

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

Public Meeting held July 13, 2023

Commissioners Present:

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

Anne Wilson

C-2022-3033952

v.

PECO Energy Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Darlene D. Heep, issued on April 5, 2023, in the above-captioned proceeding. No Exceptions have been filed. However, we have exercised our right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall adopt the Initial Decision, as modified, consistent with this Opinion and Order.

History of the Proceeding

On July 18, 2022, Anne Wilson (Complainant or Ms. Wilson) filed a Formal Complaint (Complaint)¹ with the Commission against PECO Energy Company (PECO or Company) alleging that PECO threatened to shut off her service and that there are incorrect charges on her bill. Complaint at 2. Additionally, Ms. Wilson alleged that she was informed that there was a foreign load on her bill. *Id.* For relief, the Complainant requested a zero balance and fair, more accurate billing. *Id.* at 3.

On August 11, 2022, PECO filed an Answer to the Complaint (Answer). In its Answer, the Company averred that Ms. Wilson has a delinquent account balance of \$2,188.45, for which the Company may terminate her service pursuant to 66 Pa. C.S. § 1406. Answer at 2-3. Specifically, PECO averred that when the Complainant contacted the Company to inquire into her billing, she was advised that her billing was in line with prior usage and that she was receiving actual readings on her meter. *Id.* at 2. Therefore, PECO requested that the Complaint be dismissed. *Id.* at 3.

On August 12, 2022, the Commission issued an Interim Order Setting Resolution Conference (Interim Order) that directed the Parties to attempt to resolve the matter. The Interim Order was sent by electronic mail (email) to the email address the Complainant provided on her Complaint form.² The Parties were unable to reach an agreement.

¹ This Complaint is an appeal of the Commission's Bureau of Consumer Services' (BCS) decision at Case No. 3825249.

² There is no record of Ms. Wilson creating an account on the Commission's eFiling system or of her electing to receive documents through eService. Ms. Wilson provided her email address in the contact information section on the Complaint form which indicates that an email address is required. *See*, Complaint at 1. From September 15, 2022 to April 3, 2023, the Commission had in place an extended temporary waiver of the service requirement Regulations at 52 Pa. Code §§ 1.53 and 1.54

On October 27, 2022, the Commission issued an Initial Telephonic Hearing Notice (Hearing Notice) setting a formal call-in telephonic hearing for this matter to be held on January 11, 2023. The Hearing Notice, *inter alia*, named the ALJ as the assigned presiding officer, provided a toll-free call-in number to the Parties and included language concerning the effects on the case if a party failed to appear.

Thereafter, the Commission issued a Prehearing Order on November 7, 2022, advising the Parties, *inter alia*, of the toll-free call-in number to participate in the hearing and included language concerning the effects on the case if a party failed to appear. Both the Hearing Notice and the Prehearing Order were sent to Ms. Wilson to the email address she listed on her Complaint³ and, according to the ALJ, were not returned to the Commission as undeliverable. I.D. at 2.

On January 11, 2023, the hearing convened as scheduled. I.D. at 2.⁴ Khadijah Scott, Esquire, appeared with two witnesses on behalf of PECO, prepared to present PECO's case. *Id.*; Tr. at 4. The Complainant did not call in to participate in the hearing at the scheduled time. I.D. at 2. A fifteen-minute recess was taken to allow the Complainant additional time to call in to the hearing conference number. *Id.* Neither the presiding officer nor the Commission received any contacts from the Complainant prior to the hearing about her availability nor did the Complainant call in for the hearing.

except where the applicable law requires a specific type of service, *e.g.*, 66 Pa. C.S. § 702 (“Service in all hearings, investigations and proceedings pending before the commission shall be made by registered or certified mail or by e-mail upon agreement by each party.”). *See, Waiver of Regulations Regarding Service Requirements*, Docket No. M-2021-3028321 (Order entered September 15, 2022). There is no record of Ms. Wilson requesting or agreeing to be served notice of the proceedings related to her formal complaint by email.

³ *See, supra* note 2.

⁴ We note that the Initial Decision indicated that the hearing began as scheduled on January 11, 2022. However, this appears to be a typographical error as the record reflects that the hearing convened on January 11, 2023.

Tr. at 6. Accordingly, the hearing proceeded in her absence. I.D. at 2. PECO's counsel moved to dismiss the Complaint, with prejudice, due to the Complainant's failure to appear at the hearing and prosecute her case and the ALJ took the motion under advisement. *Id.*; Tr. at 6.

The record closed on January 18, 2023, when the hearing transcript was received. I.D. at 2.

