

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Jerry Lukehart	:	
	:	
v.	:	C-2023-3039786
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Conrad A. Johnson
Administrative Law Judge

INTRODUCTION

This decision grants Respondent’s oral motion to dismiss a Formal Complaint with prejudice because Complainant failed to appear at the initial hearing to prosecute his case.

HISTORY OF THE PROCEEDING

On April 11, 2023, Jerry Lukehart (Mr. Lukehart or Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn or Respondent), alleging he wanted a payment arrangement with West Penn and asserting he “was refused medical excuse for device that monitors my heart.” For relief, Mr. Lukehart requested a payment arrangement due to financial difficulty and to use his medical device.

On May 1, 2023, West Penn filed its Answer and New Matter. Respondent acknowledged it has provided electric service to Mr. Lukehart at 288 Iron Bridge Road, Ford City, Pennsylvania (service address) since March 14, 2006. West Penn asserted (1) Complainant

was enrolled in the Pennsylvania low-income customer assistance program (PCAP) from June 12, 2016, until July 11, 2018; (2) the account is currently on budget billing; and (3) the account balance was \$16,642.42. Respondent averred Complainant was not entitled to a Commission payment arrangement (PAR) because Mr. Lukehart defaulted on a Company-issued payment agreement in 2021, and he defaulted on a Commission PAR in 2021.¹

In New Matter, West Penn averred the Commission PAR provided to Complainant was based on a reported household of four persons with a total gross income of \$1,592.50 monthly. West Penn asserted BCS provided another payment arrangement (due to the lingering effects of the COVID19 pandemic) at BCS Decision No. 3855835 on September 21, 2022, based on a reported household of four persons with a total gross income of \$2,288.00 monthly. Lastly, West Penn noted medical certificates were provided to Complainant on three occasions: April 8, 2016; May 9, 2016; and June 27, 2016. West Penn averred Complainant failed to make the payments as required by 52 Pa. Code §§ 1405(d) and 1405(e) while those medical certificates were current on the electric service account.

By Call-In Telephone Hearing Notice dated June 6, 2023, the Office of Administrative Law Judge notified the parties an initial telephonic hearing was scheduled for August 3, 2023. On June 8, 2023, as the presiding officer, I issued a Prehearing Order which, *inter alia*, advised the parties that (1) continuances would only be granted if requested; (2) the request must be received 5 business days prior to the hearing; and (3) requests would be granted only in situations where sufficient cause was shown to exist.

Complainant registered for the Commission's e-filing service when he filed the Complaint. Accordingly, the Hearing Notice and Prehearing Order were eServed to Complainant in the ordinary course of the Commission's business to the email address he provided to and registered with the Commission. There is no indication in the record that service of the Hearing Notice or the Prehearing Order failed as undeliverable to Complainant.

¹ The Commission's Bureau of Consumer Services (BCS) provided Complainant with a payment arrangement on August 2, 2021, at BCS Decision No. 3794310.

On August 3, 2023, the hearing convened at 10:03 a.m. However, Complainant was not present or represented by counsel. Respondent was represented by Margaret A. Morris, Esquire, who appeared with witness, Laurie Parker. Ms. Parker testified that Complainant continues to receive electric service from Respondent, and the current balance was \$17,378.58, on the day of the telephonic hearing. Respondent moved for the admission of 4 exhibits, which were admitted as West Penn Exhibits 2, 5, 9 and 10. Due to Mr. Lukehart's failure to appear at the hearing, West Penn made an oral motion to dismiss the Complaint with prejudice for Complainant's failure to appear to prosecute his case. The motion was taken under advisement. The complainant failed to appear for the hearing before the hearing adjourned at 10:42 a.m. The hearing record closed on August 3, 2023, upon the conclusion of the telephonic hearing, pursuant to 52 Pa. Code § 5.431(a).²

The court reporting service filed the transcript, consisting of 21 pages and 4 exhibits, with the Commission on August 15, 2023. This case is procedurally ready for ruling.

