

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Fannie McClendon	:	
	:	
v.	:	C-2022-3036441
	:	
Philadelphia Gas Works	:	

INITIAL DECISION

Before
Arlene Ashton
Administrative Law Judge

INTRODUCTION

This decision dismisses the Formal Complaint of a gas service customer for the failure of the customer to appear for the scheduled hearing and prosecute her complaint despite having notice and an opportunity to be heard.

HISTORY OF THE PROCEEDING

On October 31, 2022, Fannie McClendon (“Ms. McClendon” or “Complainant”) filed a Formal Complaint with the Pennsylvania Public Utility Commission (“Commission”) against Philadelphia Gas Works (“PGW” or “Respondent”). Ms. McClendon alleged, *inter alia*, that PGW was threatening to shut off gas service. As relief, Ms. McClendon requested that her service not be terminated and that she be placed on an affordable payment arrangement.

On November 21, 2022, PGW timely filed an Answer denying the material allegations of fact and conclusions of law in the Formal Complaint. Further, PGW averred, *inter alia*, that proper termination notices were sent to the Complainant, and that the Complainant

defaulted on numerous PGW-issued payment agreements and two Commission-issued payment arrangements.

On November 30, 2022, an Initial Call-In Telephonic Hearing Notice (“Hearing Notice”) was eServed on both parties scheduling a call-in telephonic evidentiary hearing on February 15, 2023, at 10:00 a.m., and assigning me as the presiding officer.¹ The Hearing Notice included the telephone number to call, and the passcode to enter, for the parties to participate in the hearing.

On December 7, 2022, my Prehearing Order was eServed on both parties which, *inter alia*, reminded the parties of the hearing date and time, and the telephone number to call, and the passcode to enter, to participate in the hearing. Additionally, the Prehearing Order provided certain hearing information and rules that would govern the proceeding including how to request a continuance, if necessary, and the consequences of failing to appear at the hearing and present evidence including the dismissal of the Formal Complaint.

Neither the Hearing Notice nor the Prehearing Order served on the Complainant were returned to the Commission as undeliverable.

On February 15, 2023, at 10:00 a.m., the hearing convened as scheduled. Ms. Anita Murray, Esquire, appeared on behalf of PGW, along with a witness, and PGW was prepared to proceed. A court reporter was also present.

¹ Commission records indicate that all pleadings by the parties, including the Formal Complaint and the Answer were filed by eService, the Commission’s electronic filing system. When creating an individual or corporate eService account, the user requests voluntary participation in the electronic filing of documents via the Internet using the Commission’s eFiling system. In addition, the user indicates agreement to the following terms:

By creating this account, notification of filings via electronic mail shall constitute valid service of Commission documents. I understand that such electronic service of any and all documents will be substituted for service by mail. I agree to be served via email with all subsequent filings. I agree that email notices will be sent on the same day the document is posted.

Ms. McClendon was present as well; however, before going on the record, she indicated that she was unable or unwilling to participate in the hearing.²

In light of the Complainant's inability and/or unwillingness to participate in the hearing, counsel to PGW made a motion to continue the hearing for a period of 30 days. The Complainant did not express any opposition to the granting of PGW's motion and the motion was granted. Tr. 24.

On February 16, 2023, I issued an Interim Order Granting PGW's motion for continuance. On February 22, 2023, a Further Hearing Notice was issued and served on the parties establishing a further telephonic hearing in this proceeding for March 22, 2023, at 1:30 p.m.

On March 22, 2023, the hearing convened as scheduled. Attorney Anita Murray appeared on behalf of PGW, along with a witness, and PGW was prepared to proceed. A court reporter was also present. The Complainant failed to appear for the hearing before it was adjourned at 2:13 p.m.³

At the March 22, 2023 Hearing, counsel for PGW moved to dismiss the Formal Complaint without prejudice ("Motion to Dismiss"), citing the Complainant's failure to appear for the hearing to prosecute the Formal Complaint. Tr. 54. I took PGW's Motion to Dismiss under advisement.

The record closed on April 13, 2023, upon receipt of the transcript for the further hearing by the Commission.

This decision grants PGW's Motion to Dismiss without prejudice.

² At the hearing, Complainant's daughter indicated that Complainant is aged, ailing, and suffers from dementia. Tr. 16, 24.

³ Complainant's daughter did appear for the March 22, 2023 hearing. See Discussion *infra*.

