

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kimberly Able	:	
	:	
v.	:	C-2023-3040239
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Mary D. Long
Administrative Law Judge

INTRODUCTION

This decision dismisses the Formal Complaint and bars a Complainant from filing further informal or formal complaints regarding her electric utility account balance until she pays that balance in full. The Complainant failed to appear for the hearing, and therefore waived her claim that the Commission should grant her a further payment arrangement for her unpaid balance. The Complainant’s unpaid balance exceeds \$22,000. The Complainant’s conduct of filing numerous complaints, breaking payment arrangements, and other behavior constitutes an abuse of the administrative process calculated to avoid or delay the termination of her utility service.

HISTORY OF THE PROCEEDING

Kimberly Able (Complainant) filed a Formal Complaint (complaint) on April 24, 2023 against West Penn Power Company (West Penn Power). She checked the boxes noting that the utility was threatening to terminate her service and requesting a payment arrangement. For

relief, she requested a payment arrangement that “is not going to change monthly.” She admitted that she had a previous Commission-issued payment arrangement. She noted that her bill is in a “big amount from . . . a second carrier.”

West Penn Power filed an Answer and New Matter on May 18, 2023. In its Answer West Penn Power admitted that it had issued a 10-day termination notice. West Penn Power denied, among other things, that Ms. Able was entitled to a second Commission payment arrangement. In New Matter, West Penn Power averred that Ms. Able had defaulted from a 2022 Commission payment arrangement. West Penn Power also averred that Ms. Able has a poor payment history and has filed several meritless complaints to avoid termination. West Penn Power requests that the Commission bar her from filing further complaints regarding her arrearage until her balance is paid in full. West Penn Power included a Notice to Plead which notified Ms. Able that the Commission’s Rules of Procedure require her to file a response to the New Matter within 20 days. The notice also included instructions stating how to file a response.

On June 21, 2023, the Commission’s Office of Administrative Law Judge scheduled Ms. Able’s complaint for a hearing on August 17, 2023, and assigned the case to me. I issued a prehearing order on June 22, 2023, which informed Ms. Able how to call in to participate in the hearing and included other important information regarding the procedure for the conduct of the hearing.

I convened the hearing, as scheduled, on August 17, 2023. West Penn Power appeared, along with one witness, Laurie Parker. Ms. Able did not appear. I granted leave to West Penn Power to present evidence and testimony in support of West Penn Power’s abuse of process defense. West Penn Exhibits 1 through 18 were admitted into the record. West Penn Power identified two additional exhibits which were late-filed, West Penn Exhibits 19 and 20. On August 17, 2023, I issued an interim order that notified Ms. Able that I permitted West Penn Power to present testimony and exhibits in support of West Penn Power’s abuse of process defense. The order further identified West Penn Power Exhibits 19 and 20 and attached these exhibits to the order. Finally, I provided Ms. Able an opportunity to object to the admission of West Penn Power Exhibits 19 and 20, by filing an objection on or before August 24, 2023. Ms.

Able did not file an objection to the exhibits or contact the Commission regarding the conduct of the August 17, 2023 hearing.

After I received the transcript, I closed the record by order entered on August 29, 2023.

FINDINGS OF FACT

1. The Complainant is Kimberly Able.
2. The Respondent, West Penn Power, is a jurisdictional public utility.
3. Ms. Able did not appear at the hearing.
4. Ms. Able established service with West Penn Power on October 27, 2009.
Tr. 12.
5. Ms. Able is enrolled in West Penn Power's budget billing program. Tr. 14.
6. Ms. Able's current budget bill amount for West Penn Power distribution charges is \$114. Tr. 14; WPP Ex. 2.
7. Ms. Able is enrolled with an electric generation supplier (EGS). Tr. 14.
8. The account balance as of the date of the hearing was \$23,633.90. Tr. 15;
WPP Ex. 2.

