

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

Public Meeting July 13, 2023

**Anne Wilson v. PECO Energy
Company - Electric**

**3033952-ALJ
Docket No. C-2022-3033952**

**Corrine Hales v. Pennsylvania Electric
Company**

**3034720-ALJ
Docket No. F-2022-3034720**

**Taska Taylor v. Pennsylvania Electric
Company**

**3036796-ALJ
Docket No. C-2022-3036796**

**McArthur Giles v. Philadelphia Gas
Works**

**3036835-ALJ
Docket No. F-2022-3036835**

**JOINT STATEMENT OF COMMISSIONER JOHN F. COLEMAN, JR. AND
COMMISSIONER RALPH V. YANORA**

Before the Commission for disposition are the Initial Decisions (ID) issued in the above-captioned customer complaint proceedings. In each case, the Complainants failed to appear at a scheduled hearing despite being provided with notice and opportunity to be heard.¹ The IDs dismiss each formal complaint with prejudice for failure to prosecute and meet the burden of proof.

A dismissal with prejudice bars a complainant from filing another complaint raising the same claims and issues presented in the dismissed complaint. Out of concern for the waste of the Commission's (and respondents') time and resources,² the Commission historically has dismissed *pro se* complaints with prejudice for failure to appear at a scheduled and duly notified hearing. This policy was explained in *Jefferson v. UGI*, where the Commission stated "We are concerned with regard to the consequences that these "no show" cases have on the already strained budget of the Commission. Such cases waste the time and resources of the Commission and the utility. We cannot condone the wastefulness of the current procedure that permits a "no-show complainant" to refile a complaint and thereby institute yet another stay of termination on the account. Such misuse of the process as in the case before us cannot be tolerated."³ This result has also been applied to service complaints, which usually require the utilities to expend even greater resources in the preparation of its defense.

¹ 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). The essential elements of due process in an administrative proceeding are notice and an opportunity to be heard. *J.P. v. Dep't of Human Servs.*, 150 A.3d 173 (Pa. Cmwlth. 2016).

² See *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995).

³ *Jefferson*, at 5.

However, the decision to dismiss with prejudice is not based solely on policy grounds. Rather, the decision is rooted in Section 332(f) of the Public Utility Code (Code), which provides that a party who fails to attend a properly noticed hearing “shall be deemed to have waived the opportunity to participate” and “shall not be permitted thereafter” to later reopen the matter.⁴

At the same time, non-attendance at a hearing may be excused where “... the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced.”⁵ Where a complainant’s failure to appear is unavoidable, a presiding administrative law judge (ALJ) has the discretion to recognize that and to reschedule the hearing.⁶ However, if a complainant fails to explain why the failure to appear was unavoidable prior to the issuance of the ID, the record closes and the presiding ALJ can no longer exercise that discretion.⁷

When read in its entirety, Section 332(f) of the Code mandates “with prejudice” dismissals where a complainant does not appear at a scheduled hearing and does not explain why the failure to appear was unavoidable. This is exactly the situation in these cases, as none of the Complainants contacted the Commission to explain why the failure to appear at the hearing was unavoidable. As such, the presiding officers no longer had the discretion to reschedule the hearings, and the Complaints were rightfully dismissed with prejudice.⁸

Regarding service of documents by the Commission on parties, we note that the Commission in March 2022 adopted a 6-month waiver of its service regulations at 52 Pa. Code §§ 1.53 and 1.54 to continue to allow the Commission to serve documents via email (*March 2022 Waiver Order*).⁹ In September 2022, the Commission then extended the waiver of its service regulations another six months until April 3, 2023 (*September 2022 Waiver Order*).¹⁰ Either the *March 2022 Waiver Order* or the *September 2022 Waiver Order* was in effect at the time each of the above-captioned complaints was filed.

In waiving its service regulations, the Commission relied on its plenary powers under Section 501 of the Code¹¹ as the statutory authority for the waivers. *March 2022 Waiver Order* at 3-4; *September 2022 Waiver Order* at 2 (“Our authority to waive our regulations is provided at

⁴ 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a).

⁵ 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(b).

⁶ 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b).

⁷ See, e.g., *Alice Anderson v. PECO Energy Company*, Docket No. F-2017-2614241 (Order entered July 18, 2018).

⁸ The dismissals with prejudice are entirely consistent with recent Commission precedent. See, e.g., *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).

⁹ *Waiver of Regulations Regarding Service Requirements*, Docket No. M-2021-3028321 (Order entered March 10, 2022) (*March 2022 Waiver Order*). This order extended the waiver of our service regulations previously adopted in September 2021. See *Waiver of Regulations Regarding Service Requirements*, Docket No. M-2021-3028321 (Order entered September 15, 2021).

¹⁰ *Waiver of Regulations Regarding Service Requirements*, Docket No. M-2021-3028321 (Order entered September 15, 2022) (*September 2022 Waiver Order*).

¹¹ § 501. General powers.

(a) **Enforcement of provisions of part.**--In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provisions of this part.

Section 501 of the Public Utility Code.”).¹² Also, the Commission cited the need for continued flexibility in response to the COVID-19 pandemic as the policy rationale for the waivers. *March 2022 Waiver Order* at 4; *September 2022 Waiver Order* at 2.