FINDINGS OF FACT

1. The Complainant is Fannie McClendon.
2. The Respondent is Philadelphia Gas Works.
3. The Respondent provided gas service to Complainant.
4. On October 21, 2022, Ms. McClendon filed a Formal Complaint with the Commission against the Respondent.
5. On January 19, 2023, Respondent timely filed an Answer to the Formal Complaint.
6. On November 30, 2022, an Initial Call-In Telephonic Hearing Notice was eServed on both parties scheduling an initial telephonic hearing on February 15, 2023, at 10:00 a.m., and assigning me as the presiding officer.
7. On December 7, 2022, a Prehearing Order was eServed on both parties which, *inter alia*, reminded the parties of the date and time of the scheduled hearing and the telephone number to call, and the passcode to enter, to participate in the hearing.
8. Both the Hearing Notice and the Prehearing Order provided certain hearing information and rules that would govern the proceeding including how to request a continuance, if necessary, and the consequences of failing to appear at the hearing and present evidence including the dismissal of the Formal Complaint.
9. Both the Hearing Notice and the Prehearing Order were eServed to the Complainant at the email address she registered with and provided to the Commission.

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

11. On February 15, 2023, the Complainant indicated that she was unwilling or unable to appear and participate in the scheduled hearing.

12. On February 16, 2023, an Interim Order was issued granting the Respondent's request for a continuance.

13. The February 16, 2023, Interim Order, *inter alia*, directed the Complainant to "to seek legal advice on how to proceed in this matter, to fully explore all options available to her, and to resolve any issues relating to her representation and/or participation in the hearing."

14. The February 16, 2023, Interim Order notified the Complainant that the further hearing would proceed as scheduled if she failed to appear at the further hearing, was unable to fully participate in the further hearing, or if she failed to appear for the further hearing with an attorney authorized to represent her in this proceeding.

15. The February 16, 2023, Interim Order advised the parties that the provisions of the Prehearing Order dated December 7, 2022, issued in this matter remain in effect.

16. On February 22, 2023, a Further Hearing Notice was eServed on both parties establishing a further telephonic hearing for this matter for March 22, 2023, at 1:30 p.m.

17. The Further Hearing Notice provided certain hearing information and rules that would govern the proceeding including how to request a continuance, if necessary, and the consequences of failing to appear at the hearing and present evidence including the dismissal of the Formal Complaint.

18. Both the Further Hearing Notice and the February 16, 2023 Interim Order were eServed to the Complainant at the email address she registered with and provided to the Commission.

19. The Further Hearing Notice and the February 16, 2023 Interim Order served on the Complainant were not returned to the Commission as undeliverable.

20. The Complainant failed to appear at the further hearing on March 22, 2023, at 1:30 p.m.

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) (*Schneider*). This due process requirement is satisfied when the parties are provided notice and the opportunity to be heard. *Id.* As the proponent of any request for relief, the 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). Additionally, the Commission's decision must be supported by substantial evidence. 2 Pa.C.S. § 704.

The Commission is required to fix the time and place of a hearing in a complaint proceeding and serve notice thereof upon the parties in interest. 66 Pa.C.S. § 703(a)-(b). Service to interested persons is sufficient to provide notice. 52 Pa. Code § 5.61(a). As the Commission explained, “[i]t is well-established law that once timely notice of a hearing and the opportunity to be heard have been provided, it is the responsibility of the parties to be present and participate in the hearing.” *Mumma v. PGW Elec. Utils. Corp.*, Docket No. C-00014869 at 3 (Opinion and Order entered Jan. 28, 2002) (citing *Schneider*).

In this case, the Hearing Notice scheduled a hearing on March 22, 2023, and included the telephone number to call, and the passcode to enter, for the parties to participate in the hearing. Further, a Prehearing Order was eServed on both parties which, *inter alia*,

reminded the parties of the hearing date and time, and the telephone number, and passcode to enter, to participate in the hearing. Additionally, the Prehearing Order provided certain hearing information and rules that would govern the proceeding including how to request a continuance, if necessary, and the consequences of failing to appear at the hearing and present evidence including the dismissal of the Formal Complaint.

The Hearing Notice, the Further Hearing Notice, the Prehearing Order, and the February 16, 2023 Interim Order were all eServed on the Complainant at the email address she registered with and provided to the Commission. Further, the Hearing Notice, the Further Hearing Notice, the Prehearing Order, and the February 16, 2023 Interim Order were not returned to the Commission as undeliverable.

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, 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). However, neither of these provisions apply if the presiding officer determines that the failure to appear 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 Commission has explained that where a 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.*, No. F-2018-3003502 (Opinion and Order entered Feb. 6, 2020) and the cases cited therein. 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); *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).

In this particular case, the record indicates that Complainant’s failure to appear was unavoidable and that the interests of the other parties and of the public would not be prejudiced by dismissing the Complaint without prejudice. 52 Pa. Code § 5.245(b).

Notwithstanding its ability to seek dismissal of the Complaint with prejudice, PGW moved that the Formal Complaint be dismissed without prejudice. Tr. 54. When making the motion for dismissal, counsel for PGW explained the rationale for doing so as follows: “[in] the event that Ms. Booker does retain legal counsel, she will always have the right to file another complaint with the Public Utility Commission.” Tr. 54. Thus, it appears that the Respondent is apparently willing to devote additional time and resources to a complaint on the same issue, should one be filed by or on behalf of the Complainant.

