judgment on the pleadings. In particular, Section 5.102 of the Commission's Rules provides in pertinent part:

⁴ This is a factual statement, not a criticism of Counsel.

⁵ PPL had also raised this contention in its Answer to the Complaint. Answer at 2, ¶ 4.

⁶ The PPL Motion for Summary Judgment was not ruled on prior to hearing as the period for filing and Answer to the Motion only expired the day before the hearing. The hearing was held, in part, to afford Complainant an opportunity to reply to the Motion, but Complainant did not appear.

§ 5.102 Motions for summary judgment and judgment on the pleadings.

(a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

(b) *Answers.* An answer to a motion for judgment on the pleadings or summary judgment, including an opposing affidavit or verification to a motion for summary judgment, may be filed within 20 days of the date of service of the motion...

(d) *Decisions on motions.*

(1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

52 Pa. Code § 5.102(a), (b), (d)(1).

For a court to grant a motion for judgment on the pleadings, the record must show that no facts are at issue and that the law is so clear that a trial would be a fruitless exercise. All of the opposing party's well-pleaded allegations are viewed as true but only those facts admitted by him may be considered against him. 496 A.2d 1373 (Pa. Cmwlth. 1985) (*Beardell*). In short, in order for Respondent's Motion to be granted, no material facts may be at issue, and based upon those facts Respondent must be entitled to a judgment as a matter of law.

Complainant had multiple opportunities to contest the PPL Motion for Summary Judgment, he but failed to do so. Complainant did not file an Answer or responsive pleading to the Motion.

In its Motion, PPL asserted that Complainant has not been a customer of PPL since November 4, 2022. PPL Motion for Summary Judgment at 6, ¶ 16. PPL correctly maintains that it is well-established that non-customers are not entitled to payment agreements with a public utility. *See Reynolds v. Phila. Gas Works*, Docket No. C-2010-2195218 (Final Order entered Mar. 1, 2012). So, the Complaint must be dismissed because Complainant is not entitled to have a payment agreement as a non-customer. PPL Motion for Summary Judgment at 6, ¶ 18. Although not contested, the averment in PPL's Answer and Motion for Summary Judgment that Complainant's account has been terminated does not constitute an evidentiary basis upon which to grant the Motion for Summary Judgment.⁷

PPL also argues that:

The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993).

PPL Motion for Summary Judgment at 5, ¶8.

While PPL is correct that the Commission has the discretion to dismiss a complaint without hearing in certain circumstances, the PPL Motion for Summary Judgment rests entirely on the assertion that Complainant's account has been terminated. While I do not doubt PPL's representation about the status of Complainant's account, PPL's assertion and my inclination to

⁷ The Verification attached to the Motion for Summary Judgment is a statement by a PPL employee that the assertions in the Motion for Summary Judgment are true and correct to the best of the knowledge, information and belief of the individual who signed it. Again, while I do not question the veracity of the PPL employee who signed the Verification, this is not the equivalent of sworn testimony or even in the form of a sworn Affidavit, and it does not in and of itself constitute evidence.

believe the assertion does not constitute evidence. Thus, there was, at least potentially, an issue of fact in this matter, and the Motion for Summary Judgment must be denied, Complainant's failure to contest the same notwithstanding.

Disposition of PPL's Request to Dismiss the Complaint with Prejudice

During the hearing, counsel for PPL moved for dismissal of the Complaint for lack of prosecution and asked that the dismissal be made with prejudice. See, *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered Dec. 26, 1995). On the date of the hearing in this case, it was recognized that such a request would ordinarily be granted unless there was some factor that would incline the presiding judge to exercise his or her discretion to decline such a request.

At its Public Meeting on April 20, 2023, the Commission acted on the Motion of Commissioner Kathryn L. Zerfuss, with the majority of the Commissioners voting to adopt the Motion which requires that where, as in this case, a *pro se* complainant has not agreed to eservice from the Secretary of the Commission, that the complainant be afforded an opportunity to file a written request for an evidentiary hearing.⁸ While the Commission's Opinion and Order adopting Commissioner Zerfuss' action has not yet been issued, and while no prohibition has yet been made that the Judges are not to dismiss with prejudice cases similarly situated, I believe that the Commission's intent is clear. In this case, Complainant did not establish an account for eservice, and so his case may not be dismissed with prejudice.⁹ Consequently, while PPL's motion to dismiss Mr. Lucke's Complaint will be granted, the Complaint will be dismissed without prejudice.

⁸ See, *Robert Hoyt v. Columbia Gas of PA, Inc.*, Docket No. F-2022-3032680, Motion of Commissioner Kathryn L. Zerfuss (April 20, 2023).

⁹ I do not interpret the Commissioner's Motion as invalidating the documents filed and served in this case. Rather, the Motion seeks to avoid what may be appealable error by forestalling a Judge from putting a complainant entirely, "out of court," by dismissal of a complaint, "with prejudice," in the context of specific procedural circumstances applicable only during the declared period of the Pandemic.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Section 332(a) of the Public Utility Code provides that 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. Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. This due process requirement is satisfied when the parties are provided with notice and an 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 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 to reopen the disposition of a matter accomplished at the conference or hearing; and 3) not be permitted to recall witnesses who were excused for further examination. 52 Pa. Code § 5.245(a).

6. It is the duty of a party to apprise the Commission promptly of changes to the party's current address. 52 Pa. Code § 1.53(d).

7. Mr. Lucke's due process rights have been fully preserved. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Order entered Oct. 25, 1993); *see also*, 52 Pa. Code § 5.245(a).

8. Mr. Lucke failed to carry his burden of proof in this proceeding.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PPL Electric Utilities Corporation to dismiss the Formal Complaint of Lashawn Lucke at Docket Number C-2022-3036581 for failure to prosecute is granted.
2. That the Motion for Summary Judgment made by PPL Electric Utilities Corporation at Docket No. C-2022-3036581 is denied.
3. That the request of PPL Electric Utilities Corporation that the Complaint at Docket No. C-2022-3036581 be dismissed with prejudice is denied.
4. That the Formal Complaint filed by Lashawn Lucke at Lashawn Lucke v. PPL Electric Utilities Corporation, Docket No. C-2022-3036581 is dismissed, without prejudice.
5. That the Secretary of the Commission mark this matter closed.

Date: May 17, 2023

/s/
Dennis J. Buckley
Administrative Law Judge