Additionally, these Commission Waiver Orders were never contested, and are final determinations. Pursuant to Section 316 of the Code, all final orders “.... shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.”¹³ Thus, the Waiver Orders were binding on all parties that have participated in Commission proceedings during the waiver periods. This extends to the Commission as well. The failure to follow our own, prior Orders would be an abuse of discretion according to relevant case precedent.¹⁴

The Commission may rescind or modify a prior Order, consistent with Section 703(g) of the Code, but only after giving affected parties notice and opportunity to be heard. If the Commission wishes to, after the fact, rescind or modify these waivers it must first give notice to all the parties affected by that decision. This would include all parties who have participated in our proceedings, and relied on the fact that email service was a lawful method of providing parties with notice and opportunity to be heard. Any such rescission would be very unwise given the potential to create uncertainty about many final orders, including petitions for various forms of relief, applications for certificates of public convenience, and rate related proceedings. *Pro se* litigants have participated in and received email service in all types of proceedings before the Commission over the last three years. Because rescission “... may result in disturbance of final orders, it must be granted judiciously and only under appropriate circumstances.”¹⁵

Instead of following its Waiver Orders, the Commission has recently determined that “[t]he practice of dismissing complaints by *pro se* complainants, with prejudice, when there is no record of the complainant agreeing to service by email and the complainant fails to appear at the hearing is inconsistent with due process.”¹⁶ While the Commission is not bound by the rule of *stare decisis*, the Commission must render consistent opinions and should either follow, distinguish, or overrule its own precedent.¹⁷ We believe there are compelling reasons to overrule what has unfortunately become precedent. The Commission abused its discretion by failing to follow its own Waiver Orders, in violation of Section 316 of the Code. The Commission did not give notice and opportunity to be heard to the parties covered by its Waiver Orders, in violation

¹² The Commission in the Waiver Orders did not rely on any other statutory authority to allow email service of documents by the Commission on all parties. We acknowledge that Section 702 of the Code was referenced in the Waiver Orders but only as a possible exception to the general rule allowing for email service regardless of whether a particular party has agreed to such service. *March 2022 Waiver Order* at 3; *September 2022 Waiver Order* at 1 (An exception to this general waiver is where the Public Utility Code requires service by specified means, e.g., Section 702 (Service of Complaints on Parties); or where our regulations require a specific service type, e.g., 52 Pa. Code § 3.391.). Under this exception, the “service by specified means” at issue is service of a complaint by the Commission on a party to a complaint, which is typically a public utility or energy supplier. Consequently, Section 702 should have no bearing on the outcome of these cases. The Commission has consistently interpreted, through the promulgation of regulations, Section 702 as applying only to the service of formal complaints. 52 Pa. Code §1.53(c). Section headings may be used in the aid of statutory construction. 1 Pa.C.S. §1924.

¹³ 66 Pa.C.S. §316.

¹⁴ *Peoples Natural Gas Co. v. Pennsylvania Public Utility Com.*, 542 A.2d 606 (Pa. Cmwlth. 1988), *aff’d* 567 A.2d 642 (Pa. 1989).

¹⁵ *Pittsburgh v. Pa. Dept. of Transportation*, 416 A.2d 461 (Pa. 1980).

¹⁶ *Robert Hoyt v. Columbia Gas of PA, Inc.*, Docket No. F-2022-3032680 (Order entered May 30, 2023).

¹⁷ *Bell Atl. v. Pa. P.U.C.*, 672 A.2d 352, (Pa. Cmwlth. 1995); citing *Pennsylvania Trust v. Dep’t of Envtl. Prot.*, 863 A.2d 93, 107 (Pa. Cmwlth. 2004).

of Section 703(g) of the Code. Finally, the Commission failed to follow, distinguish, or clearly overturn its longstanding precedent with respect to dismissing *pro se* complaints with prejudice for failure to appear at a scheduled and duly notified hearing.¹⁸ Accordingly, we would favor overturning this new precedent.

The Commission moved through the COVID-19 pandemic with integrity. During the pandemic and post-pandemic period, the Commission authorized its bureaus to serve Commission documents by email to give parties and the public easier access to proceedings and to reduce delayed and undeliverable mail. This flexibility greatly benefited *pro se* complainants. We regret that this innovation and its success are now being questioned. The Commission's efforts to assist *pro se* complainants are well documented.¹⁹ The Commission's use of email service during the past three years is a prime example of such efforts.

In closing, we believe each Complainant was properly served. In each case, the Complainants provided their email addresses on the Commission's Formal Complaint Form. Also in each case, the Hearing Notices and Prehearing Orders were served on each Complainant via email, and those documents were not returned as undeliverable. Each Hearing Notice and Prehearing Order advised that the Complainant could lose the case for failure to participate in the hearing or present facts on the issues raised. By failing to appear and proffer any evidence to support the Complaint, each Complainant failed to meet the burden of proof.²⁰ Further, to our knowledge, none of the Complainants ever objected to receiving email service, and none of the Complainants has contacted the Commission to inquire about the status of their Complaints. The ID in each case should be adopted without modification.



JOHN F. COLEMAN, JR.
COMMISSIONER



RALPH V. YANORA
COMMISSIONER

Date: July 13, 2023

¹⁸ The precedent established in *Hoyt* has not been applied in all cases where a *pro se* complainant was served in accordance with the Commission's Waiver Orders and then the complaint was dismissed with prejudice for the complainant's failure to appear.

¹⁹ For example, a comprehensive Consumer Complaint Procedures Guide is available on the Commission's website, along with other publications on the complaint-filing process. I voted for the Chairman's 2018 C-Motion, which established a working group related to *pro se* complainants. *Working Group for the Review of Processes and Forms Related to Pro Se Formal and Informal Complaints*, M-2018-3004734 (Final Order entered October 2, 2018).

²⁰ 66 Pa. C.S. § 332(a).