

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17120**

Public Meeting held August 3, 2023

Commissioners Present:

Gladys Brown Dutrieuille, Chairman  
Stephen M. DeFrank, Vice Chairman  
Ralph V. Yanora  
Kathryn L. Zerfuss  
John F. Coleman, Jr.

Joseph Psut

C-2022-3035383

v.

PECO Energy Company

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Joseph Psut (Mr. Psut or Complainant) filed on May 17, 2023, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Arlene Ashton issued April 28, 2023, in the above-captioned proceeding. Replies to the Exceptions of Mr. Psut were received from PECO Energy Company (PECO or Respondent) on June 12, 2023. For the reasons stated below, we shall deny the Exceptions of the Complainant and dismiss the Formal Complaint (Complaint).

## **I. History of the Proceeding**

On September 19, 2022, Mr. Psut filed a Formal Complaint (Complaint) against PECO with the Commission. In the Complaint, Mr. Psut indicated that PECO 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 flaws in the wiring because his bills are too high. Complaint at 3-4.

PECO filed an Answer with New Matter denying all material allegations of fact in the Complaint on October 6, 2022. PECO averred that the Complainant has a delinquent balance on his account, for which PECO is within its rights to terminate service under 66 Pa. C.S. § 1406. Next, PECO asserted that Mr. Psut had defaulted on two payment arrangements with PECO and that he is not entitled to an additional Commission-issued payment agreement under the Public Utility Code (Code). Additionally, PECO asserted that the bills and balance on the Complainant's account are correct. Answer at 3-4.

In its New Matter, PECO averred that the Commission has no jurisdiction to give the Complainant a payment arrangement pursuant to 66 Pa. C.S. § 1405(c) and that Mr. Psut's Complaint should be dismissed. Answer at 6. Despite PECO including a Notice to Plead with its Answer and New Matter notifying the Complainant if he did not file a written response to the New Matter within twenty (20) days of the date of service, the facts set forth in the New Matter may be deemed to be true, Mr. Psut did not file a written response to New Matter. I.D. at 2.

By Hearing Notice dated December 27, 2022, an initial telephonic hearing was scheduled for January 31, 2023, at 10:00 a.m., and the matter was assigned to the ALJ. The Hearing Notice advised the Parties of the date, time, and dial-in number for the scheduled hearing and warned of the consequences of failing to appear, which includes

the dismissal of the case if a Party is not present and prepared to go forward with the case when it is called. Hearing Notice at 1.

On December 29, 2022, the ALJ issued a Prehearing Order which reminded the Parties of the date, time, and dial-in number for the scheduled hearing and included instructions on how to call in for the hearing. Prehearing Order at 1. The Prehearing Order informed the Parties about the applicable procedural rules and guidelines for the proceeding, including the procedure to request a change of the scheduled hearing date. Furthermore, the Prehearing Order warned of the consequences of a Party failing to appear; specifically, that a Party may lose the case if it does not take part in the hearing and present evidence on the issue raised. Prehearing Order at 1.

The evidentiary hearing convened on January 31, 2023, as scheduled. Counsel for PECO was present along with two potential witnesses. The Complainant did not appear. Due to the Complainant's absence, the hearing was recessed for approximately ten minutes to allow the Complainant additional time to appear. I.D. at 3. The hearing reconvened at 10:15 a.m. and the Complainant had still neither appeared nor had he contacted the Office of Administrative Law Judge to indicate whether he would or would not appear. Counsel for PECO moved to dismiss the Complaint with prejudice. The ALJ granted the Respondent's motion to dismiss the Complaint but did so without prejudice. *Id.*; I.D. at 7.

The record closed at the conclusion of the hearing on January 31, 2023.

On April 28, 2023, the Commission issued the Initial Decision of ALJ Ashton which dismissed the Complaint for failure of the Complainant to appear at the hearing and prosecute the Complaint. I.D. at 7, 9.

As noted, *supra*, the Complainant filed Exceptions on May 17, 2023.<sup>1</sup> PECO filed its Reply Exceptions on June 12, 2023.

## II. Discussion

### A. Legal Standards

#### 1. Due Process

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984) (*Schneider*). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hospital Ass'n of Western Pennsylvania v. Pa. PUC*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

The Commission is required to fix the time and place of a hearing in a complaint proceeding and to serve notice thereof upon the parties in interest. See 66 Pa. C.S. § 703(a)-(b). Service on interested persons is sufficient to provide notice. 52 Pa. Code § 5.201(a).

Once a hearing is scheduled and duly notified by the Commission, it is the responsibility of the parties to appear and participate in the hearing. *Mumma v. PPL*

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<sup>1</sup> We note that subsequent to the ALJ's dismissal, the Complainant filed a new Formal Complaint on June 8, 2023. In this Complaint, Mr. Psut avers that the utility is threatening to shut off his utility service or has already shut off his service and requests a payment arrangement. Complaint at Docket No. C-2023-3041260. As discussed *infra*, because we shall dismiss the present Complaint without prejudice, the disposition of the present Complaint will not impact the filing of the new Complaint.

