

**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

Nikisha Leach

C-2022-3036868

v.

Philadelphia Gas Works

**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) Arlene Ashton, issued on June 16, 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 November 8, 2022, Nikisha Leach (Complainant or Ms. Leach) filed a Formal Complaint (Complaint) with the Commission against Philadelphia Gas Works (PGW or Company) alleging that PGW is threatening to shut off her service or has already done so and is requesting a payment arrangement. Complaint at 2-3.

On December 7, 2022, PGW filed an Answer (Answer) to the Complaint. In its Answer, the Company, *inter alia*, admitted that it: established gas service at the Service Address as of April 7, 2017; issued a shut off notice for the gas service at the Service Address; that the Service Address is listed as receiving residential gas heat and other domestic usage; and that the Complainant has had at least two broken Company issued payment agreements and one broken Commission issued payment agreement. Answer at 1.

On December 13, 2022, the Commission issued and served by email an Initial Call-In Telephonic Hearing Notice (Hearing Notice) setting a formal call-in telephonic hearing for this matter to be held on March 2, 2023. The Hearing Notice, *inter alia*, named the ALJ as the assigned presiding officer, provided a toll-free call-in number to the Parties as well as instructions on how to request a continuance and included language concerning the effects on the case if a party failed to appear.

Also on December 14, 2022, the Commission issued and served by email a Prehearing Order, advising the Parties, *inter alia*, of the toll-free call-in number to participate in the hearing, directed the Parties to comply with various procedural requirements including the procedure to request a change to the scheduled hearing and included language concerning the effects on the case if a party failed to appear. Both the Hearing Notice and the Prehearing Order were sent to Ms. Leach at the email address she

listed on her Complaint<sup>1</sup> and, according to the ALJ, were not returned to the Commission as undeliverable. I.D. at 3.

On March 2, 2023, the hearing convened as scheduled. I.D. at 3. Anita Murray, Esquire, appeared with one witness on behalf of PGW, prepared to present PGW's case. *Id.*; Tr. at 3. The Complainant did not call in to participate in the hearing at the scheduled time. I.D. at 3. The presiding officer allowed additional time for Ms. Leach to call in to the hearing conference number. *Id.*; Tr. at 6-7. Attorney Murray stated that on the evening of March 1, 2023 she received an email from Ms. Leach explaining that due to her work schedule, she could not attend the scheduled hearing on March 2 and requested that it be delayed until either noon of March 2 or to March 3. I.D. at 4; Tr. 3-4. Attorney Murray stated that she responded to the email early on the morning of March 2 informing Ms. Leach that any request for continuance must be directed to the Commission as well as the OALJ and must comply with the requirements set forth in the Prehearing Order issued in this matter. *Id.* at 4; Tr. 4. Neither the presiding officer nor the Commission received any contacts or any request for a continuance from the Complainant prior to the hearing. Accordingly, the hearing proceeded in her absence. I.D. at 4. PGW's counsel moved to dismiss the Complaint due to the Complainant's failure to appear at the hearing and prosecute her case. *Id.* The Complainant did not contact the ALJ or file anything with the Commission regarding her failure to appear for the hearing. *Id.*

The record closed on March 24, 2023. I.D. at 4.

On June 16, 2023, the Commission issued the Initial Decision of ALJ Ashton, in which she granted PGW's motion and dismissed the Complaint, with prejudice, for failure of the Complainant to appear and prosecute her case despite being given notice and an opportunity to appear and be heard. I.D. at 1 and 6-8.

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<sup>1</sup> *See, supra* note 2.

## Discussion

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. PUC*, 479 A.2d 10, 15 (Pa. Cmwlth. 1984). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Schneider*, 479 A.2d at 15 (Pa. Cmwlth. 1984). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Montefiore Hospital Ass'n of Western Pennsylvania v. Pa. PUC*, 421 A.2d 481, 484 (Pa. Cmwlth. 1980).

The Commission is required to fix the time and place of a hearing in a complaint proceeding and to serve notice thereof upon the parties in interest. *See*, 66 Pa. C.S. § 703(a)-(b). Service on interested persons is sufficient to provide notice. 52 Pa. Code § 5.201(a).<sup>2</sup>

Recently the Commission found that “[t]he practice of dismissing complaints by *pro se* complainants, with prejudice, when there is no record of the complainant agreeing to service by email and the complainant fails to appear at the hearing is inconsistent with due process.” *Robert Hoyt v. Columbia Gas of PA, Inc.*, Docket No. F-2022-3032680 (Opinion and Order entered May 30, 2023) (*Hoyt*) at 7. Furthermore, the Commission stated that “[t]here is no need to close the door to this venue to *pro se* complainants unless record evidence shows that they are abusing the Commission’s administrative process to avoid paying their utility bills.” *Id.* at 7.