FINDINGS OF FACT

1. Complainant is Jerry Lukehart, who resides at 288 Iron Bridge Road, Ford City, Pennsylvania (service address). (West Penn Exhibit 2).
2. Respondent is West Penn Power Company, a jurisdictional electric distribution company which provides residential electric service at the service address. (West Penn Exhibit 2).
3. As of the date of the initial telephonic hearing, the unpaid balance on Complainant's electric service account was \$17,378.58. (Tr. 9; West Penn Exhibit 2).
4. The last payment Respondent received from Complainant on the electric service account was received on August 16, 2022. (West Penn Exhibit 2).

² The regulation at 52 Pa. Code § 5.431(a) indicates the hearing record closes at the conclusion of a hearing unless otherwise directed by the presiding officer or the Commission.

5. The hearing notice dated June 6, 2023, and the Prehearing Order dated June 8, 2023, were eServed on Complainant at the email address provided by Complainant and were not returned to the Commission as undeliverable.

6. Complainant was not present and did not participate in the hearing on August 3, 2023. (Tr. 1-21).

7. Complainant did not contact the Commission or the presiding officer to explain why his failure to appear at the hearing was unavoidable.

DISCUSSION

Burden of Proof and Due Process

Pursuant to Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), the burden of proof is on the proponent of a rule or order. In this proceeding, Mr. Lukehart, as the complainant, is the proponent of a rule or order. Therefore, Complainant bears the burden of proving by a preponderance of the evidence that Respondent violated the Public Utility Code or a regulation or order of the Commission.³ Mr. Lukehart must show the utility is responsible or accountable for the problem described in the Complaint.⁴ 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 provided with notice and the opportunity to appear and be heard.⁵

³ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

⁴ *Feinstein v. Phila. Suburban Water Co.*, 50 Pa.P.U.C. 300 (1976).

⁵ *Schneider v. Pa. Pub. Util. Comm 'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

Dismissal of Complaint for Failure to Appear and Prosecute

Mr. Lukehart did not appear at the time scheduled for the August 3, 2023, hearing and no one appeared to represent Mr. Lukehart at the hearing. The date, time, and location of the hearing, as well as how to call into the telephonic hearing, was listed in the hearing notice, dated June 6, 2023, and in the Prehearing Order, dated June 8, 2023.

Complainant registered for the Commission's e-file service. Accordingly, The Office of Administrative Law Judge eServed the hearing notice and the Prehearing Order to Complainant by serving the same at the email address Mr. Lukehart provided and registered with the Commission. There is no indication in the record that eService failed as undeliverable to Mr. Lukehart. Accordingly, it must be presumed that these documents sent to Complainant were received by Complainant.⁶ Once notice of a hearing and the opportunity to be heard was provided, it was the responsibility of Mr. Lukehart to appear and participate in the hearing.⁷ If Mr. Lukehart could not appear, for any reason, then it was the responsibility of Mr. Lukehart to notify the presiding officer immediately about the impediment or dilemma.⁸

Section 332(f) of the Public Utility Code, 66 Pa.C.S. § 332(f), provides in pertinent part:

Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat[.]

⁶ *Hu v. PECO Energy Co.*, Docket No. C-2019-3012075 (Order entered Dec. 19, 2019); *Zirkel v. Phila. Gas Works*, Docket No. C-2016-2561176 (Final Order entered Apr. 7, 2017); *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered Jan. 31, 2017).

⁷ *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993); *Mumma v. PPL Elec. Utils. Corp.*, Docket No. C-00014869 (Order entered Jan. 24, 2002).

⁸ *Williams v. PECO Energy Co.*, Docket No. C-2018-3000734 (Opinion and Order entered Mar. 14, 2019).

In this proceeding, Mr. Lukehart did not call into the telephonic hearing as specified in the hearing notice and in the Prehearing Order. The hearing notice clearly indicated Complainant was to call into the hearing and provided Complainant with the Commission's toll-free conference bridge number and PIN number to do so. The hearing notice also provided an address and telephone number where Mr. Lukehart could reach the presiding officer if additional information was needed prior to the hearing.

