

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kristen Flaherty	:	
	:	
v.	:	C-2023-3041914
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Chad L. Allensworth
Administrative Law Judge

INTRODUCTION

This decision dismisses the Formal Complaint of a customer for lack of jurisdiction to award a payment arrangement for arrearages incurred while in the Pennsylvania Customer Assistance Program as well as failure of the customer to appear at the scheduled hearing and prosecute her Formal Complaint despite having notice and an opportunity to be heard.

HISTORY OF THE PROCEEDING

On July 26, 2023, Kristen Flaherty (“Complainant” or “Ms. Flaherty”) filed a Formal Complaint (“complaint”) with Pennsylvania Public Utility Commission (“Commission”) against West Penn Power Company (“Respondent” or “West Penn”). The complaint marked that Respondent was threatening to shut off electric service or already had shut off electric service and requested a payment arrangement (“PAR”). (Complaint ¶¶ 4-5). As relief, Complainant wanted a new PAR based on “zero income.” (Complaint ¶ 6).

On April 20, 2023, Respondent filed its “Answer and New Matter of West Penn Power Company to the Complaint of Kristen Flaherty” (“answer and new matter”). In its answer, Respondent admitted to providing electric service to Complainant and to issuing a ten-day termination notice for delinquent charges. (Answer and New Matter ¶¶ 3-4). Respondent denied that the Commission had authority to direct a PAR for the arrears. (Answer and New Matter ¶ 4). Respondent further asserted that Complainant: (a) was in the Respondent’s Pennsylvania low-income Customer Assistance Program (“PCAP”), (b) failed to pay her bills in full or by the due date and (c) was prohibited from obtaining a PAR due to being in PCAP. (Answer and New Matter ¶ 4).

In its new matter, Respondent re-asserted that Complainant is actively enrolled in PCAP, the Commission has no authority to issue a PAR for Complainant while she is in PCAP and that Complainant acknowledged that her account cannot be the subject of a Commission PAR while enrolled in PCAP. (Answer and New Matter ¶¶ 12-14). The answer and new matter included a notice to plead that provided Complainant with 20 days to respond from the date of service.

Complainant did not file a response to the new matter.

On September 26, 2023, an Initial Call-In Telephone Hearing Notice (“Hearing Notice”) was served scheduling a telephonic hearing on November 15, 2023, at 1:30 p.m. and assigning the undersigned as the presiding officer. The Hearing Notice included the telephone number to call as well as the PIN number to enter and participate in the hearing. The Hearing Notice also provided how to request a continuance and the consequences of failing to appear and present evidence.

Additionally, on September 26, 2023, a Prehearing Order was served on the parties which, *inter alia*, reminded the parties of the date and time of the scheduled hearing, the telephone number to call, and the PIN number to enter and participate in the hearing. The Prehearing Order also provided certain hearing information and rules that would govern the proceeding including how to request a continuance, if necessary, and the consequences of failing to appear at the hearing and present evidence including the dismissal of the complaint.

The Hearing Notice and Prehearing Order were eServed to Complainant in the ordinary course of the Commission's business to the email address she registered with the Commission.¹ Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as undeliverable.

On November 15, 2023 at 1:30 p.m., the hearing convened as scheduled. Attorney Margaret A. Morris appeared on behalf of Respondent ready to proceed along with her witness, Alison Walker – Advanced Customer Service Compliance Specialist. Ms. Walker sponsored the following five exhibits: Respondent's Exhibit 4 – Payment Arrangement History, Respondent's Exhibit 5 – Bureau of Consumer Services Decision, Respondent's Exhibit 8 – PCAP Enrollment Letter, Respondent's Exhibit 10 – Cover Letter and Certificate of Satisfaction for Docket No. C-2023-3039663, and Respondent's Exhibit 11 – West Penn Power Billing Statement with Due Date of November 9, 2023.

Complainant failed to appear for the hearing. The hearing was delayed for approximately 15 minutes to allow time for Complainant to call in, but neither Complainant nor anyone representing Complainant appeared. (Tr. 4-5). As such, the hearing proceeded in Complainant's absence.

