

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

**KRISTEN FLAHERTY
V.
DUQUESNE LIGHT COMPANY**

**PUBLIC MEETING OF OCTOBER 19, 2023
3039314- ALJ
DOCKET NO. C-2023-3039314**

**JOINT MOTION OF CHAIRMAN STEPHEN M. DeFRANK
AND VICE CHAIR KIMBERLY BARROW**

On July 26, 2023, the Office of Administrative Law Judge issued the Initial Decision of Administrative Law Judge (ALJ) Chad L. Allensworth in this matter involving a complaint filed by Kristen Flaherty against Duquesne Light Company (Duquesne) dated March 28, 2023. On the formal complaint, Ms. Flaherty indicated that Duquesne was threatening to terminate her gas service and requested a payment arrangement.¹ Ms. Flaherty attached to her complaint a shut off notice she received from Duquesne showing an outstanding amount of \$1,424.64 for electric service as of March 22, 2023.

Duquesne filed a timely answer and new matter in response to the complaint. In particular, Duquesne noted in its new matter that Ms. Flaherty filed a prior complaint on September 19, 2022, making the same allegations of threats to shut off electric service and requesting a payment arrangement which was dismissed by Initial Decision dated February 16, 2023, with a final order of dismissal entered March 21, 2023. As a result, Duquesne argued that the complaint filed on March 28, 2023, should be barred by the doctrine of *res judicata*. Duquesne added that Ms. Flaherty should be prohibited from filing any further complaints until her current balance is paid in full.

On May 17, 2023, Duquesne filed a motion for judgment on the pleadings arguing that the complaint should be dismissed on the basis of *res judicata* and again arguing that Ms. Flaherty should be barred from filing any further complaints until her balance is paid in full. The Initial Decision granted the motion for judgment on the pleadings and dismissed the complaint without a hearing.

We find the two reasons offered for dismissal in the Initial Decision to be erroneous. First, the prior complaint that is used as a basis for dismissal by *res judicata* was not decided on the merits. Instead, the prior case was dismissed for failure to prosecute. Furthermore, we do not agree that abuse of process sufficient to bar Ms. Flaherty from filing further complaints at this Commission has occurred.

The doctrine of *res judicata* is designed to promote certainty, finality and judicial economy. For the doctrine of *res judicata* to prevail, the following four conditions must all be met: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality and capacity of the parties suing or being sued. *See, Day v. Volkswagenwrk Aktiengesellschaft*, 464 A.2d 1313 (Pa. Super 1983). In addition, the doctrine of *res judicata* prevents a suit between the same parties on the same cause of action after a court of competent jurisdiction has

¹ The Initial Decision noted that Duquesne does not provide gas service but electric service.

rendered a final judgment on the merits. *See, Reynolds v. PPL Elect. Utilities Corp.*, Docket No. C-2011-2255268 (Opinion and Order entered Dec. 15, 2011); *Potora v. UGI Penn Natural Gas, Inc.*, Docket No. C-2018-3003485 (Opinion and Order entered Aug. 8, 2019).

In this case, there was no final judgment on the merits of the prior complaint because it was dismissed when Ms. Flaherty failed to appear and prosecute the complaint. *See, Kristen Flaherty v. Duquesne Light Co.*, Docket No. C-2022-3035389 (Initial Decision dated Feb. 16, 2023; Final Order entered March 21, 2023). As a result, *res judicata* cannot be used to dismiss the instant case.

Nor should this complaint be dismissed on a preliminary basis due to Section 316 of the Public Utility Code. Section 316 of the Code governs *prima facie* evidence of facts found which are conclusive unless set aside. This provision does not address *stare decisis* or dismissals with prejudice. This provision creates a presumption that prior facts, such as tariffed rates, are reasonable and precludes collateral attacks upon those facts absent a showing of changed circumstances. *McLaughlin v. DQE*, Docket No. C-20065798 (2009); *Duquesne Light Co. et al. v. Pa. PUC*, 715 A. 2d 540 (Pa. Cmwlth. 1998); *Popowsky v. Pa. PUC*, 669 A. 2d 1029, 1037 n. 14 (Pa. Cmwlth. 1995), rev'd in part on other grounds, 550 Pa. 449, 706 A. 2d 1197 (1997); *Zucker v. Pa. PUC*, 401 A. 2d 1377, 1380 (1979); *Schellhammer v. Pa. PUC*, 157 Pa. Cmwlth. 86, 629 A. 2d 189, 193 (1993).