Since Mr. Lukehart did not appear or participate in the hearing, despite receiving two written notices of the date and time of the hearing, the hearing was held in accordance with 66 Pa.C.S. § 332(f) and 52 Pa. Code § 5.245. Accordingly, Respondent's attorney moved to dismiss the Complaint with prejudice for failure to appear.

The party who fails to appear at a hearing has the burden of explaining why his/her failure to appear was unavoidable.⁹ When there are no facts in the record that the party's failure to appear was unavoidable, a complaint may be dismissed with prejudice.¹⁰ To date, there has been no communication to the Office of Administrative Law Judge or the presiding officer by, or on behalf of, Complainant explaining why Complainant's failure to appear at the hearing was unavoidable. Further, a large balance remains on the electric service account, on which Mr. Lukehart has not made a payment since August 16, 2022.

Because Mr. Lukehart did not contact the presiding officer or the Office of Administrative Law Judge to explain his absence or to explain why he was unavailable, Complainant failed to take advantage of the opportunity provided in which to appear and prosecute the Complaint against Respondent by presenting evidence to support the allegations. As a result, Complainant failed to sustain his burden of proof.

⁹ 66 Pa.C.S. § 332(a); *Herr v. West Penn Power Co.*, Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022).

¹⁰ *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered Apr. 22, 2022); *Volgstadt v. UGI Penn Natural Gas*, Docket No. F-02266429 (Opinion and Order entered Sept. 12, 2008); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995); *El-Ayazra v. West Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016).

Notably, Mr. Lukehart filed his Formal Complaint as a self-represented complainant. When a complainant is self-represented and does not expressly elect to be served electronically, the Commission refrains from dismissing the complaint with prejudice for failure to prosecute. Instead, the Commission has held due process dictates the complaint just be dismissed.¹¹ However, in the present case, Mr. Lukehart expressly elected eService, and there is no indication in the record that electronic service failed. Accordingly, Respondent's oral motion to dismiss the Complaint with prejudice will be granted in the ordering paragraphs below.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter in this proceeding. 66 Pa.C.S. § 701.
2. The due process rights of Complainant have been fully protected in this proceeding. *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993); 52 Pa. Code § 5.245(a).
3. Complainant, as the proponent of a rule or order, has the burden of proof in this matter. 66 Pa.C.S. § 332(a).
4. Complainant, by failing to appear at the scheduled hearing, waived the opportunity to participate in the hearing. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a).
5. Notice eServed to a party with no notification that service failed is presumed received. *Hu v. PECO Energy Co.*, Docket No. C-2019-3012075 (Order entered Dec. 19, 2019); *Zirkel v. Phila. Gas Works*, Docket No. C-2016-2561176 (Final Order entered Apr. 7, 2017); and *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered Jan. 31, 2017).

¹¹ See *Robert Hoyt v. Columbia Gas of PA, Inc.*, Docket No. F-2022-3032680 (Opinion and Order entered May 30, 2023).

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

7. When a complainant fails to appear for a scheduled conference or hearing and a complainant's failure to appear does not appear to be avoidable, the complaint may be dismissed. *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered Apr. 22, 2022); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995); *El-Ayazra v. West Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa. Code § 5.245.

8. Complainant failed to meet the burden of proving that he is entitled to the relief requested. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the oral motion of West Penn Power Company to dismiss with prejudice the Complaint filed in Jerry Lukehart v. West Penn Power Company at Docket No. C-2023-3039786 is granted.

2. That the Formal Complaint filed by Jerry Lukehart in Jerry Lukehart v. West Penn Power Company at Docket No. C-2023-3039786 is dismissed with prejudice.

3. That the Secretary mark this case as closed.

Date: October 2, 2023

/s/
Conrad A. Johnson
Administrative Law Judge