During the hearing, Attorney Morris noted her contact attempts with Complainant and made verbal motions to dismiss with prejudice for lack of Commission jurisdiction to issue a PAR while Complainant is in PCAP and for failure of Complainant to appear and prosecute her Complaint. The motions were taken under advisement. Complainant never contacted the Office of Administrative Law Judge to explain why her absence from the hearing was unavoidable.

The record closed on November 29, 2023 when the 29-page transcript was filed with the Commission.

¹ In her complaint, Complainant selected the option to receive all communications from the Commission via eService through an eFiling account she created and registered with the Commission. (Complaint ¶ 2).

FINDINGS OF FACT

1. Complainant is Kristen Flaherty, who receives electric service at 3998 Millers Run Road, McDonald, PA 15057 (“service property”). (Tr. 5).
2. Respondent is West Penn Power Company, who provides electric service to Complainant. (Tr. 5).
3. On July 26, 2023, Complainant filed the complaint at issue against Respondent.
4. On August 16, 2023, Respondent filed its answer and new matter, which included a notice to plead.
5. The new matter asserted that the Commission lacks authority to direct a PAR because Complainant is in PCAP and that Complainant was abusing the Commission’s complaint process by filing the current complaint to avoid a lawful termination. (Answer and New Matter ¶¶ 13, 15)
6. Complainant did not respond to the new matter.
7. On September 26, 2023, a Hearing Notice was eServed scheduling an initial telephonic hearing on November 15, 2023 at 1:30 p.m.
8. On September 26, 2023, a Prehearing Order was eServed reminding the parties of the date and time of the scheduled hearing.
9. Both the Hearing Notice and the Prehearing Order provided information on how to call into the hearing as well as rules that would govern the proceeding, including how to request a continuance and the consequences of failing to appear at the hearing and present evidence including the dismissal of the complaint.

10. Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as undeliverable.

11. On November 15, 2023, Complainant failed to appear and participate in the scheduled hearing.

12. Complainant failed to contact the undersigned or the Office of Administrative Law Judge to explain why her failure to appear at the hearing was unavoidable.

13. Alison Walker is a customer service compliance specialist for First Energy Company, who has worked for that company for 26 years with 11 years in the current position, which requires her to review, investigate and respond to Commission complaints and testify at hearings. (Tr. 13).

14. In August 2019, Complainant received a PAR from the Bureau of Consumer Services (“BCS”) at BCS number 372799 that required her to pay her budget bill plus \$58 beginning September 12, 2019. (Tr. 23; Respondent’s Exhibits 4 and 5).

15. Complainant did not appeal the PAR at BCS number 372799 thereby allowing it to become a Commission PAR. (Tr. 23).

16. Complainant defaulted on the PAR issued at BCS number 372799 based on non-payment. (Tr. 23).

17. Complainant was enrolled in Respondent’s PCAP effective April 15, 2022 and remained in PCAP as of the date of the hearing. (Tr. 16; Respondent’s Exhibit 8).

18. Complainant’s PCAP enrollment set aside her account balance at the time of enrollment with the purpose of reducing the balance over time with the application of forgiveness credits. (Respondent’s Exhibit 8).

19. Complainant owes \$256.99 in PCAP arrearages. (Tr. 19).

20. In 2023, Complainant filed a prior Formal Complaint listed as *Kristen Flaherty v. West Penn Power Company*, Docket No. C-2023-3039663 wherein she requested a Commission PAR while enrolled in PCAP. (Tr. 19-20; Respondent's Exhibit 10).

21. The case at Docket No. C-2023-3039663 was resolved by Certificate of Satisfaction with acknowledgment by Complainant that her account was not eligible for a Commission PAR while enrolled in PCAP. (Tr. 19; Respondent's Exhibit 10).

22. Complainant filed the current complaint 41 days after she received the Certificate of Satisfaction for Docket No. C-2023-3039663. (Tr. 19).

DISCUSSION

Burden of Proof

As a matter of law, to establish a legally sufficient claim, a Complainant must show that the named utility is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa.P.U.C. 196 (1990). The offense must also be a violation of the Public Utility Code, a Commission regulation or order or a violation of a Commission-approved tariff. 66 Pa.C.S. § 701.

