

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Howard Smith	:	
	:	C-2023-3039820
v.	:	
	:	
PECO Energy Company	:	

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 12, 2023, Howard Smith (Mr. Smith or Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission against PECO Energy Company (PECO 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 1, 2023, Respondent PECO 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 identify a reliability, safety or quality issue with his service.

On May 9, 2023, an Initial Telephonic Hearing Notice was issued to all parties, setting an Initial Telephonic Hearing for July 13, 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 July 6, 2023 hearing for medical reasons. The matter was sent to scheduling for a new hearing date.

On July 6, 2023, a Rescheduled Initial Telephonic Hearing Notice was issued, setting a hearing for August 7, 2023.

On August 1, 2023, a CORRECTED: Rescheduled Initial Telephonic Hearing Notice was issued to all parties, setting a hearing for September 7, 2023.

On August 1, 2023, a Prehearing Order was issued. 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 15, 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 August 29, 2023, a Rescheduled Initial Hearing Notice was issued to all parties, setting an Initial Telephonic Hearing for October 12, 2023.

On September 13, 2023, a Prehearing Order was issued. The Prehearing Order advised the Complainant of the hearing procedures and also stated the date and time of the hearing.

On or about September 20, 2023, the wife of the Complainant called and stated that Mr. Smith needed more time for rehabilitation and asked that the hearing be continued.

PECO did not object to any of the continuances requested by the Complainant for medical reasons.

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 27, 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 27, 2023.

On November 27, 2023, a Cancellation Notice was issued for the November 27, 2023 hearing.

On November 28, 2023, the Complainant sent an email to the Commission stating that he wanted to discuss with PECO confusion regarding the Customer Assistance Program and his budget billing.

On January 2, 2024, an Initial Telephonic Hearing Notice was issued for a hearing on February 20, 2024.¹

On January 8, 2024, PECO filed a Motion to Dismiss the Complaint, asserting that the Complainant did not comply with the orders that he provide additional information regarding his Complaint. Given that the Complainant was acting *pro se* and the November 28, 2023 email sent by the Complainant, the Motion to Dismiss was held in abeyance pending the hearing, where additional information could be obtained.

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.² No documents were returned to the Commission as undeliverable.

The hearing began as scheduled on February 20, 2024. PECO was represented by Attorney Khadijah Scott. 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 Scott to dismiss the matter for failure to prosecute was taken under advisement.

¹ This matter and C-2023-3039819, Howard Smith v Philadelphia Gas Works, were rescheduled due to scheduling issues and given notification that Mr. Smith remained in a physical rehabilitation facility.

² When Complainant registered for an eFiling account he agreed to the following terms and conditions:

I agree that I will accept electronic service in the Commission proceeding in which I am a party of record. By creating this account, notification of filings via electronic mail shall constitute valid service of Commission documents. I understand that such electronic service of any and all documents will be substituted for service by mail. I agree to be served via email with all subsequent filings. I agree that email notices will be sent on the same day the document is posted.

By clicking on the 'Create Account' button below, [I am] agreeing to all the Terms and Agreements listed above.

eFiling Registration Page, <https://efiling.puc.pa.gov/Accounts/Create?accountType=I> (last visited May 14, 2024).

FINDINGS OF FACT

1. The Complainant is Howard Smith, a PECO Energy Company customer on Pemberton Street in Philadelphia, Pennsylvania.
2. PECO Energy Company is the Respondent.
3. On April 12, 2023, the Complainant filed this action.
4. The Respondent filed an Answer on May 1, 2023.
5. On May 9, 2023, an Initial Telephonic Hearing Notice was issued to all parties, setting an Initial Telephonic Hearing for July 13, 2023.
6. On May 23, 2023, a Prehearing Order was issued which advised the Complainant of the procedures for the hearing and also stated the date and time of the hearing.
7. The May 23, 2023 Prehearing Order also ordered the Complainant to, by June 2, 2023, provide more information and details about his Complaint.
8. On July 5, 2023, the Complainant emailed the Legal Assistant to request a continuance of the July 6, 2023 hearing for medical reasons.
9. On July 6, 2023, a Rescheduled Initial Telephonic Hearing Notice was issued, setting a hearing for August 7, 2023.
10. On August 1, 2023, a CORRECTED Rescheduled Initial Telephonic Hearing Notice was issued to all parties, setting a hearing for September 7, 2023.

11. On August 1, 2023, a Prehearing Order was issued that advised the Complainant of the hearing procedures and also stated the date and time of the hearing.

12. The August 1, 2023 Prehearing Order also required the Complainant to, by August 15, 2023, provide more information and details about his Complaint.

13. On August 28, 2023, the Complainant emailed the Commission to request a continuance, again due to medical reasons.

14. On August 29, 2023, a Rescheduled Initial Hearing Notice was issued to all parties, setting an Initial Telephonic Hearing for October 12, 2023.

15. On September 13, 2023, a Pre-hearing Order was issued, which advised the Complainant of the hearing procedures and also stated the date and time of the hearing.

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

17. On or about November 27, 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 27, 2023.

18. On November 27, 2023, a Cancellation Notice was issued for the November 27, 2023 hearing.

19. On January 2, 2024, an Initial Telephonic Hearing Notice was issued for a hearing on February 20, 2024, beginning at 1:30 p.m.

20. 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.

21. The 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.

22. The hearing began as scheduled on February 20, 2024 at 1:30 p.m.

23. Counsel for PECO dialed in for the February 20, 2024 hearing at 1:30 p.m.

24. The Complainant was not present when the telephonic hearing began as scheduled at 1:30 p.m. February 20, 2024.

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

26. The hearing resumed at 1:45 p.m. and the Complainant had not called in to the hearing.

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

28. The Complainant had not called into the hearing when the hearing adjourned at 1:50 p.m.

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

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

31. The Complainant has not contacted the Commission 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 electronically. 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 20, 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 or provide a statement of "good cause" for his absence on the February 20, 2024 scheduled hearing date.

The Prehearing Order and the Hearing Notice for the February 20, 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.³ The Complainant has waived the opportunity to participate in the hearing by failing to appear. 52 Pa. Code § 5.245(a); *Jefferson v. UGI Utils., Inc.*, 1995 Pa.P.U.C. LEXIS 159 (Opinion and Order entered Dec. 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 it is entitled to relief. By failing to appear and proffer any evidence to support the Complaint, the Complainant has failed to meet this burden. 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.*

³ 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).

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 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; 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 failed to appear and failed to carry his burden of proof in this proceeding. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PECO Energy Company to dismiss the formal Complaint of Howard Smith at Docket No. C-2023-3039820 is granted.
2. That the Formal Complaint filed by Howard Smith in Howard Smith v. PECO Energy Company at Docket No. C-2023-3039820 is dismissed.
3. That the Secretary's Bureau should mark this matter closed.

Date: May 17, 2024

_____/s/
Darlene Heep
Administrative Law Judge