9. Eleven payments have been posted to Ms. Able's account since January 1, 2020. Tr. 17; WPP Ex. 3.

10. With the exception of one payment in February, 2021, Ms. Able does not typically make payments during the Winter Moratorium, December 1 through March 31. Tr. 17.

11. Ms. Able presented three medical certificates to prevent termination of electricity service when the account was delinquent. Tr. 17.

12. West Penn Power accepted a medical certificate on November 13, 2012, for a balance of \$7,157.08. Tr. 18; WPP Ex. 5.

13. Ms. Able did not make payments required by the Commission's regulations while the medical certificate was on the account. Tr. 18.

14. West Penn Power denied a proffered medical certificate on August 9, 2013, because the doctor's office reported that there was no medical provider available to sign the certificate. Tr. 18.

15. West Penn Power accepted a medical certificate on October 2, 2013, for a balance of \$7,043.09. Tr. 18; WPP Ex. 5.

16. Ms. Able did not make payments required by the Commission's regulations while the medical certificate was on the account. Tr. 18.

17. Ms. Able proffered medical certificates on October 14, 2022, and April 14, 2023, to stop termination of her delinquent account. Tr. 19.

18. The October 14, 2022, medical certificate and April 14, 2023, medical certificate were not returned to West Penn Power by a medical provider. Tr. 19, 42.

19. Ms. Able's account was enrolled in West Penn Power's customer assistance program, PCAP, on October 25, 2016. Tr. 20.

20. The deferred balance on October 25, 2016, was \$14,587.09. Tr. 20.

21. Ms. Able's account was removed from PCAP on November 2, 2018, because she failed to re-verify her eligibility. Tr. 20, 43; WPP Ex. 20.

22. The remaining deferred arrearage on November 2, 2018, was \$8,509.09. Tr. 20.

23. West Penn Power provided Ms. Able with a payment arrangement on July 5, 2019. Tr. 21; WPP Ex. 4.

24. The payment arrangement terms for the \$12,384.34 arrearage were budget bill plus \$1,032 plus EGS charges beginning July 29, 2019. Tr. 21; WPP Ex. 4.

25. Ms. Able defaulted on the July 2019 payment arrangement. Tr. 21.

26. West Penn Power provided Ms. Able with a second payment arrangement on May 5, 2021, in accordance with the Commission's Covid-19 Emergency Order. Tr. 21; WPP Ex. 4; Docket No. M-2020-3019244.

27. The May 2021 payment arrangement terms for the \$19,585.45 arrearage were budget bill plus \$326 plus EGS charges beginning May 27, 2021. Tr. 21; WPP Ex. 5.

28. Ms. Able defaulted on the May 2021 payment arrangement. Tr. 21.

29. The Commission's Bureau of Consumer Services (BCS) awarded a payment arrangement to Ms. Able on April 18, 2022. Tr. 21; WPP Ex. 5.

30. The April 2022 payment arrangement terms for the \$19,649.29 arrearage were budget bill plus \$328 plus EGS charges beginning June 22, 2022. Tr. 21; BCS No. 3830581; WPP Ex. 16.

31. Ms. Able did not appeal the April 2022 Commission-issued payment arrangement. Tr. 22.

32. Since 2013, West Penn Power has issued 34 ten-day termination notices to Ms. Able because her account was delinquent. Tr. 24; WPP Ex. 7.

33. Ms. Able has filed ten informal complaints since 2013 with the Commission's BCS. Tr. 25; 27-34, 35-37; WPP Exs. 8-14, 16-17, 19.¹

34. Six informal complaints were dismissed by BCS because Ms. Able had PCAP arrearages. WPP Exs. 8, 9, 10, 12, 13, 14.

35. In two informal complaints, BCS granted Ms. Able payment arrangements. WPP Exs. 11, 16.

¹ Ms. Able filed an additional informal complaint which solely involved her EGS charges. WPP Ex. 19.

36. One informal complaint was dismissed because Ms. Able had a poor payment history and failed to respond to BCS's requests for information. WPP Ex. 17.

