

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

Nikisha Leach

Public Meeting October 19, 2023

3033868-ALJ

v.

Docket No. C-2022-3036868

Philadelphia Gas Works

STATEMENT OF COMMISSIONER JOHN F. COLEMAN, JR.

Before the Commission for disposition is the Initial Decision of Administrative Law Judge Arlene Ashton that dismissed the Formal Complaint of Nikisha Leach for the failure to attend a scheduled hearing and prosecute her complaint. I agree with the Initial Decision and find that it should be adopted without modification.

The Complainant was eServed an Initial Telephonic Hearing Notice and Prehearing Order that informed her that a telephonic hearing was scheduled for March 2, 2023. The Complainant was notified in both documents that her case could be dismissed “with prejudice” for failure to appear at the hearing. Instructions for requesting a continuance of the hearing were included in both documents. The hearing was convened as scheduled on March 2, 2023. Counsel for PGW, along with a PGW witness and court reporter were present, but the Complainant was not. PGW’s counsel advised the ALJ that the Complainant had sent her an email the night before that contained a request to reschedule the hearing. PGW’s counsel informed the ALJ that she had replied to the email and directed the Complainant to provide any request for continuance to the Commission. PGW’s counsel also stated that she informed the Complainant that PGW would oppose any request for continuance given that PGW was ready to proceed.

After it was confirmed that the Commission had received no request for continuance, PGW moved to dismiss the complaint, with prejudice, for failure to appear at the hearing. Section 5.245 of the Commission’s regulations apply to circumstances where a complainant fails to appear at a hearing, and provide that a complainant will have waived their opportunity to participate and not be permitted to reopen to later reopen a matter unless the presiding officer determines that the non-appearance was unavoidable.¹ The ALJ held, properly, that the Complainant, as the moving party, had the burden to prosecute her complaint.² The ALJ found that that the information relayed by PGW’s attorney was not testimony, and that there was no

¹ 52 Pa. Code § 5.245. This regulation implements Section 332(f) of the Public Utility Code, which provides that a party who fails to attend a hearing shall be deemed to have waived participation and shall not be permitted to later reopen a disposition unless the presiding officer determines that the non-appearance was “unavoidable.” 66 Pa. C.S. § 332 (f). Dismissing a party’s action “with prejudice” gives full effect to Section 332(f), and signals that the Commission will not permit the party to later reopen the disposition.

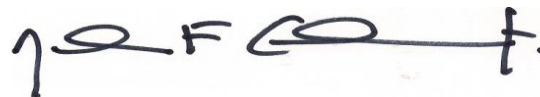
² 66 Pa.C.S. § 332(a). A party failing to appear at a hearing has the burden of proof explaining how the failure to appear satisfies the “unavoidable” standard of Section 332(f). *Herr v. West Penn*, C-2021-3028202 (Order entered September 15, 2022).

evidence of a request for a continuance for the Commission to consider. Accordingly, the ALJ granted PGW's Motion to Dismiss, with prejudice, the Formal Complaint.

Commission regulations provide that a request for continuance should be filed at least five days prior to the hearing date.³ A presiding officer may, but is not required to, disregard a defect in procedure and waive a requirement of the Commission's regulations to secure a just, speedy, and inexpensive determination of a proceeding where it does not adversely affect a substantive right of a party.⁴ Accordingly, it is within the discretion of the presiding officer to accept a continuance submitted less than five days before a hearing in some circumstances. However, as noted by the ALJ, no request for continuance was filed with the Commission by the Complainant. The presiding ALJ also acknowledged that she could not rely on the out of court statement made by the Complainant to PGW's counsel to determine whether Sections 1.15 or 5.245 should be waived. PGW's verbal representation regarding the Complainant's request was hearsay, and a finding of fact based solely on hearsay that is not corroborated by record evidence will not stand.⁵ Accordingly, the presiding ALJ did not abuse her discretion by failing to grant a continuance.

The Commission only has those powers conferred by the legislature.⁶ This grant does not include the general authority to waive or nullify provisions of its enabling legislation that might be contrary to policy concerns.⁷ There is no basis in law to rely on Section 1.2 of our regulations or past Commission decisions involving *pro se* litigants to waive or nullify Section 332(f) of the Public Utility Code, including the required element that a non-appearance must be unavoidable to be excused. If the Commission has concerns regarding whether sufficient due process is afforded to *pro se* litigants, that issue may be advanced by proposing an amendment to the Public Utility Code. As the presiding ALJ followed the provisions of Section 332(f), the Initial Decision contains no error in law and should be adopted without modification.

Date: October 19, 2023



**JOHN F. COLEMAN, JR.
COMMISSIONER**

³ 52 Pa. Code §1.15 (b).

⁴ 52 Pa. Code §1.2.

⁵ *Enigwe v. PGW*, F-2016-255196 (Order entered April 4, 2018); *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976)

⁶ *City of Philadelphia v. Philadelphia Electric Company*, 472 A.2d 997 (Pa 1994).

⁷ The General Assembly has expressly granted the Commission limited authority to waive several subsections. See 66 Pa.C.S. 2212(c) and 2212(h)(1), pertaining to city natural gas distribution operations, and 3202(b), pertaining to authorities of cities of the second class. If the Commission had a general authority to waive the provisions of its enabling legislation, these specific grants would be unnecessary.