

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Alan Brainard

v.

West Penn Power Company

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C-2022-3036606

INITIAL DECISION

Before
Michael J. Mroczka
Special Agent

INTRODUCTION

This decision dismisses the Formal Complaint, with prejudice, for the failure of Complainant to appear for the hearing and prosecute the complaint.

HISTORY OF THE PROCEEDING

On November 7, 2022, Alan Brainard (Complainant) filed a Formal Complaint (complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (Respondent or West Penn). The complaint alleges that West Penn is threatening to shut off his service or has already shut off his service and he would like a payment arrangement.

On November 28, 2022, the Respondent filed an answer and new matter in which it denied the material allegations of fact and conclusions of law in the complaint. In its new matter, Respondent alleges that Complainant had a previous Commission-issued payment arrangement which defaulted due to non-payment and therefore is not entitled to a subsequent

Commission-issued payment arrangement. Respondent requested that the complaint be dismissed.

On January 3, 2023, a Call-In Telephone Hearing Notice was served on the parties scheduling an initial telephonic hearing on March 8, 2023 at 1:30 p.m. and the case was assigned to me. The Hearing Notice provided the parties with the Toll-Free Bridge Number and the PIN to call and participate in the telephonic hearing. The Hearing Notice further stated as follows:

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.

You may request a continuance of the hearing if you have a good reason. All continuances will be granted only for good cause. To request a continuance, you must submit a written request (a “motion”) at least five (5) days before the hearing. Your motion should include: 1) The case name, number, and hearing date; 2) The reason for the request; and 3) Whether the other party agrees (or if you do not know).

On January 4, 2023, a Prehearing Order was served on the parties which reminded the parties of the date and time of the hearing. The Prehearing Order again stated the failure to appear warning. Additionally, the Prehearing Order informed the parties about the applicable procedural rules, and again included the procedure to follow for hearing continuances.

The Hearing Notice and Prehearing Order were eServed to the Complainant in the ordinary course of the Commission’s business to the email address that was registered with the Commission by Complainant. Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as undeliverable.

On March 8, 2023, the hearing convened as scheduled. Margaret A. Morris, Esquire, appeared on behalf of Respondent along with one witness and was ready to proceed. The court reporter was also present. Complainant was not present to start the hearing. After a

short recess to allow time for Complainant to appear, the hearing proceeded in Complainant's absence. No testimony was taken, and no exhibits were introduced into the record. At the hearing, Respondent moved to dismiss the complaint with prejudice for Complainant's failure to appear and prosecute his complaint. I took this motion under advisement.

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

The record closed on March 27, 2023, after the receipt of the of the 6-page transcript. This decision grants the Respondent's motion to dismiss the complaint with prejudice.

FINDINGS OF FACT

1. The Complainant is Alan Brainard.
2. The Respondent is West Penn Power Company.
3. On November 7, 2022, Complainant filed a Formal Complaint against Respondent.
4. On November 28, 2022, Respondent filed an answer and new matter to the complaint.
5. On January 3, 2023, a Call-In Telephone Hearing Notice was served on Complainant scheduling an initial telephonic hearing on March 8, 2023, at 1:30 p.m.
6. On January 4, 2023 a Prehearing Order for Telephone Hearing was served on Complainant providing additional information to the parties regarding the hearing.
7. Both the Hearing Notice and Prehearing Order were eServed on Complainant to the email address Complainant registered with and provided to the Commission.

8. Both the Hearing Notice and Prehearing Order provided the Complainant with the toll-free bridge telephone number and PIN to call and participate in the hearing, and, *inter alia*, the procedure for requesting a continuance and the possible consequences of failing to appear at the hearing.

9. Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as undeliverable.

10. Complainant failed to appear and participate in the scheduled telephonic hearing on March 8, 2023.

11. The court reporter, Counsel for Respondent and its witness(es) were present and prepared to proceed at the March 8, 2023 hearing.

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

DISCUSSION

Due Process and Notice

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 be heard. *Id.*

The record shows that Complainant was provided notice and the opportunity to be heard. First, on January 3, 2023, Complainant was served a Hearing Notice which advised the parties of the date and time of the hearing, and how to participate. Second, on January 4, 2023, Complainant was served a Prehearing Order which reminded the parties of the date and time of the hearing, and how to participate. Further, both documents advised the

parties, *inter alia*, how to request a continuance prior to the hearing if needed. Finally, both documents advised Complainant that failure to appear may result in dismissal with prejudice which means that Complainant would be barred from filing another complaint raising the same claim(s) and issues(s) presented in the dismissed complaint.