37. In 2019, Ms. Able filed a Formal Complaint which appealed BCS Decision 3654829 at Docket No. C-2019-3012943. WPP Ex. 15.

38. Ms. Able's 2019 Formal Complaint at Docket No. C-2019-3012943 was resolved and West Penn Power filed a certificate of satisfaction. WPP Ex. 15.

39. As part of the settlement, Ms. Able agreed to contact the Dollar Energy Fund to process her PCAP application. Tr. 34; WPP Ex. 15.

40. Ms. Able did not contact the Dollar Energy Fund. Tr. 34-35.

41. Ms. Able did not object to the certificate of satisfaction to request a hearing. Tr. 34.

DISCUSSION

Ms. Able filed a Formal Complaint seeking relief from the Commission in the form of a payment arrangement. Ms. Able must prove that she is entitled to this relief from the Commission.² Ms. Able did not appear at the hearing scheduled for her benefit and therefore did not take the opportunity to explain why the Commission should award her a further payment arrangement.

² 66 Pa.C.S. § 332.

Failure to Appear

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them.³ The fundamental tenets of due process are notice and an opportunity to be heard.⁴ However, the Commonwealth Court has consistently held that where a party fails to avail themselves of the opportunity to be heard without good cause, the proceeding may be dismissed and there is no violation of due process.⁵ The Commission has codified this principle in its regulations:

- (a) After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will:
 - (1) Be deemed to have waived the opportunity to participate in the conference or hearing.
 - (2) Not be permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing.
 - (3) Not be permitted to recall witnesses who were excused for further examination.
- (b) Subsection (a)(1)—(3) does not apply if the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitting the reopening or further examination. Counsel shall be expected to go forward with the examination of witnesses at the hearing under § 5.242 (relating to order of procedure), or as has been otherwise stipulated or has been directed by the presiding officer.^[6]

Ms. Able received adequate notice of the date and time of the hearing. She also had notice of the consequences if she did not appear and participate in the hearing. On her Formal Complaint form, Ms. Able elected to receive service by e-file and by email by initialing

³ *Pa. Bankers Ass'n v. Pa. Dep't of Banking*, 965 A.2d 956 (Pa. 2008); *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

⁴ *Pa. Bankers Ass'n*, 965 A.2d 956.

⁵ *See Fountain Capital Fund, Inc. v. Pa. Sec. Comm'n*, 948 A.2d 208 (Pa. Cmwlth. 2008), and the cases cited therein.

⁶ 52 Pa. Code § 5.425.

the appropriate spot on the form. She did not elect to receive service by First-Class Mail.⁷ Commission records indicate that Ms. Able did not register for e-filing as directed on the formal complaint form. Consistent with Commission procedure in place at the time, Commission records indicate that she was served with the June 21, 2023 Hearing Notice and June 22, 2023 Prehearing Order by e-mail. The June 22, 2023 Prehearing Order was also served by First-Class mail. Accordingly, it must be presumed that these documents sent to Complainant were received by Complainant.⁸ Both of these documents notified Ms. Able that if she failed to appear she could lose her case. Both of these documents also included contact information in the event Ms. Able had a conflict with the time and date of the hearing.

After the hearing, I issued an interim order which notified Ms. Able that the hearing had convened in her absence, and that I had taken evidence on West Penn Power's abuse of process defense. Ms. Able also had an opportunity to object to late-filed exhibits. Ms. Able not only did not object to the admission of the late-filed exhibits, but she did not contact me or my office to explain her failure to appear at her hearing or request a new hearing date and time.

