

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Frederick White	:	
	:	
v.	:	C-2022-3034688
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Marta Guhl
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint of Frederick White against PECO Energy Company because he failed to appear for his hearing and prosecute his Complaint.

HISTORY OF THE PROCEEDING

On August 22, 2022, Frederick White (Complainant or Mr. White) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against PECO Energy Company (PECO or Respondent), indicating that a storm had caused damages to his appliances on his property and that PECO was responsible. The Complainant indicated that PECO failed to provide safe and reasonable service. The Complainant also requested that PECO pay for the damages.

On September 14, 2022¹, Respondent filed an Answer denying the material allegations of the Complaint. Also, on that date the Respondent filed Preliminary Objections alleging that the Commission did not have jurisdiction to award damages in this case.

The matter was assigned to me as motion judge and I issued an Interim Order on March 1, 2023, which denied the Preliminary Objections in part and granted in part and dismissed the portion of the Complaint related to damages. There was no indication that this Order was returned as undeliverable.

On March 6, 2023, the Commission issued an Initial Call-In Telephonic Hearing Notice, and the matter was scheduled for hearing on April 20, 2023, at 10:00 a.m.² The case was assigned to me. The Notice contained the following information:

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.

I issued a Prehearing Order on March 30, 2023. The Prehearing Order directed the parties to comply with various procedural requirements and indicated how to request a change in the hearing date. It also contained the same warning that was found in the Hearing Notice.

The hearing began on April 20, 2023, as scheduled. Counsel for PECO was present with a witness and was prepared to proceed. The Complainant failed to call into the hearing.

¹ The Complaint was served on the Respondent by the Secretary’s Bureau on August 25, 2022.

² The Complainant's Hearing Notice was sent to him via First-Class Mail through the United States Postal Service and was returned by the Postal Service as undeliverable on March 17, 2023. The Notice was sent to the address listed on the Formal Complaint form. There is no indication in the record that the Complainant changed or updated his mailing address with the Commission. Further, the Prehearing Order was also sent to the Complainant via First-Class Mail at the same address and there is no indication that it was returned as being undeliverable.

No witnesses were presented, and no exhibits were introduced into the record. Counsel for PECO moved that the Complaint be dismissed with prejudice for lack of prosecution pursuant to 52 Pa. Code § 5.245. In accordance with Commission policy, I am granting the Motion in part.

The record closed on May 23, 2023, upon my receipt of the transcript.

FINDINGS OF FACT

1. The Complainant is Frederick White.
2. The Respondent is PECO Energy Company.
3. On August 22, 2023, Mr. White filed a Complaint with the Commission against the Respondent.
4. On September 14, 2022, the Respondent filed an Answer to the Complaint as well as Preliminary Objections.
5. On March 1, 2023, an Interim Order was issued granting in part and denying in part the Preliminary Objections and dismissing the portion of the Complaint which related to the request for damages.
6. On March 6, 2023, the Commission issued an Initial Call-In Telephonic Hearing Notice, and the matter was scheduled for hearing on April 20, 2023, at 10:00 a.m.
7. On March 30, 2023, a Prehearing Order was sent to all parties containing, *inter alia*, a warning of potentially serious consequences if they failed to obtain a continuance and failed to attend the hearing.

8. Both the Hearing Notice and Prehearing Order contained the warning that failing to appear could result in the case being dismissed with prejudice.

9. Both the Hearing Notice and Prehearing Order were mailed to the Complainant via U.S. First-Class Mail to the address provided on the Formal Complaint form.

10. On or about March 17, 2023, the Hearing Notice was returned to the Secretary's Bureau by the United States Postal Service as undeliverable.

11. The Prehearing Order sent to the Complainant was not returned as being undeliverable.

12. The Complainant failed to appear at the April 20, 2023, hearing.

13. There is no indication that the Complainant contacted the Commission to change or update his mailing address.

14. The Complainant did not settle or withdraw this Complaint prior to the scheduled hearing date or obtain a continuance.

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

DISCUSSION

As the party seeking affirmative relief from the Commission, the burden of proof rests on the Complainant. 66 Pa.C.S. § 332(a). "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

Administrative agencies, like the Public Utility Commission, are required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider v. Pa. Pub. Util. Comm'n.*, 479 A.2d 10 (Pa. Cmwlth. 1984).