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<sup>2</sup> We note as well, and as discussed in the Initial Decision, as with most cases in which a party fails to appear, once a hearing is scheduled and duly noticed by the Commission, it is the responsibility of the parties to appear and participate in the hearing. *Mumma v. PPL*, Docket No. C-00014869 (Opinion and Order entered January 24, 2002); *See also*, 66 Pa. C.S. § 332(f) and 52 Pa. Code § 5.245(a)-(b) (if a party fails to appear at a scheduled and duly noticed hearing, the party will be deemed to have waived the opportunity to participate in the hearing).

As the proponent of a rule or order, the Complainant in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code, 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant must show that the Company is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Complainant's evidence must be more convincing, by even the smallest amount, than that presented by the Company. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission's decision must be supported by substantial evidence in the record. *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

### **ALJ's Initial Decision**

ALJ Ashton made twelve (12) Findings of Fact and reached eight (8) Conclusions of Law. I.D. at 4-5, 7-8. 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 stated that as the party seeking relief from the Commission, the Complainant bears the burden of proof in this matter. According to the ALJ, the Complainant failed to appear at the date and time set for the hearing in her case, despite notice of the hearing having been served upon her by the Commission. I.D. at 3-4.

The ALJ noted that the Hearing Notice and the Prehearing Order were served electronically upon Ms. Leach at the email address she provided in the Complaint form and there was no notification that service of the documents failed. Accordingly, the ALJ presumed that the documents sent to the Complainant were received by her. I.D. at 4, citing *Hu v. PECO Energy Company*, Docket No. C-2019-3012075 (Opinion and Order entered December 19, 2019) (*Hu*); *Zirkel v. Philadelphia Gas Works*, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017) (*Zirkel*); *Morella v. PECO Energy Company*, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016) (*Morella*).

The ALJ further noted that the Complainant did not contact the presiding officer or the Commission's Office of Administrative Law Judge to explain the reason for her absence, why she was unavailable or to request a continuance. According to the ALJ, Ms. Leach failed to take advantage of the opportunity to appear and prosecute the Complaint. Thus, the ALJ found that Ms. Leach failed to carry her burden of proof. Accordingly, the ALJ granted PGW's motion and dismissed the Complaint, with prejudice, for failure to prosecute. I.D. at 5, citing *Brown v. PECO Energy Company*, Docket No. C-2019-3009486 (Opinion and Order entered April 22, 2022); *Little v Pittsburgh Water & Sewer Auth.*, Docket No. F-2021-3027107 (Opinion and Order entered February 7, 2022); *Williams v PECO Energy Co.*, Docket No. C-2018-3000734 (Opinion and Order entered March 14, 2019); *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995); *El-Ayazra v. West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016).

## **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 and the applicable law, we shall reverse the Initial Decision, and remand the matter to OALJ, consistent with the following discussion.

In *Hoyt*, the Commission explained:

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. The Commission is required to fix the time and place of a hearing in a complaint proceeding and to serve notice thereof upon the parties in interest.

*Id.* at 4-5 (internal citations omitted).

First, the ALJ's December 14, 2022, Prehearing Order warned of the consequences of not appearing at the hearing and advised the Parties that any continuances should be sent at least five days in advance of the evidentiary hearing. However, work conflicts are sometimes unavoidable, and we note the Complainant's request was to move the scheduled hearing to a later time on the same day or to the following day.

Second, we have concerns regarding the Commission's practice of routinely dismissing pro se complaints, with prejudice, as being inconsistent with due process. In cases where there is no reason to suspect that the Commission's administrative process is being abused, dismissing without prejudice protects the

Complainant's right to due process while respecting the Commission's administrative process. In *Hoyt*, the Commission determined that "[t]he practice of dismissing complaints by *pro se* complainants, with prejudice, when there is no record of the complainant agreeing to service by email and the complainant fails to appear at the hearing is inconsistent with due process." *Id.* at 7. The Commission found that "[t]here is no need to close the door to this venue to *pro se* complainants unless record evidence shows that they are abusing the Commission's administrative process to avoid paying their utility bills." *Id.* The same reasoning applies here in this case because this Complainant does not appear to be abusing the Commission's process. For that reason, we submit that it is not appropriate to dismiss this Complaint with prejudice. Therefore, we shall remand the matter to the OALJ and the matter be set for hearing as soon as possible consistent with this Opinion and Order.

### **Conclusion**


Based on the foregoing, we shall reverse the Initial Decision of ALJ Ashton and remand the matter to the OALJ to have the matter set for hearing as soon as practicable, consistent with this Opinion and Order; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Initial Decision of Administrative Law Judge Arlene Ashton, issued on June 16, 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 hearing as soon as practicable 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