

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Howard Smith	:	
	:	C-2023-3039819
v.	:	
	:	
Philadelphia Gas Works	:	

INITIAL DECISION

Before
Darlene Davis Heep
Administrative Law Judge

INTRODUCTION

This decision grants the Respondent’s Motion to Dismiss the Complaint for failure to prosecute because the Complainant failed to appear for the hearing.

HISTORY OF THE PROCEEDING

On April 11, 2023, Howard Smith (Mr. Smith or Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission against Philadelphia Gas Works (PGW or Respondent). On the Complaint Form, Mr. Smith checked the boxes that state: 1) The utility is threatening to shut off my service or has already shut off my service and 2) I am having a reliability, safety or quality problem with my utility service. Under Requested Relief, Mr. Smith stated that he would like to bring in his paperwork and go over things to resolve the matter.

On May 5, 2023, Respondent PGW filed its Answer. In the Answer, PGW admitted that a ten-day termination notice was issued for a past due amount and averred that the Complainant did not have a reliability, safety or quality issue with his service.

On May 15, 2023, an Initial Telephonic Hearing Notice was issued to all parties, setting an Initial Telephonic Hearing for June 29, 2023.

On May 23, 2023, a Prehearing Order was issued. The Prehearing Order advised the Complainant of the procedures and stated the date and time of the hearing. It also ordered the Complainant to, by June 2, 2023, provide more information and details about his Complaint. No additional information was provided by the Complainant.

On July 5, 2023, the Complainant emailed the Legal Assistant assigned to the case to request a continuance of the hearing for medical reasons. PGW did not object.

On June 20, 2023, an order was issued granting the continuance, sending the matter for rescheduling and directing the Complainant to submit a written statement further explaining his claim that he has a reliability, safety, or quality problem with his service at least 21 days before the rescheduled hearing date.

On June 23, 2023, a Rescheduled Initial Telephonic Hearing Notice was issued, setting a hearing for August 9, 2023. Subsequently a relative of the Complainant contacted my office and stated that a further continuance was needed for medical reasons. The matter was sent to scheduling for a new hearing date.

On August 1, 2023, a Rescheduled Initial Telephonic Hearing Notice was issued to all parties, setting a hearing for September 26, 2023. A prehearing Order was issued on August 2, 2023.

The Prehearing Order advised the Complainant of the procedures to be followed for the hearing and the date and time of the hearing. This order also stated:

No later than August 31, 2023, provide additional information regarding your complaint. As stated in the Complainant form, “Explain the problem, including dates, times or places and any other relevant details that may be important.”

August 1, 2023 Prehearing Order at 2. No additional information was provided by August 15, 2023.

On August 28, 2023, the Complainant emailed the Commission to request a continuance, again due to medical reasons. The matter was sent to Scheduling for a new hearing date.

On September 21, 2023, Mr. Howard submitted a letter from a physician stating that he required additional time for rehabilitation and the matter was sent to scheduling for a new hearing date. Also on September 21, 2023, a Rescheduled Initial Hearing Notice was issued to all parties, setting an Initial Telephonic Hearing for November 28, 2023.

On September 21, 2023, a Rescheduled Initial Telephonic Hearing Notice was issued to all parties, setting a hearing for November 27, 2023.

On or about November 21, 2023, a relative of the Complainant called the Philadelphia Office of the Commission and stated that the Complainant had not yet fully recovered and requested continuation of the hearing set for November 28, 2023. The parties were notified that the hearing would be rescheduled.

On December 16, 2023, an Order was issued that continued the hearing and advised the Complainant that no further continuances would be granted, and that required Mr. Smith to provide additional information regarding his Complaint no later than January 5, 2024.

On January 2, 2024, an Initial Call-In Telephonic Hearing Notice was issued, setting a hearing for February 12, 2023, beginning at 10:00 a.m. A Prehearing Order was issued

on January 3, 2024, which also stated the date and time of the hearing and provided dial in instructions.

All Hearing Notices and Prehearing Orders were eServed to the Complainant in the ordinary course of the Commission's business to the email address that was registered with the Commission by Complainant. No documents were returned to the Commission as undeliverable.

The hearing began as scheduled on February 12, 2024. PGW was represented by Attorney Graciela Christlieb. The Complainant did not call into the hearing. A short recess was taken to allow the Complainant time to call in.

When the hearing resumed, the Complainant had not called into the hearing. A motion by Attorney Christlieb to dismiss the matter for failure to prosecute was taken under advisement.

FINDINGS OF FACT

1. The Complainant is Howard Smith, a PGW customer on Pemberton Street in Philadelphia, Pennsylvania.
2. Philadelphia Gas Works is the Respondent.
3. On April 11, 2023, the Complainant filed this action.
4. The Respondent filed an Answer on May 5, 2023.
5. On May 23, 2023, a Prehearing Order was issued that advised the Complainant of the procedures and stated the date and time of the hearing.

6. This matter was rescheduled five times at the request of the Complainant due to medical reasons.

7. On January 2, 2024, an Initial Call-In Telephonic Hearing Notice was issued, setting a hearing for February 12, 2023.

8. A Prehearing Order was issued on January 3, 2024.

9. All Hearing Notices issued advised all parties:

[y]ou may lose the case if you do not take part in this hearing and present evidence on the issue(s) raised. Your case may be dismissed “with prejudice” which means that you will be, barred from filing another complaint raising the same claim(s) and issue(s) presented in the dismissed complaint.