*Electric Utilities Corporation*, Docket No. C-00014869 (Order entered January 24, 2002); *Sentner v. Bell Tel. Co. of PA*, Docket No. F-00161106 (Order entered October 25, 1993).

A party to a proceeding has the right to request a continuance of the hearing, which may be considered and granted by the presiding officer “only for good cause shown.” See 52 Pa. Code § 1.15(b). The party making the request must file a motion at least five days prior to the hearing date stating the facts on which the request is made, except that during a hearing, an oral request for hearing continuance may be made before the presiding officer in the hearing room. 52 Pa. Code § 1.15(b).

If a party fails to appear at a scheduled and duly notified hearing, the party will be deemed to have waived the opportunity to participate in a hearing in the matter. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). This result is not applied to the party, however, if the presiding officer determines that the party’s failure to appear was “unavoidable” and the interests of the other party (or parties) and the public will not be “prejudiced” by permitting the reopening or further examination. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). Also, this result may not be applied if the presiding officer of the Commission determines that the complainant demonstrated a good faith attempt to attend the hearing. See, e.g., *Yomari Then v. Philadelphia Gas Works*, Docket No. F-2012-2318264 (Order entered June 13, 2013); see also *Windell C. Wiggins v. PECO Energy Company*, Docket No. C-2010-2190335 (Order entered October 27, 2011).

The public interest is prejudiced by the wasteful use of the agency’s and the respondent’s time and resources in addressing a complaint. See, *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995); see also, e.g., *Charles Nichols III v. Bell-Atlantic-Pennsylvania*, Docket No. C-00956667 (Order entered August 4, 1995).

## 2. Burden of Proof

As the party seeking affirmative relief from the Commission, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code. 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant, as the party seeking relief, must show that PECO is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by PECO. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, to rebut the evidence of the Complainant, shifts to PECO. If the evidence presented by PECO is of co-equal weight, the Complainant has not satisfied her burden of proof. The Complainant now has to provide some additional evidence to rebut that of PECO. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

## **B. Initial Decision**

The ALJ made thirteen Findings of Fact and reached eight Conclusions of Law. I.D. at 4-5; 8-9. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

In dismissing the Complaint, the ALJ found that the Complainant was unable to sustain his burden of proof because he failed to participate in the hearing. The ALJ stated that the Commission sent a Hearing Notice to the Complainant and the ALJ issued a Prehearing Order, both electronically served on the Complainant at the email address he provided in his Complaint, but which were never returned as undeliverable. Therefore, the ALJ presumed that the documents were received by the Complainant. I.D. at 5.

Furthermore, the ALJ found that the Complainant had ample opportunity to appear and be heard in this proceeding but voluntarily chose not to do so; therefore, by failing to participate and proffer any evidence to support his Complaint, the ALJ determined that Mr. Psut has failed to meet his burden of proof. The ALJ ultimately granted PECO's motion to dismiss but determined that it be dismissed without prejudice. I.D. at 7.

### **C. Exceptions and Reply to Exceptions**

The Complainant's Exceptions<sup>2</sup> consist of a one-paragraph handwritten letter. The Complainant states that on January 31, 2023, he was to have a telephonic hearing. The Complainant avers that he did not have the call-in number. Mr. Psut states that he had received several emails from PECO and the Commission but could not find the number to call and instead had assumed he would receive a call. Exc. at 1.

In its Reply Exceptions, PECO argues that the Complainant has failed to show good cause to warrant a further hearing. PECO states that the ALJ provided each Party with a Prehearing Order and Hearing Notice which indicated the date of the hearing and the dial-in information with instructions for the hearing. PECO points out that the Complainant, in his Exceptions, does not allege that the ALJ made an error of law or abused her discretion in any manner nor did he allege that the ALJ used an incorrect electronic mail address to notify him of the Hearing date. Finally, PECO avers that the Complainant failed to set forth that PECO violated any regulation, statute or order. PECO requests that the Commission deny the Complainant's Exceptions and adopt the ALJ's Initial Decision in its entirety. R. Exc. at 4-5.

### **D. Disposition**

As a preliminary matter, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at

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<sup>2</sup> We note that the format of the Exceptions does not strictly comply with Section 5.533(b) of our Regulations, which requires that each exception be numbered and identify the finding of fact and conclusion of law to which exception is taken and cite to the relevant pages of the Initial Decision. *See*, 52 Pa. Code § 5.533(b). Nevertheless, recognizing that the Complainant is appearing *pro se*, we will accept the Exceptions as filed, pursuant to Section 1.2(a) of our Regulations, and consider the merits.