However, since a dismissal without prejudice in this matter raises the prospect of further proceedings, which would require the Commission to devote addition time and resources to another complaint on the same issue, the record must also show that Complainant’s failure to appear was unavoidable and that the interests of the public would not be prejudiced by dismissing the Complaint without prejudice. 52 Pa. Code § 5.245(b).

The record reflects that the Complainant appeared only very briefly at the initial telephonic hearing for this matter held on February 15, 2023. Tr.15. Ms. McClendon’s entire testimony in this matter consisted of the following exchange:

JUDGE:	The Complainant is present - Ms. McClendon?
MS. MCCLENDON:	Yes.
JUDGE:	Are you able to participate in the hearing today?
MS. MCCLENDON:	No.
JUDGE:	And why is it that you are not able to participate in the hearing?

[Ms. McClendon did not answer]

MS. BOOKER:^[4] You have to answer, mom. Mommy don't [sic] understand.

Tr. 15-16. Subsequently, Ms. Booker explained that her mother was almost 91 years old and has dementia and that "she can hear you . . . she just don't understand everything." Tr. 16, 24. At the February 15, 2023 hearing, Ms. Booker stated that she had acted on behalf of her mother with Ms. McClendon's doctors and some of Ms. McClendon's creditors. However, Ms. Booker also stated that she had not formally been appointed to act as Ms. McClendon's guardian or legal representative in those instances or in this proceeding. Tr. 17. On motion by PGW, a continuance was granted to allow Ms. Booker to assist her mother in obtaining counsel or take other action to address the issues relating to Ms. McClendon's claims against PGW.

Ms. McClendon did not appear or participate in the hearing held on March 22, 2023. Ms. Booker called into the hearing and confirmed that her mother was not physically and mentally able to fully participate in the hearing. Ms. Booker confirmed that neither she nor Ms. McClendon had taken any other action that would allow her to represent Ms. McClendon's interests in claims against PGW at issue in this proceeding. Further, at no point in the proceeding did Ms. Booker indicate that she was an attorney. Finally, Ms. Booker indicated that her efforts to assist Ms. McClendon had been hampered by Ms. Booker's own serious health condition. Tr. 37, 47.

This case presents a rather unique set of facts. By her own admission, the Complainant was unable and unwilling to participate in this proceeding. It is unclear when her physical and mental inability to conduct her own affairs began or might end. In addition, it is unclear whether Ms. McClendon had the capacity to file the Complaint and pursue the claims described therein against PGW. In light of those facts and circumstances, it is questionable whether the Formal Complaint, as filed is valid. Tr. 53, 55. *See generally, Katz v. PPL Elec. Utils. Corp.*, Docket No. F-2010-2211384 (Opinion and Order entered Jan. 27, 2012) (complaint filed by customer mother/brother, who did not live with him or have POA).

⁴ At the initial telephonic hearing, Ms. Booker identified herself as the Complainant's daughter. Tr. 16.

Nevertheless, it is apparent from the hearing transcript that Ms. Booker, who was trying to help her ageing and ailing 90-year-old mother, was also suffering from, and dealing with her own significant health issues. Further, the transcript reflects that despite clear instructions regarding the steps Complainant and Ms. Brooks were to take prior to the March 22, 2023, Hearing, Ms. Brooks' serious medical condition precluded both her and Complainant from obtaining an attorney or taking other appropriate action to grant Ms. Brooks attorney-in-fact status on behalf of Complainant in time for the March 22, 2023, Hearing. I find that these unusual circumstances are sufficient to show that Complainant's failure to appear at the March 22, 2023 hearing was unavoidable. 52 Pa. Code § 5.245(b).

Additionally, given the unique circumstances which gave rise to Complainant's failure to appear at the hearing, I also find that the interests of the public would not be prejudiced by dismissing the Complaint without prejudice. 52 Pa. Code § 5.245(b).

Although the Commission's above-referenced rulings allow for dismissal of the Formal Complaint with prejudice, in light of the unusual facts and circumstances presented here, PGW's motion to dismiss the Formal Complaint without 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. 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, 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).

4. 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, 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).

5. 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).

6. If the presiding officer determines that the failure to appear at the hearing was unavoidable and the interests of the other parties and of the public would not be prejudiced thereby, the presiding officer may dismiss the complaint without prejudice. 52 Pa. Code § 5.245(b).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of Philadelphia Gas Works to dismiss Fannie McClendon's Formal Complaint without prejudice at Docket No. C-2022-3036441 is granted.

2. That the Formal Complaint of Fannie McClendon in Fannie McClendon v. Philadelphia Gas Works at Docket No. C-2022-3036441 is dismissed without prejudice.

3. That the docket at Docket No. C-2022-3036441 be marked closed.

Date: July 6, 2023

_____/s/_____
Arlene Ashton
Administrative Law Judge