Section 332(a) of the Public Utility Code (Code) provides that a Complainant, as the party seeking affirmative relief from the Commission, has the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is evidence that is more convincing, by even the smallest amount, than that presented by the opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, this Commission's decision must be supported by substantial evidence in the record. 2 Pa.C.S. § 704. "Substantial evidence" is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The pertinent inquiry is

whether substantial evidence exists to support the Commission’s findings. *Elliot Co. v. Workers’ Comp. Appeal Bd. (Shipley)*, 785 A.2d 480 (Pa. Cmwlth. 2002). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980); *Murphy v. Pa. Dep’t of Pub. Welfare, White Haven Ctr.*, 480 A.2d 382 (Pa. Cmwlth. 1984).

Motion to Dismiss for Lack of Jurisdiction

Ms. Flaherty filed a complaint seeking a new payment arrangement from West Penn. During the hearing, West Penn made a verbal motion to dismiss the complaint for lack of Commission jurisdiction to award a payment arrangement based on Ms. Flaherty being in PCAP. Thus, Chapter 14 of the Code, the Responsible Utility Customer Protection Act, 66 Pa.C.S. § 1401–1419 applies. Specifically, section 1405 of the statute provides, in pertinent part, as follows:

§ 1405. Payment arrangements.

(a) General rule. – The commission is authorized to investigate complaints regarding payment disputes between a public utility, applicants and customers. The commission is authorized to establish payment arrangements between a public utility, customers and applicants within the limits established by this chapter.

.....

(c) Customer assistance programs. – Customer assistance program rates shall be timely paid and shall not be the subject of payment arrangements negotiated or approved by the commission.

66 Pa.C.S. § 1405.

In support of its motion to dismiss for lack of jurisdiction, West Penn presented uncontradicted testimony from Ms. Walker, a customer service compliance specialist, as well as documentation providing that Ms. Flaherty was enrolled in West Penn’s PCAP on April 15, 2022 and that she is still currently enrolled in PCAP. (Tr. 13, 16; Respondent’s Exhibit 8). Ms. Walker also testified that Ms. Flaherty owes \$256.99 in PCAP arrearages. (Tr. 19).

Documentation from the hearing also indicated that Ms. Flaherty was aware that she could not seek a Commission PAR for the PCAP arrearages based on a prior Certificate of Satisfaction she accepted in *Kristen Flaherty v. West Penn Power Company*, Docket No. C-2023-3039663, which was 41 days prior to filing the complaint at issue.² (Tr. 19; Respondent’s Exhibit 10).

The statute is clear that the Commission is prohibited from issuing a payment arrangement for amounts owed by a customer while in PCAP. 66 Pa.C.S. § 1405. As such, the Commission has no authority to grant Ms. Flaherty a payment arrangement for the \$256.99 in PCAP arrearages.

Accordingly, Respondent’s motion to dismiss for lack of jurisdiction will be granted regarding the \$256.99 in PCAP arrearages.

Motion to Dismiss for Failure to Appear

As previously stated, Ms. Flaherty filed a complaint seeking a new payment arrangement from West Penn. Although the Commission is prohibited from granting a PAR for the PCAP portion of Ms. Flaherty’s arrearages, that does not preclude the Commission from issuing a PAR for the non-PCAP portion of her arrearages. *Hewitt v. PECO Energy Co.*, Docket No. F-2011-2273271 (Opinion and Order entered Sept. 12, 2013). Thus, West Penn also made a verbal motion to dismiss those claims with prejudice for failure to appear.

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984) (“*Schneider*”). This due process requirement is satisfied when the parties are provided notice and the opportunity to be heard. *Id.* As the proponent of any request for relief, the Complainant bears the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). Additionally, the Commission’s decision must be supported by substantial evidence. 2 Pa.C.S. § 704.

² Ms. Flaherty was not present for the hearing and failed to provide any evidence contrary to the evidence West Penn provided.

The Commission is required to fix the time and place of a hearing in a Complaint proceeding and serve notice thereof upon the parties in interest. 66 Pa.C.S. § 703(a)-(b). Service on interested persons is sufficient to provide notice. 52 Pa. Code § 5.61(a). As the Commission explained, “[i]t is well-established law that once timely notice of a hearing and the opportunity to be heard have been provided, it is the responsibility of the parties to be present and participate in the hearing.” *Mumma v. UGI Elec. Utils. Corp.*, Docket No. C-00014869 at 3 (Opinion and Order entered Jan. 28, 2002) (citing *Schneider*).

