

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held October 19, 2023

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Ralph V. Yanora, Dissenting
Kathryn L. Zerfuss
John F. Coleman, Jr., Statement, Dissenting

Kristen Flaherty

C-2023-3039314

v.

Duquesne Light Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Chad L. Allensworth, issued on July 26, 2023, in the above-captioned proceeding. No Exceptions have been filed. However, we have exercised our right to review the Initial Decision pursuant to Section 332(h) of the Public Utility Code (Code), 66 Pa. C.S. § 332(h). For the reasons stated below, we shall reverse the Initial Decision and remand the matter to the Office of Administrative Law Judge (OALJ), consistent with this Opinion and Order.

History of the Proceeding

On March 28, 2023, Kristen Flaherty (Complainant or Ms. Flaherty) filed a Formal Complaint (Complaint) with the Commission against Duquesne Light Company (Duquesne or Company) alleging that Duquesne was threatening to terminate her gas service and she requested a payment arrangement.¹

On April 17, 2023, Duquesne filed an Answer and New Matter in response to the Complaint. In its Answer the Company denies that the Complainant received gas service but instead stated that she receives electric service. The Company also denies all material allegations of the Complaint unless admitted. Answer at 2. The Company further denies any wrongdoing associated with issuing one or more termination notices. *Id.* Duquesne admits that it notified the Complainant of its intent to shut off her service for her repeated and persistent failure to pay her monthly bills in full and on time. *Id.* In addition, Duquesne admits that the Complainant has asked for a payment arrangement for her outstanding account balance but denies that she is eligible for one since she is enrolled in the Company's Customer Assistance Program and has not made any payments on the account since establishing the service in her name on August 6, 2021 nor has she applied for any energy assistance programs or grants. *Id.* at 3.

In New Matter, Duquesne noted, *inter alia*, that the Complainant has shown a lack of good faith effort to pay her utility bills and that consequently the Commission can refuse to issue a payment arrangement. *Id.* at 5. In addition, Duquesne stated that the Commission entered a Final Order on March 21, 2023 to the Initial Decision issued on February 16, 2023. In that Initial Decision the presiding officer dismissed a prior complaint with prejudice for failure to sustain the burden of proof by failing to prosecute the complaint. Subsequently, on March 28, 2023, the Complainant filed this Complaint

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

which Duquesne argues is legally insufficient as it is barred by the doctrine of *res judicata* by the earlier Final Order. *Id.* at 6. In addition, Duquesne stated that the Complainant had filed no less than fifteen complaints with the Commission involving various jurisdictional utility companies authorized to provide service in Pennsylvania. *Id.*

On May 17, 2023, Duquesne filed a Motion for Judgment on the Pleadings regarding the Complaint on the grounds that the Motion should be granted and the Complaint should be dismissed because the Complainant is not eligible for a payment arrangement since she is enrolled in the Company's CAP and because it is barred by the doctrine of *res judicata*. Motion at 2.

On June 6, 2023, the Commission issued a Motion Judge Assignment Notice that, *inter alia*, named the ALJ as the assigned presiding officer.

On July 21, 2023, the Complainant filed another formal complaint using the newly revised complaint form to include her choice of the method of service.

On July 26, 2023, the Commission issued the Initial Decision of ALJ Allensworth, in which he granted Duquesne's motion for judgment on the pleadings asserting the doctrine of *res judicata* and barring the customer from filing any further complaints against the utility until she pays the outstanding balance on her account or the balance is otherwise forgiven. The Initial Decision dismissed the Complaint without a hearing. I.D. at 1.

Discussion

The Commission's regulation at 52 Pa. Code § 5.102(a) permits any party to move for summary judgment or judgment on the pleadings after the pleadings are closed, but within such time as to not delay a hearing. The presiding officer will grant

the motion if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

The moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. The Commission must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *First Mortgage Co. of Pennsylvania v. McCall*, 459 A.2d 406 (Pa. Super. 1983).

The provision at 52 Pa. Code § 5.102(c) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of the case exists, a hearing is unnecessary. *Lehigh Valley Power Committee v. Pa. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989).

The doctrine of *res judicata* reflects the refusal of the law to tolerate the re-litigation of a matter decided by a court of competent jurisdiction. For the doctrine to prevail four conditions must 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 sued. *Day v. Volkswagenwerk Aktiengesellschaft*, 474 A.2d 1313, 1316-17 (Pa. Super. 1983). The doctrine of *res judicata*, which is also known as claim preclusion, holds that a final judgment on the merits by a court of competent jurisdiction will bar any future action on the same cause of action between the parties and their privies. *Hopewell Estates, Inc. v. Kent*, 646 A.2d 1192 (Pa. Super. 1994).