On April 5, 2023, the Commission issued the Initial Decision of ALJ Heep, in which she granted PECO's motion and dismissed the Complaint, with prejudice, for failure of the Complainant to appear and prosecute her case. I.D. at 1 and 6.

Discussion

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d at 15 (Pa. Cmwlth. 1984). 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).⁵

ALJ's Initial Decision

ALJ Heep made sixteen (16) Findings of Fact and reached eight (8) Conclusions of Law. I.D. at 3-4, 6-7. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law except as reversed or modified by this Opinion and Order, either expressly or by necessary implication.

The ALJ stated that as the party seeking relief from the Commission, the Complainant bears the burden of proof in this matter. According to the ALJ, the Complainant failed to appear at the date and time set for the hearing in her case, despite notice of the hearing having been served upon her by the Commission. I.D. at 5.

The ALJ noted that the Hearing Notice and the Prehearing Order were served electronically upon Ms. Wilson at the email address she provided on her Complaint form, and that neither document was returned to the Commission as undeliverable. Accordingly, the ALJ presumed that the documents sent to the Complainant in the ordinary course of business were received by her and that she had notice of the date and time of the hearing. I.D. at 5, citing *Hu v. PECO Energy Company*, Docket No. C-2019-3012075 (Order entered December 19, 2019) (*Hu*); *Zirkel v. Philadelphia Gas Works*, Docket No. C-2016-2561176 (Order entered January 27, 2017)

⁵ We note as well, and as discussed in the Initial Decision, as with most cases in which a party fails to appear, once a hearing is scheduled and duly noticed by the Commission, it is the responsibility of the parties to appear and participate in the hearing. *Mumma v. PPL*, Docket No. C-00014869 (Order entered January 24, 2002); *See also*, 66 Pa. C.S. § 332(f) and 52 Pa. Code § 5.245(a)-(b) (if a party fails to appear at a scheduled and duly noticed hearing, the party will be deemed to have waived the opportunity to participate in the hearing).

(Zirkel); *Morella v. PECO Energy Company*, Docket No. C-2016-2553416 (Order entered November 16, 2016) (*Morella*).

The ALJ further noted that the Complainant did not request a continuance of the hearing or provide an explanation as to why her failure to attend the hearing was unavoidable. According to the ALJ, Ms. Wilson had notice of the hearing and an opportunity to be heard in this proceeding but waived her opportunity to participate in the hearing by failing to appear. I.D. at 5, citing 52 Pa. Code § 5.245(a); *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995). Therefore, the ALJ found that Ms. Wilson's due process rights were fully protected. I.D. at 7, citing *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Order entered October 25, 1993); *See also*, 52 Pa. Code § 5.245(a).

Additionally, the ALJ stated that during the hearing, counsel for PECO moved for dismissal of the Complaint for lack of prosecution. According to the ALJ, by failing to appear and present any evidence in support of her Complaint, Ms. Wilson failed to carry her burden. I.D. at 5-6, citing *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Order entered December 26, 1995); *El-Ayazra v. West Penn Power Company*, Docket No. F 2015-2509292 (Order entered June 30, 2016); 52 Pa. Code § 5.245.

Lastly, the ALJ noted the absence of facts in the record that would allow the Commission to reach the conclusion that the Complainant's failure to appear at the hearing was unavoidable. Thus, the ALJ dismissed the Complaint, with prejudice. I.D. at 6, citing *Little v. Pittsburgh Water & Sewer Authority*, Docket No. F-2021-3027107 (Order entered February 7, 2022); *Williams v. PECO Energy Company*, Docket No. C-2018-3000734 (Order entered March 14, 2019).

Disposition

As a preliminary matter, any argument that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. We are not required to consider expressly or at length each contention or argument raised by parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). On exercise of our independent review of the Parties' positions in their pleadings in this case, we shall adopt the Initial Decision, as modified, consistent with the following discussion.

This case is similar to the Commission's recent decision in *Robert Hoyt v. Columbia Gas of PA, Inc.*, Docket No. F-2022-3032680 (Order entered May 30, 2023) (*Hoyt*).⁶ In *Hoyt*, the Commission explained:

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties

⁶ This case is also on point with other recently entered Orders. *See, e.g., Janet Baxter v. West Penn Power Company*, Docket No. C-2022-3032225 (Order entered May 30, 2023); *Tauheed Davenport v. PECO Energy Company*, Docket No. C-2022-3033480 (Order entered May 31, 2023); *Frank Everett v. Philadelphia Gas Works*, Docket No. C-2022-3034443 (Order entered May 30, 2023); *Christine Fahmy v. UGI Utilities, Inc.*, Docket No. F-2022-3036840 (Order entered May 31, 2023); *Robert Green v. UGI Utilities, Inc. (Gas Division)*, Docket No. C-2022-3033307 (Order entered May 30, 2023); *Angela Hairston v. West Penn Power Company*, Docket No. C-2022-3034322 (Order entered May 30, 2023); *Jerrod Miner v. Philadelphia Gas Works*, Docket No. F-2022-3035563 (Order entered May 31, 2023); *Marcella Parker v. PECO Energy Company*, Docket No. F-2022-3034455 (Order entered May 30, 2023); *Paul Sablich v. PECO Energy Company*, Docket No. C-2022-3033148 (Order entered May 30, 2023) (*Sablich*); *Maureen Stopperich v. Duquesne Light Company*, Docket No. C-2022-3034514 (Order entered May 31, 2023); *Ronald Baroni v. PECO Energy Company*, Docket No. C-2022-3032488 (Order entered June 20, 2023); and *Robert Adams v. Philadelphia Gas Works*, Docket No. C-2022-3035184 (Order entered June 20, 2023).

appearing before it. Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. 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.

Id. at 4–5 (internal citations omitted).

First, in *Hoyt*, the Commission 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.” *Id.* at 7. The Commission found that “[t]here is no need to close the door to this venue to *pro se* complainants unless record evidence shows that they are abusing the Commission’s administrative process to avoid paying their utility bills.” *Id.* The same reasoning applies here in this case because there is no evidence of abuse of administrative process. For that reason, it is not appropriate to dismiss this Complaint with prejudice.

Second, the Commission determined in *Hoyt* that when the Commission serves the hearing notice by email, not returned as undeliverable, to a complainant who did not elect to receive notice through the Commission’s eFiling or eService system or otherwise agree to service by email, the Commission may not presume that the complainant received notice of the hearing for purposes of satisfying due process. *Id.*

In making this determination, the Commission distinguished *Hoyt* from *Zirkel* and *Morella*. In *Zirkel* and *Morella*, the Commission determined that due process is satisfied and the complainant is presumed to have received notice of the date and time of a scheduled hearing when the Commission serves electronic notice on the Complainant in accordance with the Complainant’s selection to receive electronic service of all

documents and the record contains no notification that the notice failed to be delivered electronically to the email address provided by the Complainant. *Id.* The Commission determined that *Zirkel* and *Morella* do not apply when a complainant does not select eService but simply provides an email address because the complaint form stated that one was required. *Hoyt* at 8.⁷

Similarly, here, the Complainant did not elect to receive documents through eService or otherwise agree to be served notice of the proceedings related to her formal complaint by email. Therefore, following the Commission's decision in *Hoyt*, the Commission may not presume that the Complainant received the Hearing Notice or Prehearing Order. For these reasons, we find that the Complainant did not receive adequate notice of the hearing to preserve due process.

Lastly, in *Hoyt*, the Commission determined that it was in the public interest to afford a complainant an opportunity for an evidentiary hearing if the complainant elects one. As stated above, this case is similar to *Hoyt* and its progeny and, as such, the Complainant should be provided twenty (20) days to file a written request for further hearing with the Commission's Secretary's Bureau. If the Complainant files such a request, the proceeding would be remanded to the Office of Administrative Law Judge for further proceedings as warranted. Failure to timely file the hearing request would result in the dismissal of the Complaint and the matter would be closed without further action of the Commission. Further, any dismissal of the Complaint should be without prejudice.

Accordingly, we will modify the ALJ's Initial Decision, consistent with the discussion in this Opinion and Order.

⁷ For similar reasons, we have also determined that the case of *Hu* is distinguishable. *See, e.g., Sablich* at 7.

Conclusion

Based on the foregoing, we shall adopt the Initial Decision of ALJ Heep, as modified, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Initial Decision of Administrative Law Judge Darlene Davis Heep, issued on April 5, 2023, is adopted as modified, consistent with this Opinion and Order.

2. That Anne Wilson be provided an opportunity to file a written request for an evidentiary hearing within twenty (20) days of the entry of this Opinion and Order.

3. That if a written request for an evidentiary hearing is timely filed, the proceeding shall be remanded to the Office of Administrative Law Judge for further proceedings as warranted and for the issuance of an Initial Decision on Remand.

4. That if a written request for an evidentiary hearing is not timely filed, the Formal Complaint of Anne Wilson filed on July 18, 2022, shall be dismissed, without prejudice, without further action of the Commission.

5. That the Secretary's Bureau serve a copy of this Opinion and Order on Anne Wilson by certified mail.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: July 13, 2023

ORDER ENTERED: August 14, 2023