Finally, not only did counsel for West Penn Power, Ms. Morris, appear at the hearing along with a witness, she described the attempts she made to contact Ms. Able in advance of the hearing.⁹ Ms. Morris called Ms. Able on July 27, 2023, and left a voice mail. Ms. Morris sent an email to Ms. Able on July 27, 2023. Ms. Able did not respond to either of these attempts to contact her. Ms. Morris again called Ms. Able on August 15, 2023, but her phone was no longer accepting calls. Ms. Morris also sent an email on August 15, 2023. Ms. Morris attempted to call Ms. Able for a third time on August 16, 2023, but was unable to leave a message because the phone was not accepting calls.¹⁰

⁷ Formal Complaint.

⁸ *Hu v. PECO Energy Co.*, Docket No. C-2019-3012075 (Order entered Dec. 19, 2019); *Zirkel v. Phila. Gas Works*, Docket No. C-2016-2561176 (Final Order entered Apr. 7, 2017); *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Final Order entered Jan. 31, 2017); *Berkowitz v. Mayflower Sec., Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mut. Ins. Co.*, 449 A.2d 658 (Pa. Super. 1982).

⁹ The Prehearing Order required counsel to contact the complainant in advance of the hearing to discuss the potential to settle the case. See Prehearing Order ¶ 10.

¹⁰ Tr. 5-6.

Ms. Morris appeared at the hearing with one witness, Laurie Parker. Ms. Morris prepared 18 exhibits for the hearing. Ms. Morris provided these exhibits to Ms. Able in advance of the hearing. The cover page for the exhibits included the time, date and call-in telephone number for the hearing. Ms. Morris' cover letter also included her contact information.

In sum, Ms. Able filed a complaint with the Commission requesting a hearing on her request for a payment arrangement. The Commission provided her with notice of the date and time of the hearing and contact information in the event Ms. Able wished to reschedule her hearing. Ms. Able was further notified that the hearing had taken place, and she did not contact the Commission to either explain her absence or request a further hearing. Counsel for West Penn Power expended substantial time and resources to attempt to contact Ms. Able and prepare for the hearing that Ms. Able requested. In *Herr v. West Penn Power Co.*,¹¹ the Commission held that a utility is prejudiced when a complainant fails to appear for a hearing, recognizing the expenditure of resources.¹² According to Commission regulations, Ms. Able has waived her opportunity for a hearing.¹³ Her complaint will be dismissed with prejudice.

Abuse of the Administrative Process

In appropriate circumstances, the Commission may bar a complainant from filing further complaints until the outstanding balance has been paid, where the Commission determines that the complainant is abusing the Commission's administrative process in order to avoid termination of utility service.

West Penn Power asserts that Ms. Able has abused the Commission's administrative process and requests that she be barred from filing further complaints about her arrearage until her account balance has been paid. Ms. Able had notice of West Penn Power's

¹¹ Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022) (*Herr*).

¹² *Herr* at p. 16.

¹³ 52 Pa. Code § 5.425.

defense. West Penn Power pled the abuse of process defense in its New Matter. West Penn Power's New Matter included a Notice to Plead which informed Ms. Able that she was required to respond. The Notice to Plead included instructions for responding. Ms. Able did not respond to the New Matter, nor did she appear at the hearing to dispute the claim.

In support of its position, West Penn Power points to Ms. Able's very large balance, poor payment history, and history of defaulted payment arrangements. West Penn Power also argues that Ms. Able's pattern of filing formal and informal complaints and medical certificates point to a pattern of using the Commission's process to avoid termination.

Although the Commission does not have specific standards for determining that a complainant is abusing the Commission's administrative process, there are factors that the Commission has considered in past decisions. The Commission has barred complaints from individuals who frequently request hearing continuances and afterward fail to appear.¹⁴ The Commission has also considered the number and nature of complaints filed by a customer, the number of defaulted payment arrangements, the complainant's payment history and the use of tactics to avoid payments and service terminations.¹⁵

In *Herr v. West Penn Power Co.*, the Commission recently precluded a complainant from filing further complaints in circumstances similar to the facts present here.¹⁶ In *Herr*, the Commission concluded that the complainant had a substantial unpaid balance and had made only ten payments in a seven-year period. The complainant did not comply with any payment arrangements, including a Commission-issued payment arrangement, company payment arrangements and customer assistance plan arrangements. The Commission also considered that the complainant had filed eight informal complaints and two formal complaints seeking relief from the Commission in the form of payment arrangements. The complainant in *Herr* failed to

¹⁴ Grossman v. Bell Tel. Co. of Pa., 67 Pa.P.U.C. 714 (1988).