Both the Hearing Notice and Prehearing Order were eServed to the Complainant at the email address he registered with the Commission. Neither was returned to the Commission as undeliverable. Notice eServed to a party's registered email address with no notification that service failed is presumed to have been received. *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 Apr. 7, 2017); *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered Jan. 31, 2017).

Failure to Appear, Waiver and the "Unavoidable" Standard

Once a hearing is scheduled and the parties are duly notified by the Commission, it is the responsibility of the parties to appear and participate in the hearing. *Mumma v. PPL Elec. Utils. Corp.*, Docket No. C-00014869 (Opinion and Order entered Jan. 24, 2002). Both the Public Utility Code and the Commission's regulations provide that, after being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing and shall not be permitted to later reopen the matter or be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a). However, these provisions in the Code and in the Commission's regulations do not apply if the presiding officer determines that the party's failure to appear at the hearing was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitting the reopening or further examination. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(b).

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. *Armstrong v. Metro. Edison Co.*, Docket No. C-2022-3033882 (Order

entered Apr. 20, 2023); *Long v. UGI Utils. Inc.*, Docket No. C-2022-3035404 (Order entered Apr. 20, 2023); *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered Apr. 22, 2022); *Little v. Pittsburgh Water & Sewer Auth.*, Docket No. F-2021-3027107 (Opinion and Order entered Feb. 7, 2022); *Williams v. PECO Energy Co.*, Docket No. C-2018-3000734 (Opinion and Order entered Mar. 14, 2019); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995); 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

Complainant failed to appear for the hearing despite receiving notice and despite the undersigned allowing additional time for Complainant to appear. To date, there has been no communication to the Office of Administrative Law Judge or me by, or on behalf of, Complainant explaining why Complainant's failure to appear at the hearing was unavoidable.

Consequently, I find that Complainant waived the opportunity to participate in a hearing on the matters raised in the complaint, Complainant's absence was not unavoidable, and the complaint should be dismissed with prejudice.

Burden of Proof and Dismissal of Complaint

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). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the respondent public utility is responsible or accountable for the problem described in the complaint. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa.P.U.C. 196 (1990); *Feinstein v. Phila. Suburban Water Co.*, 50 Pa.P.U.C. 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is established by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

As the proponent of any request for relief, Complainant bears the burden of proof. By failing to participate and proffer any evidence to support the complaint,

Complainant has failed to meet this burden. Thus, it is appropriate to dismiss the complaint. *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)). Accordingly, the merits of the complaint will not be addressed.

Respondent's motion to dismiss, with prejudice, will be granted.

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. The Commission is required to provide due process to the parties appearing before them; 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).

3. Notice eServed to a party's registered email address with no notification that service failed to be delivered to that email address is presumed to have been received. *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 Apr. 7, 2017); *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered Jan. 31, 2017).

4. After being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing and shall not be permitted to later reopen the matter or be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

5. Complainant's due process rights have been fully protected and Complainant's failure to appear was not unavoidable. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984); 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

6. If there are no facts in the record that a party's failure to appear at a hearing was unavoidable, the complaint should be dismissed with prejudice. *Armstrong v. Metro. Edison Co.*, Docket No. C-2022-3033882 (Order entered Apr. 20, 2023); *Long v. UGI Utils. Inc.*, Docket No. C-2022-3035404 (Order entered Apr. 20, 2023); *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered Apr. 22, 2022); *Little v. Pittsburgh Water & Sewer Auth.*, Docket No. F-2021-3027107 (Opinion and Order entered Feb. 7, 2022); *Williams v. PECO Energy Co.*, Docket No. C-2018-3000734 (Opinion and Order entered Mar. 14, 2019); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995).

7. As the party seeking relief, Complainant bears the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

8. By failing to participate in the hearing and proffer any evidence to support the complaint, Complainant has failed to meet the burden of proof. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That West Penn Power Companys' motion to dismiss the Formal Complaint of Alan Brainard at Docket Number C-2022-3036606, is granted.

2. That the Formal Complaint filed by Alan Brainard in Alan Brainard v. West Penn Power Company, Docket Number C-2022-3036606, is hereby dismissed with prejudice.

3. That the Secretary's Bureau shall mark Docket No. C-2022-3036606 as closed.

Date: June 22, 2023

/s/
Michael J. Mroczka
Special Agent