Section 316 of the Public Utility Code (Code) reads:

§ 316. Effect of commission action.

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. ...

66 Pa. C.S. § 316.

ALJ's Initial Decision

ALJ Allensworth made thirteen (13) Findings of Fact and reached ten (10) Conclusions of Law. I.D. at 3-5, 13-15. We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law except as reversed or modified by this Opinion and Order, either expressly or by necessary implication.

The ALJ found that since Ms. Flaherty failed to timely reply to Duquesne's New Matter she admitted to all of the following: (1) that the Complaint was filed only seven days after the Commission dismissed her prior complaint against Duquesne with prejudice and raised the identical issues; (2) that she has not made a payment on her account since establishing her electric service on August 6, 2021, including not making payments since her enrollment in the Company's CAP on April 12, 2022; and (3) that she failed to oppose the Company's assertions that her actions show a pattern of attempts to delay termination of her electric or were an abuse of process. I.D. at 12.

Furthermore, the ALJ found that the Complainant abused the administrative process by filing numerous complaints for her utility services over the course of the last three years, fifteen complaints in all, in order to avoid payment for her utilities and thus

possible termination of services. I.D. at 12-13. In this instance her electric service. *Id.* at 13.

The ALJ dismissed the Complaint on the grounds of *res judicata* and abuse of process and prohibited Ms. Flaherty from filing any further informal or formal complaints with the Commission regarding her Duquesne account until her current outstanding balance on her account is either paid in full or otherwise forgiven. *Id.* at 13.

Disposition

As a preliminary matter, any argument that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. We are not required to consider expressly or at length each contention or argument raised by parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984). On exercise of our independent review of the record, in this matter, the applicable law and the Initial Decision, we will reverse the ALJ's Initial Decision and remand this matter to the Office of Administrative Law Judge for such further proceedings as deemed necessary, consistent with this Opinion and Order.

The two reasons offered for dismissal in the Initial Decision are 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*. 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 rendered a final judgement on the merits. *See, Reynolds v. PPL Electric Utilities Corp.*, Docket No. C-2011-2255268 (Opinion and Order entered December 15, 2011); *Potora v. UGI Penn Natural Gas, Inc.*, Docket No. C-2018-3003485 (Opinion and Order entered August 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 February 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-2008-2032251 (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, 706 A. 2d 1197 (Pa. 1997); *Zucker v. Pa. PUC*, 401 A.2d 1377, 1380 (Pa. 1979); *Schellhammer v. Pa. PUC*, 629 A.2d 189, 193 (Pa. Cmwlth. 1993).

The Commission often relies on Section 316 of the Code and the ancillary principles of *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*, 183 A. 41, 553-554 (Pa. 1936); *Farabugh Chevrolet v. Covenant Management, Inc.*, 522 A.2d 100, 101 (Pa. Super. 1987); *Gutman v. Giordano*, 557 A.2d 782, 783 (Pa. Super. 1989); *Acobacey v. Acobacey*, 22 Phila. 333, 191 Phila. Cty. Rptr. LEXIS 42 (1991); *Monroeville v. Liberatore*, 1999 Pa. Comm. 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. P.U.C. 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 fifteen (15) complaints against

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 eighteen occasions).

various utilities. Certainly, this is a high number. However, only two of those fifteen (15) complaints, including the current complaint, were filed against Duquesne. The thirteen (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 the Office of Administrative Law Judge so the complaint can be heard on the merits.

Conclusion

Based on the foregoing, we shall reverse the Initial Decision of ALJ Chad L. Allensworth and remand the matter to the OALJ for such further proceedings, as deemed necessary, consistent with this Opinion and Order. **THEREFORE,**

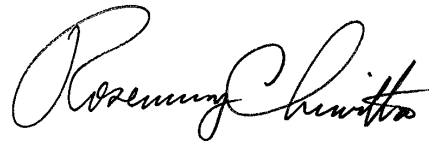
IT IS ORDERED:

1. That the Initial Decision of Administrative Law Judge Chad L. Allensworth, issued on July 26, 2023, is reversed, consistent with this Opinion and Order.

2. That the proceeding shall be remanded to the Office of Administrative Law Judge for further proceedings, as warranted, and for the issuance of an Initial Decision on Remand, consistent with this Opinion and Order.

3. That the proceeding be set for a hearing on the merits consistent with this Opinion and Order.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive, flowing style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: October 19, 2023

ORDER ENTERED: November 13, 2023