¹⁵ See *Hogan v. West Penn Power Co.*, Docket F-2019-3012920 (Final Order entered Mar. 10, 2020); *Potora v. UGI Penn Nat. Gas, Inc.* Docket No. C-2018-3003485 (Opinion and Order entered Aug. 8, 2019); *DiFilippo v. PECO Energy Co.*, Docket No. C-20027116 (Final Order entered Oct. 3, 2002).

appear for a hearing and did not provide a good reason for failing to appear, even though she was provided with ample opportunity to do so. Taking all of these factors into consideration, the Commission determined that the complainant was abusing the administrative process in order to avoid termination of utility service. Accordingly, the Commission precluded the complainant from filing further complaints regarding the arrearages on her account until all arrearages were paid in full.¹⁷

The evidence in this record in this case supports the same conclusion that the Commission reached in *Herr*. Ms. Able has a substantial account balance of \$23,633.90. Since January 2020, Ms. Able has only made 11 payments on her account. Ms. Able typically does not make payments on her account during the Winter Moratorium.¹⁸ Ms. Able has qualified for two medical certificates but did not make payments while the medical certificates were in effect.¹⁹

Ms. Able has also been provided with several payment arrangements since 2016.²⁰ These payments arrangements include payment plans offered by West Penn Power, customer assistance program (PCAP) payment plans and two Commission-issued payment arrangements. Ms. Able has not complied with the payment terms provided by these plans. As part of the settlement of Ms. Able's 2019 formal complaint, she agreed to contact the Dollar Energy Fund, but did not do so.

Finally, like the complainant in *Herr*, Ms. Able has filed several informal and formal complaints regarding her account arrearage. Since 2013, she has filed ten informal complaints, and two formal complaints, including this complaint. As noted above, Ms. Able's

¹⁷ The Commission did not preclude the complainant from filing any complaint with the Commission. Indeed, the Commission permitted this complainant filed a subsequent complaint alleging that the utility had improperly denied her request for a medical certificate. *Herr v. Pa. Publ. Util. Comm'n*, Docket C-2022-3036729 (Final Order entered June 5, 2023).

¹⁸ See 52 Pa. Code § 56.100. Most utilities, including electric distribution utilities, may not terminate service to certain low-income customers between December 1 and March 31. However, this section does not relieve customers from the responsibility for making payments for utility service.

¹⁹ See 52 Pa. Code § 56.116 requires customers to make payments on current undisputed bills whenever service termination is postponed under medical emergency procedures.

²⁰ See WPP Exs. 4, 11, 16,

previous formal complaint filed in 2019 was resolved by a certificate of satisfaction. She did not object to the certificate of satisfaction or request a new hearing.

To conclude, despite numerous attempts to assist her in retiring her account arrearages, Ms. Able has made few inroads into her growing account balance. The evidence indicates that she has not made a good-faith effort to make regular payments on her account. Instead, she has engaged in a pattern of activity calculated to avoid or delay termination of her utility service. An order barring a customer from filing further complaints until the customer pays an account balance in full may seem like a harsh result. However, the Commission must also consider the interests of the utility and the utility's other customers. Unpaid bills are included in the utility's uncollectible expenses. A utility's customers pay this expense as part of the utility's rates.²¹ West Penn Power deserves to be paid for the service it has provided to Ms. Able. West Penn Power's other customers should not be responsible for Ms. Able's failure to make any good faith effort to pay for her service. Therefore, I find that she has abused the Commission's administrative process and should be barred from filing further formal or informal complaints regarding her arrearage until her balance is paid in full.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa.C.S. § 701.
2. Complainant as the proponent of a rule or order has the burden of proof. 66 Pa.C.S. § 332(a).
3. The Complainant had adequate notice of the date and time of the hearing and her due process rights have been fully protected. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

²¹ 66 Pa.C.S. 1402(1). A utility's customers also likely pay the legal expenses incurred in defending a customer's complaint.