On September 26, 2023, the Commission issued and served a Hearing Notice and Prehearing Order for the November 15, 2023 hearing on both parties. The Hearing Notice and Prehearing Order informed the parties of: (a) the date and time of the hearing; (b) how to call in for the hearing; (c) how to request a continuance if needed and (d) the consequences of failing to appear at the hearing and present evidence including the dismissal of the complaint. The Hearing Notice and Prehearing Order were eServed on Complainant at the email address registered by Complainant with the Commission.³ Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as undelivered. Accordingly, it must be presumed that the document sent to Complainant was received by Complainant. *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).

Both the Public Utility Code and the Commission’s regulations provide that, after being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing, not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f), 52 Pa. Code § 5.245(a). However, neither of these provisions 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. 66 Pa.C.S. § 332(f), 52 Pa. Code § 5.245(b).

³ See n.1 supra.

In the instant case, Complainant failed to appear for the hearing despite receiving notice and despite the undersigned allowing additional time for Complainant to appear. The party who failed to appear at the hearing has the burden of explaining why his/her failure to appear was unavoidable. 66 Pa.C.S. § 332(a); *Herr v. West Penn Power Co.*, Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022). To date, Complainant has not communicated with the undersigned or the Office of Administrative Law Judge to explain why her failure to appear at the hearing was unavoidable. Therefore, I find that Complainant waived the opportunity to participate in a hearing on the matters raised in the complaint and Complainant's absence was not unavoidable. Thus, by her failure to appear, Complainant did not meet her burden of proof.

Consequently, it is appropriate to dismiss the complaint. As the Commission has explained, where a Complainant fails to appear for a scheduled hearing without good cause, the public interest is prejudiced by the wasteful use of the agency's and the Respondent's time and resources. *See, e.g., Elliott v. Pa. Elec. Co.*, No. F-2018-3003502 (Opinion and Order entered Feb. 6, 2020). When there are no facts in the record that the party's failure to appear was unavoidable, the complaint may be dismissed with prejudice. *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered Apr. 22, 2022); *Little v. Pittsburgh Water & Sewer Auth.*, Docket No. F-2021-3027107 (Opinion and Order entered Feb. 7, 2022); *Williams v. PECO Energy Co.*, Docket No. C-2018-3000734 (Opinion and Order entered Mar. 14, 2019); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995); 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a).

Accordingly, Respondent's motion to dismiss the complaint for failure to appear will be granted.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. § 701.

2. Customer assistance program debt rates shall be timely paid and shall not be the subject of payment arrangements negotiated or approved by the commission. 66 Pa.C.S. § 1405(c).

3. The Commission is required to provide due process to the parties appearing before them and this due process requirement is satisfied when the parties are provided notice and the opportunity to be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

4. After being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing, not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f), 52 Pa. Code § 5.245(a).

5. 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, the presiding officer may find that a party did not waive the opportunity to participate in the hearing. 66 Pa.C.S. § 332(f), 52 Pa. Code § 5.245(b).

6. Notice eServed to a party with no notification that service failed is presumed received. *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).

7. Complainant's due process rights have been fully preserved and Complainant's failure to appear was not unavoidable. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984); 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

8. As the party seeking relief, Complainant bears the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a), *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

9. The Complainant has failed to meet her burden of proof in this proceeding. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That West Penn Power Company's Motion to Dismiss the Complaint of Kristen Flaherty for lack of jurisdiction in Kristen Flaherty v. West Penn Power Company at Docket No. C-2023-3041914 is granted in regard to the delinquent \$256.99 she incurred while in the Pennsylvania Customer Assistance Program.

2. That West Penn Power Company's Motion to Dismiss the Complaint of Kristen Flaherty for failure to appear in Kristen Flaherty v. West Penn Power Company at Docket No. C-2023-3041914 is granted.

3. That the Formal Complaint of Kristen Flaherty in Kristen Flaherty v. West Penn Power Company at Docket No. C-2023-3041914 is dismissed.

4. That the matter at Docket No. C-2023-3041914 be marked closed.

Date: February 23, 2024

/s/
Chad L. Allensworth
Administrative Law Judge