

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

**Regulations Concerning the PA  
Public Utility Commission's  
General Provisions at 52 Pa. Code  
Chapters 1, 3 and 5**

**Public Meeting November 9, 2023  
3041347-LAW  
Docket No. L-2023-3041347**

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

Before the Commission for disposition is the Commission's Notice of Proposed Rulemaking (NOPR) seeking comments on proposed amendments to update and clarify the Commission's procedural regulations at 52 Pa. Code §§ 1.1-1.96, 3.1-3.602, and 5.01-5.633. By way of background, the Commission's general provisions for practice before the Commission were last modified in 2006. In preparation for this NOPR, the Commission convened a series of meetings between Commission staff and attorneys who practice before the Commission in 2016. The recommendation prepared by staff is the result of lengthy efforts to obtain input and balance the interests of all parties. I thank those who participated in this process. I would have supported beginning the rulemaking through the adoption of the proposed Order that is now before us.

However, I do not support the Motion that has been offered to modify the proposed Order. My objections to the Motion are both to the process and the substance of some of the changes. First, regarding the process, the Motion proposes a number of far reaching, substantive changes that were not the subject of the Commission's prior efforts to obtain input from stakeholders and build consensus. I think a better approach would have been to share these changes with stakeholders through an Advanced Notice of Proposed Rulemaking. Additionally, in some cases the Motion does not identify the specific, alternative regulatory language that is to be used in the Annex that will be served on the Office of Attorney General, the Governor's Budget Office, and the public. It is the Commission's usual practice in NOPRs to vote on specific, regulatory language, whether from a staff recommendation or a Motion. Given that it is unclear what the Commission is voting to do for some of the changes, I am not certain that this approach satisfies Pennsylvania's Open Meeting Law.<sup>1</sup>

Turning to the substance of the Motion, I will explain my objections to some of the substantive changes, using the criteria in Section 5.2 of the Regulatory Review Act.<sup>2</sup>

1. Dismissals With Prejudice, Section 332(f): Statutory Authority, Economic Impact, Clarity

The Pennsylvania General Assembly adopted Section 332(f) of the Public Utility Code (Code) to ensure judicial economy and provide for finality of proceedings. The Commission's existing regulations at Section 5.245(a)-(c) follow the statutory language and enjoy the

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<sup>1</sup> 65 Pa.C.S. §§ 701-716.

<sup>2</sup> 71 P.S. § 745.5a. Among other things, the Section 5.2 criteria requires us to show the following in support of a proposed regulation: the legal authority, need, and financial/economic impact.

presumption of reasonableness. The dismissal of a case, “with prejudice,” for the failure to appear at a hearing gives full effect to all the words of this subsection.<sup>3</sup> Such dismissals are mandated by the plain language of the statute, and are not a policy decision of the Commission:

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, or to recall for further examination of witnesses who were excused, unless the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting such reopening or further examination.

66 Pa.C.S. § 332(f) (emphasis added). In my view, the proposed rule is contrary to the plain language of Section 332(f) of the Code. The word “shall” carries an imperative or mandatory meaning, and was used twice by the General Assembly as a clear direction to the Commission.<sup>4</sup> The plain language of the statute provides the best indication of legislative intent regarding the consequences of failing to appear at a scheduled hearing.<sup>5</sup> The statute does allow the Commission to permit a party to reopen the proceeding if nonappearance was “unavoidable” and the interests of other parties are not prejudiced. Words and phrases of a statute are to be construed according to their ordinary and plain meaning, and there is no basis in the language of the statute or law to eliminate the requirement of a finding that nonappearance was “unavoidable” and replace it with an “abuse of process” standard. The proposed rule is also contrary to Commonwealth Court precedent recognizing that the dismissal of cases for failure to appear at an agency hearing does not violate due process.<sup>6</sup>

The obligation to abide by Section 332(f) clearly applies both to attorneys and parties. The section heading is “Actions of parties and counsel.”<sup>7</sup> The language clearly penalizes a “party” complainant who is representing themselves who fails to appear by prohibiting them from later reopening the proceeding. With attorneys, the language permits the Commission to bar them from appearing before the Commission in any future proceedings for obstructive conduct. In either case, the obligation is the same; either party complainants representing themselves or their attorneys are obligated by Code Section 332(f) to appear for a scheduled hearing or to explain why the nonappearance was unavoidable.

Allowing parties to later reopen proceedings they failed to prosecute will result in increased legal costs for public utilities which will be paid for by other ratepayers. No alternative regulatory language has been proposed for review.

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<sup>3</sup> 1 Pa.C.S. § 1921(a).