4. By failing to appear at the scheduled hearing, the Complainant has waived her claims and has failed to sustain her burden of proof. 66 Pa.C.S. § 332; 52 Pa. Code § 5.245.

5. The Commission may preclude a complaint from filing further complaints until all account arrearages are paid in full when the Commission determines that the complainant has abused the Commission's administrative process. *Herr v. West Penn Power Co.*, Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022); *Hogan v. West Penn Power Co.*, Docket F-2019-3012920 (Final Order entered Mar. 10, 2020); *Potora v. UGI Penn Nat. Gas, Inc.*, Docket No. C-2018-3003485 (Opinion and Order entered Aug. 8, 2019); *DiFilippo v. PECO Energy Co.*, Docket No. C-20027116 (Final Order entered Oct. 3, 2002).

6. The Complainant's conduct constitutes an abuse of administrative process in order to avoid or delay the termination of her utility service. *Herr v. West Penn Power Co.*, Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022); *Hogan v. West Penn Power Co.*, Docket F-2019-3012920 (Final Order entered Mar. 10, 2020); *Potora v. UGI Penn Nat. Gas, Inc.*, Docket No. C-2018-3003485 (Opinion and Order entered Aug. 8, 2019); *DiFilippo v. PECO Energy Co.*, Docket No. C-20027116 (Final Order entered Oct. 3, 2002).

7. It is appropriate to preclude the complainant from filing further complaints regarding her account balance until her account balance is paid in full. *Herr v. West Penn Power*, Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022); *Hogan v. West Penn Power Co.*, Docket F-2019-3012920 (Final Order entered Mar. 10, 2020); *Potora v. UGI Penn Nat. Gas, Inc.*, Docket No. C-2018-3003485 (Opinion and Order entered Aug. 8, 2019); *DiFilippo v. PECO Energy Co.*, Docket No. C 20027116 (Final Order entered Oct. 3, 2002).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of Kimberly Able in Kimberly Able v. West Penn Power Company, Docket C-202303040239, is dismissed, with prejudice.
2. That commencing with the next billing period subsequent to the Commission's Final Order in this proceeding, Kimberly Able shall pay to West Penn Power Company, by cash, certified check, or money order, her account balance.
3. That if Kimberly Able fails to comply with the terms of this Order, West Penn Power Company is hereby authorized to suspend or terminate service upon compliance with all applicable tariff and regulatory requirements, and take any other action permitted by law.
4. That Kimberly Able is precluded from filing further formal or informal complaints with the Commission regarding the current balance on her account for electric service rendered by West Penn Power Company, until all arrearages are paid in full and that no complaint pertaining to such arrearages shall be accepted for filing by the Commission's Secretary's Bureau.
5. That the Commission's Bureau of Consumer Services and the Secretary for the Commission reject any further complaints, either informal or formal, by Kimberly Able against West Penn Power Company, on the arrearages for electric service rendered by West Penn Power Company until all the arrearages are paid in full.

6. That West Penn Power Company shall file a notice with the Commission, with a copy to all Parties to this proceeding, at Docket No. C-2023-3040239, within seven (7) days of the date that Kimberly Able's arrearages are paid in full.

7. That a copy of this Opinion and Order shall be served upon the Commission's Bureau of Consumer Services and the Secretary's Bureau.

8. That upon the filing of the notice required in Ordering Paragraph No.6 above, the Secretary's Bureau shall mark Docket No. C-2023-3040239 closed.

Date: November 21, 2023

/s/
Mary D. Long
Administrative Law Judge