length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Where a party fails to appear at a hearing, the failure to appear is deemed to be a waiver of the right to present evidence to support claims in the complaint if the party was afforded due process, and the reason for failing to appear was not established as unavoidable. We also note that it is within the sound discretion of the ALJ to decide whether a complainant's failure to appear was unavoidable and whether permitting a hearing would prejudice the public interest or the interest of the other party. *See*, 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a), (b). Upon a complainant's failure to appear, it is for the ALJ to weigh whether that failure should be deemed the complainant's waiver of the opportunity to participate in a hearing in a complaint proceeding, pursuant to 66 Pa. C.S. § 331(d) (pertaining to authority of the ALJ as presiding officer). In so doing, the ALJ must, as a preliminary matter, ensure that the complainant has been afforded due process. The ALJ must ensure that notice and opportunity to be heard has been afforded, both in the proceeding in general and specifically, with respect to the hearing at which the Complainant has failed to appear. *See, Schneider, Mayflower.*

On this point, we agree with the ALJ that the Complainant's due process rights to notice and opportunity to be heard were accommodated and preserved throughout the underlying proceeding. The Hearing Notice dated December 27, 2022, advised the Parties of the date, time, and dial-in number for the scheduled hearing and warned of the consequences of failing to appear:

**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.

Hearing Notice at 1 (emphasis in original).

In addition, the Prehearing Order issued by the ALJ on December 29, 2022, again reminded the Parties of the date, time, and dial-in number for the scheduled hearing. The Prehearing Order also gave a similar warning to the participants regarding the consequences of failing to appear. Finally, the Prehearing Order gave specific instructions on how to participate in the hearing:

To participate in the hearing, **you must dial the toll-free number listed below. You will be prompted to enter a PIN number, which is also listed below. You will be asked to speak your name, press the # key, and then the telephone system will connect you to the hearing.** If you have any witnesses you want to have present during the hearing who are participating from a separate phone, you must provide them with the telephone number and PIN Number.

Prehearing Order at 1 (emphasis added).

The ALJ correctly found that both the Hearing Notice and the Prehearing Order were served on the Complainant, and neither was returned as undeliverable. Further, at no time did the Complainant claim that he did not receive these documents or that they were erroneously served. On the contrary, the Complainant, in his exceptions, stated that he received “several emails from PECO and the PUC.” Exc. at 1. The Hearing Notice and Prehearing Order advised the Parties of the date, time, and the *dial-in number* for the scheduled hearing. Importantly, each of these documents also specified that the Complainant could lose the case through dismissal as a consequence of failing to appear.

We find that the Complainant had notice and was reminded of the scheduled hearing date and given the dial-in number with instruction on how to participate in the hearing on several different occasions. The Complainant failed to appear for the hearing and prosecute his Complaint, nor did he make any attempt to notify the ALJ that he did not receive the dial-in number to participate. The Complainant's due process rights have been preserved and protected.

The ALJ also properly found that, having been provided notice and an opportunity to be heard, but failing to appear and proffer any evidence to support the Complaint, the Complainant waived the right to present evidence in the proceeding and therefore, failed to meet his burden of proof. We agree with the ALJ's conclusion that the failure of the Complainant to appear at the scheduled hearing is unexcused, and that by failing to attend the hearing and present evidence on the issue raised, the Complainant failed to sustain his burden of proof.

Furthermore, we note that the Complainant's Exceptions alleging that he did not receive the dial-in number to participate in the hearing is refuted by the fact that the Complainant conceded that he received several emails from both PECO and the Commission. As discussed, *supra*, at least two documents electronically mailed to the Complainant from the Commission contained the dial-in number and instructions to participate.

For the reasons set forth above, we agree with the ALJ that the Complainant waived the opportunity to participate in the hearing by failing to appear. By failing to appear and offer evidence to support his Complaint, the Complainant has failed to meet the burden of proof that is placed on him under the Code to satisfy his request for

relief. Consequently, the ALJ's decision to dismiss the Complaint without prejudice,<sup>3</sup> is affirmed. Accordingly, the Complainant's Exceptions shall be denied.

### III. Conclusion

Based on our review of the Exceptions and the Initial Decision, we shall deny the Exceptions of Joseph Psut and adopt the ALJ's Initial Decision, consistent with this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions of Joseph Psut, filed on May 17, 2023, to the Initial Decision of Administrative Law Judge Arlene Ashton are denied, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Arlene Ashton, issued on April 28, 2023, is adopted, consistent with this Opinion and Order.
3. That the Formal Complaint filed by Joseph Psut on September 19, 2022, against PECO Energy Company at Docket No. C-2022-3035383, is denied, and dismissed without prejudice, consistent with this Opinion and Order.

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<sup>3</sup> 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 the complainant has not affirmatively agreed to accept service via email. *Hoyt v. Columbia Gas of Pa., Inc.*, Docket No. F-2022-3032680 (Order adopted April 20, 2023). We note that in the present case, the Opinion and Order in *Hoyt* is distinguishable and not applicable here, since, the Complainant agreed to electronic service for the service of documents. Further the Complainant acknowledged actual receipt of the emails and therefore established actual "notice" for purposes of due process.

4. That this proceeding at Docket No. C-2022-3035383, be marked closed.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first letter of each word being significantly larger and more stylized.

Rosemary Chiavetta  
Secretary

(SEAL)

Order Adopted: August 3, 2023

Order Entered: August 3, 2023