The Commission served notice of the April 20, 2023, hearing in this case to the Complainant on March 6, 2023, via U.S. First-Class Mail to the address he listed on his Formal Complaint form. The notice informed the parties of the date and time of the hearing, as well as how to call in for the hearing. However, on or about March 17, 2023, the notice was returned as undeliverable.

In addition, I issued a Prehearing Order dated March 30, 2023, which, *inter alia*, warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to appear and participate in the hearing. The Prehearing Order, which was also served on the Complainant via U.S. First-Class Mail at the same address on his Formal Complaint form, was never returned as undeliverable. The Prehearing Order also included the date, time and call-in instructions for the hearing. The Notice of Hearing and Prehearing Order were served on the Complainant via U.S. First-Class Mail. There is no indication that the Complainant contacted the Commission to update or change his mailing address. Accordingly, I must presume that the Prehearing Order, which was sent in the ordinary course of business, was received by the Complainant. *Berkowitz v. Mayflower Sec., Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mut. Ins. Co.*, 449 A.2d 658 (Pa. Super. 1982). Therefore, the Complainant is deemed to have received this particular document and had sufficient notice of the day and time of the scheduled hearing. Neither the Complainant nor a representative licensed to practice law in this Commonwealth appeared at the hearing on his behalf. To date, there is no further information about the Complainant regarding this hearing.

Once notice of a hearing and the opportunity to be heard have been provided, it is the responsibility of the parties to appear and participate in the hearing. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993). While there is

indication that the Complainant did not receive the Hearing Notice, there is nothing to indicate that the Prehearing Order was not received by the Complainant. Further, there is nothing in the record to indicate that the Complainant contacted the Commission to update or change his mailing address. It is the Complainant's responsibility to update any contact information with the Commission. *See* 52 Pa. Code §1.53(d).

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 may 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).

Although Complainant has not explained why he failed to attend the scheduled hearing, or that his failure was unavoidable, the record does reflect that the Notice of Hearing was returned as undeliverable. Therefore, under 52 Pa. Code § 5.245(b), I believe the matter should not be dismissed with prejudice. Given the unusual circumstances of this case, the Notice served March 6, 2023 was returned as undeliverable, but the Notice served March 30, 2023 was

not returned as undeliverable, I find that the interests of the Company and of the public would not be prejudiced by permitting the reopening or further examination of this matter.

Finally, Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of any request for relief. As the party bringing this Complaint, the Complainant bears the burden of proving by a preponderance of the evidence that he is entitled to his requested relief. The Complainant did not appear for the hearing scheduled for April 20, 2023. Thus, by his failure to appear, the Complainant did not meet his burden of proof.

Consequently, it is appropriate to grant PECO's Motion and to dismiss Mr. White's Complaint. However, because the Hearing Notice was returned to the Commission as undeliverable, I will not dismiss the Complaint with prejudice. 52 Pa. Code § 5.245(b).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of the dispute. 66 Pa.C.S. § 701.

2. The party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

4. The Commission is required to provide due process to the parties appearing before it. 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).

5. Notice sent via U.S. First-Class Mail to a party's registered address with no notification that service failed to be delivered to that address is presumed to have been received. *Berkowitz v. Mayflower Sec., Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mut. Ins. Co.*, 449 A.2d 658 (Pa. Super. 1982).

6. The due process rights of the Complainant have been fully protected. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlt. 1984).

7. 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).

8. A presiding officer may permit the reopening of, or further examination in, the proceeding if she 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. 52 Pa. Code § 5.245(b).

9. By failing to appear for the hearing and proffer any evidence to support the Complaint, the Complainant has failed to meet his burden of proving that he is entitled to the relief that he seeks from the Commission. 66 Pa.C.S. § 332(a).

10. That the Complaint will not be dismissed with prejudice. 52 Pa. Code § 5.245(b).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss the Formal Complaint filed by Frederick White at Docket No. C-2022-3034688 is granted in part.
2. That the Formal Complaint of Frederick White in Frederick White v. PECO Energy Company at Docket No. C-2022-3034688 is dismissed without prejudice.
3. That Docket No. C-2022-3034688 be marked closed.

Date: August 18, 2023

_____/s/
Marta Guhl
Administrative Law Judge