10. All Prehearing Orders issued advised the Complainant of the procedures and the date and time of the hearing and also stated:

FAILURE TO APPEAR: You may lose the case if you do not take part in this hearing and present evidence on the issues raised. Your case may be dismissed “with prejudice” which means that you will be barred from filing another complaint raising the same claim(s) and issue(s) presented in the dismissed complaint.

11. The hearing began as scheduled on February 12, 2024 at 10:00 a.m.

12. Counsel for PGW dialed in for the February 12, 2024 hearing at 10:00 a.m.

13. The Complainant was not present when the telephonic hearing began as scheduled on February 12, 2024.

14. A recess was taken to allow the Complainant time to call in to the hearing.

15. The hearing resumed at 10:15 a.m. and the Complainant had not called in to the hearing.

16. Counsel for PGW made a motion to dismiss the Complaint for failure to prosecute, which was taken under advisement.

17. The Complainant had not called into the hearing when the hearing adjourned at 10:22 a.m.

18. The Hearing Notices and Prehearing Orders were eSserved on the Complainant to the email address provided by the Complainant and registered with the Commission.

19. None of the documents sent to the Complainant were returned as undeliverable to the Office of Administrative Law Judge (OALJ).

20. Complainant has not contacted the OALJ to request a sixth continuance or to explain why his failure to appear at the hearing was unavoidable.

DISCUSSION

As the party seeking affirmative relief from the Commission, the burden of proof rests on the Complainant. 66 Pa.C.S. § 332(a).

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). The essential elements of due process in an administrative proceeding are notice and an opportunity to be heard. *J.P. v. Dep't of Human Servs.*, 150 A.3d 173 (Pa. Cmwlth. 2016). Further, electronic service which is not indicated undeliverable is considered presumed to be received by the parties. *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) (*Morella*).

Several Hearing Notices and Prehearing Orders were sent to the Complainant. None of the Hearing Notices or Prehearing Orders were returned as undeliverable.

A Hearing Notice was sent to the Complainant on January 2, 2024 for a hearing to be held on February 12, 2024. It also advised the Complainant that he may lose the case if he did not take part in this hearing and present evidence on the issues raised. Although the Complainant or a representative had contacted the Commission previously by email and telephone to request a continuance, the Complainant did not request a continuance for the February 12, 2024 scheduled hearing date.

The Prehearing Order and the Hearing Notice for the February 12, 2024 hearing contained information regarding the date, time and call-in information for the hearing. These documents were served upon the Complainant and none of these documents were returned as undeliverable. It is therefore deemed that the Complainant received these documents and had notice of the date and time of the scheduled hearing. *Morella*.

As the Commission noted in *Strydio v. PPL Electric Utilities Corp.*, Docket No. C-2017-2633043, p. 6 (Opinion and Order entered July 18, 2018), "[o]nce notice of a hearing and the opportunity to be heard have been provided by the Commission, it is the responsibility of the parties to appear and participate in the hearing," (*citing, Mumma v. PPL Elec. Utils. Corp.*, Docket No. C-00014869 (Opinion and Order entered Jan. 24, 2002)); *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993). The Complainant was notified of the scheduled hearing and did not appear. To date, the Complainant has not contacted the Commission or the undersigned regarding this hearing to explain why his failure to appear was unavoidable.¹ The Complainant has waived the opportunity to participate in the hearing by

¹ 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).

failing to appear. 52 Pa. Code § 5.245(a); *Jefferson v. UGI Utils., Inc.*, 1995 Pa. PUC LEXIS 159 (Opinion and Order entered December 26, 1995).

Finally, Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of any request for relief. As the party bringing this Complaint, the Complainant bears the burden of proving by a preponderance of the evidence that he is entitled to relief. The Complainant did not appear for the hearing or offer evidence to support the Complaint. Therefore, the Complainant has not met the burden of proof and the Complaint will be dismissed. *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995); *El-Ayazra v. W. Penn Power Co.*, Docket No. F 2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa. Code § 5.245.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.
2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).
3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).
4. Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. This due process requirement is satisfied when the parties are accorded notice and the opportunity to be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).
5. After being notified, a party who fails to be represented at a hearing in a proceeding will: 1) be deemed to have waived the opportunity to participate in the hearing; 2) not

be permitted thereafter to reopen the disposition of a matter accomplished at the hearing; and 3) not be permitted to recall witnesses who were excused for further examination. 52 Pa. Code § 5.245(a).

6. The Complainant's due process rights have been fully protected. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993).

7. The Complainant did not appear and did not carry his burden of proof in this proceeding. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of Philadelphia Gas Works to dismiss the formal Complaint of Howard Smith at Docket No. C-2023-3039819 is granted.

2. That the Formal Complaint filed by Howard Smith in *Howard Smith v. Philadelphia Gas Works* at Docket No. C-2023-3039819 is dismissed.

3. That the Secretary's Bureau should mark this matter closed.

Date: May 15, 2024

_____/s/
Darlene Heep
Administrative Law Judge