<sup>4</sup> *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 577 Pa. 231 (2004). “This Court has repeatedly recognized the unambiguous meaning of the word in most contexts.” 577 Pa. at 245.

<sup>5</sup> *Miller v. County of Centre*, 643 Pa. 560 (2017).

<sup>6</sup> “[D]ismissal of a proceeding for a party’s failure to prosecute or failure to appear at a hearing without good cause does not violate due process.” *Fountain Capital Fund, Inc. v. Pennsylvania Securities Commission*, 948 A.2d 208, 214 (Pa. Cmwlth. 2008).

<sup>7</sup> Section headings may be used in aid of construction. 1 Pa.C.S. § 1924.

2. Need: *Res judicata*/Collateral Estoppel interplay with dismissal with prejudice: Need, Clarity

The Motion proposes to prohibit the application of *res judicata* and collateral estoppel to dismiss a complaint brought on the same allegations as a complaint that was previously dismissed for failure to appear at the scheduled hearing. I do not disagree that *res judicata*/collateral estoppel should not be used to dismiss such a complaint. One of the required elements of *res judicata* is that the case acting as a bar must have been a final judgment,<sup>8</sup> and it is at least debatable as to whether a decision to dismiss a complaint with prejudice when the complainant fails to appear is a “final judgment” for purposes of *res judicata*.<sup>9</sup> In my view, however, this prohibition would be an unnecessary addition to our regulations because an existing Code provision already addresses how to handle a complaint brought on the same allegations as a complaint that was previously dismissed for failure to appear. Namely, this type of case can be dismissed under Section 316 of the Code, which gives conclusive effect to a final Commission order not appealed that dismisses a complaint with prejudice for failure to appear at hearing.<sup>10</sup> Therefore, I do not agree with the Motion that Section 316 of the Code does not address dismissals with prejudice. No specific regulatory language has been proposed for consideration in this Motion.

3. Representation of Corporations and Partnerships and Representation of Individuals. Clarity/Statutory Authority.

The Motion proposes to revise our procedural rules to permit small business corporations or partnerships to appear through an authorized corporate official. The Motion also proposes to revise the rules to permit an individual consumer to be represented by an authorized representative who is not an attorney. I oppose these proposed revisions because I am concerned that they would allow for the unauthorized practice of law before the Commission. I note that the Motion cites to the practice before other forums and state agencies as support for the proposed revisions. However, without more details about the nature of the proceedings before these other forums and state agencies, I am not comfortable concluding that the proposed revisions are lawful. Unlike the examples cited, the Commission is neither part of Pennsylvania’s unified judicial system nor an executive agency. The Motion provides no analysis or comparison of the enabling legislation, regulations or rules of court for these other forums with the respective rules or case precedent that applies to the Commission. In my view, these are the types of changes that should have been vetted with stakeholders first through an Advanced Notice of Proposed Rulemaking. No specific regulatory language has been proposed in this Motion on this issue.

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<sup>8</sup> *McNeil v. Owens-Corning Fiberglas Corp.*, 545 Pa. 209, 213, 680 A.2d 1145,1147-48 (1996).

<sup>9</sup> *See Howell v. Philadelphia Gas Works*, Docket No. C-2016-2568426, (Opinion and Order entered May 2, 2017).

<sup>10</sup> 66 Pa. C.S. § 316. Section 316 of the Code provides, in pertinent part, that: “Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” I concede that Section 316 of the Code governs *prima facie* evidence of facts found which are conclusive unless set aside and creates a presumption that prior facts are reasonable. However, that is not all that Section 316 does. Section 316 of the Code also gives conclusive effect to a final Commission order that is not appealed and in doing so, precludes a collateral attack of such order. Thus, regardless of whether *res judicata*/collateral estoppel applies, a complainant is barred by Code Section 316 from relitigating issues raised in a prior complaint that was dismissed with prejudice for failure to prosecute and meet the burden of proof.

4. Extensions of time and continuances: Need/clarity

The Commission's administrative law judges already have the discretion to liberally construe our procedural rules and accept requests for continuance received less than five days prior to the hearing date, and grant such requests on a regular basis. Section 1.2 of our regulations permit the ALJs to waive any defect of procedure "to secure the just, speedy and inexpensive" determination in every type of proceeding.<sup>11</sup> Liberal construction is to apply with particularity for cases involve pro se litigants.<sup>12</sup> The revision to Section 1.15 is unnecessary and would appear to create a standard different than found at Section 1.2(a).

Having identified these specific concerns, I do not agree with modifying the proposed Order to include the changes from the Motion.



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

**Date: November 9, 2023**

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<sup>11</sup> 52 Pa. Code § 1.2(a).

<sup>12</sup> 52 Pa. Code § 1.2(d).