The Commission often relies on Section 316 of the Code and the ancillary *res judicata* or collateral estoppel. However, Pennsylvania law holds that *res judicata* should not apply if a matter is dismissed on procedural matters, like a failure to appear, because there has been no substantive determination on the merits. *Scharf v. DeCou Company*, 320 Pa. 552, 183 A.41, 553-554 (1936); *Farabiugh Chevrolet v. Covenant Management, Inc.*, 361 Pa. Super. 234, 522 A.2d 100, 101 (1987); *Gutman v. Giordano*, 384 Pa. Super 78, 557 A.2d 782, 783 (1989); *Acobacey v. Acobacey*, 22 Phila. 333, 191 Phila. Cty. Rptr. LEXIS 42 (1991); *Monroeville v. Liberatore*, 1999 Pa. Commw. LEXIS 537, 736 A.2d 31, 34 (1999). In this case, the facts found in the prior complaint only involved the failure to appear and not the averments raised in the instant complaint.

In addition, record evidence in this proceeding does not support barring Ms. Flaherty from filing any further complaints due to abuse of Commission processes.

The Commission has found that a complainant abused the regulatory process by frequently requesting continuances of hearings and then not appearing and by not honoring his part of a settlement. *Grossman v. Bell Telephone Company of Pennsylvania*, 67 Pa. PUC 714 (1988). In subsequent abuse of process cases, the Commission extended the identifying criteria to include such factors as the number and the nature of complaints, the number of defaulted payments, the use of tactics to avoid payments and service terminations, and the history of payments.²

In this case, the extent to which Ms. Flaherty has used the Commission process does not rise to the level of abuse such that she should be barred from filing further complaints in the future. Ms. Flaherty has filed 15 complaints against various utilities. Certainly, this is a high number. However,

² *DiFilippo v. PECO Energy Company*, Docket No. C-20027116 (Initial Decision dated August 8, 2002; Final Order dated October 3, 2002) (complainant had abused the Commission's complaint process by filing three previous complaints which were all dismissed with prejudice and by filing a fourth complaint which contained impertinent or scandalous matters); *Seidenstricker v. Metropolitan Edison Company*, Docket No. F-2008-2019388 (Opinion and Order entered July 28, 2009) (complainant was an abuser of the system by defaulting on four Bureau of Consumer Services and four Met-Ed payment plans, by using a variety of means to avoid terminations and by invoking the provisions of 66 Pa. C.S. §§ 1521-1533 on 18 occasions).

only two of those 15 complaints, including the current complaint, were filed against Duquesne. The 13 additional complaints were filed against other utility companies. It is unreasonable to associate complaints Ms. Flaherty filed against other utility companies to bar her from filing a complaint against Duquesne, where the facts and circumstances of those other cases may have no bearing on the service Ms. Flaherty receives from Duquesne. Here, Ms. Flaherty filed only one other complaint against Duquesne and that does not constitute an abuse of process. Nor is there any evidence that Ms. Flaherty misused the hearing continuance or settlement processes.

Barring a consumer from filing a complaint is a matter that should only be done in rare circumstances where an abuse of process has clearly been found. Otherwise, a consumer may be unnecessarily prohibited from having legitimate concerns heard regarding essential utility services. In this case, Ms. Flaherty should not be prohibited from filing further complaints against Duquesne.

As a result, it is appropriate that this matter be reversed and remanded back to Office of Administrative Law Judge so the complaint can be heard on the merits.

THEREFORE, I MOVE:

1. That the Initial Decision of Administrative Law Judge Chad L. Allensworth in Kristen Flaherty v. Duquesne Light Company at docket number C-2023-3039314 be reversed and remanded back to the Office of Administrative Law Judge for a hearing on the merits consistent with the above discussion.
2. That the Office of Special Assistants prepare an Opinion and Order consistent with this motion.

October 19, 2023
Date



Stephen M. DeFrank
Chairman

October 19, 2023
Date



Kimberly Barrow
Vice Chair