

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert Brady	:	
	:	
v.	:	C-2023-3044862
	:	
Borough of Point Marion	:	

INITIAL DECISION

Before
Katrina L. Dunderdale
Administrative Law Judge

INTRODUCTION

The undersigned grants Respondent’s oral Motion to Dismiss the Formal Complaint of Robert Brady because Complainant failed to appear at the initial hearing and prosecute the case.

HISTORY OF THE PROCEEDING

On November 27, 2023, Robert Brady (Mr. Brady or Complainant) filed the Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against the Borough of Point Marion (Point Marion or Respondent), alleging a sharp increase in the water rate he must pay to Point Marion for water service and indicating a reliability, safety or quality problem with his service. Mr. Brady asserted his water bill went from \$34 per month to \$84 per month even though he only receives water service due to having a septic tank.

On January 3, 2024, Point Marion filed its Answer. Respondent acknowledged it provides water service to Mr. Brady at the service address (417 Stewartstown Road, Point

Marion, Pennsylvania). Point Marion denied generally all material allegations in the Complaint and acknowledged it raised rates for water service. Respondent asserted the Borough is subject to the Pennsylvania Borough Code and is not subject to the Commission's regulations.

By Call-In Telephone Hearing Notice dated February 1, 2024, the Office of Administrative Law Judge (OALJ) notified the parties an initial telephonic hearing was scheduled for March 18, 2024. On February 1, 2024, the presiding officer issued a Prehearing Order which, *inter alia*, advised the parties that continuances would only be granted if requested, the request must be received five business days prior to the hearing and requests would be granted only in situations where sufficient cause was shown to exist.

In his complaint, Complainant selected the option to receive all communications from the Commission via First Class Mail at the address provided by Complainant on the Complaint form. However, Complainant also registered an eFiling account, thereby electing eService.¹ Accordingly, the Hearing Notice and Prehearing Order were eServed on Complainant in the ordinary course of the Commission's business to the email address provided by Mr. Brady and registered with the Commission. Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as undeliverable.

On March 18, 2024, the presiding officer convened the hearing at 10:05 a.m., at which time Complainant was not present or represented by counsel. Respondent was represented by Douglas S. Sholtis, Esquire, who appeared with Linda Bise, the Secretary and Water

¹ 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 June 5, 2024).

Coordinator for Point Marion. Mr. Brady did not call into the hearing conference bridge and the presiding officer took a recess at 10:09 a.m., to give Mr. Brady additional time to call in to the hearing conference bridge and to provide Mr. Brady with an opportunity to join the telephonic hearing, and to ascertain if Mr. Brady contacted the Commission to indicate he was unavailable for the hearing. The presiding officer reconvened the hearing at 10:13 a.m. but Mr. Brady continued to be absent. Complainant did not contact the presiding officer or the OALJ to explain whether some impediment had made his timely appearance unavoidable or to communicate that he was unavailable to attend the hearing.

After reconvening at 10:13 a.m., Point Marion made an oral Motion to Dismiss with prejudice for failure to appear and prosecute the Complaint. Respondent noted it provides water service to Complainant at the service address. The presiding officer advised Respondent that the oral Motion to Dismiss would be taken under advisement and concluded the hearing at 10:15 a.m. The hearing record closed on March 18, 2024, upon the conclusion of the telephonic hearing, pursuant to 52 Pa. Code § 5.431(a).²

FINDINGS OF FACT

1. Complainant is Robert Brady, who receives water service at 417 Stewartstown Road, Point Marion, Pennsylvania (service address).
2. Respondent is Borough of Point Marion, a Borough in Fayette County, Pennsylvania, which provides water service at the service address.
3. The Hearing Notice dated February 1, 2024, and the Prehearing Order dated February 1, 2024, were eServed on Complainant at the email address provided to and registered with the Commission by Complainant.

² The regulation at 52 Pa. Code § 5.431(a) indicates the hearing record closes at the conclusion of a hearing unless otherwise directed by the presiding officer or the Commission.

4. The Hearing Notice dated February 1, 2024, and the Prehearing Order dated February 1, 2024, were not returned to the Commission as undeliverable.

5. Complainant was not present and did not participate in the hearing on March 18, 2024. (Tr. 1-21).

6. Complainant did not contact the Commission, Office of Administrative Law Judge or the presiding officer to explain how his failure to appear at the hearing was unavoidable.

DISCUSSION

Burden of Proof

Pursuant to Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), the burden of proof is on the proponent of a rule or order. In this proceeding, Mr. Brady, as the complainant, is the proponent of a rule or order. Therefore, Mr. Brady bears the burden of proving by a preponderance of the evidence that Respondent violated the Public Utility Code or a regulation or order of the Commission.³ Mr. Brady must show the utility is responsible or accountable for the problem described in the Complaint.⁴ Administrative agencies, like the Public Utility Commission, are required to provide due process to the parties appearing before them. This requirement is satisfied when the parties are provided with notice and the opportunity to appear and be heard.⁵

³ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

⁴ *Feinstein v. Phila. Suburban Water Co.*, 50 Pa.P.U.C. 300 (1976).

⁵ *Schneider v. Pa. Pub. Util. Comm 'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

Dismissal of Complaint for Failure to Appear and Prosecute

Mr. Brady did not appear at the time scheduled for the March 18, 2024, hearing and no one appeared to represent Mr. Brady at the hearing. The date, time and location of the hearing, as well as how to call into the telephonic hearing, was listed in the Hearing Notice, dated February 1, 2024, and in the Prehearing Order, dated February 1, 2024.

The OALJ served both the Hearing Notice and the Prehearing Order by eService at the email address Complaint provided to and registered with the Commission. The documents were not returned as undeliverable. Accordingly, it must be presumed that these documents sent to Complainant were received by Complainant.⁶

Once notice of a hearing and the opportunity to be heard was provided, it was the responsibility of Mr. Brady to appear and participate in the hearing.⁷ If Mr. Brady could not appear, for any reason, then it was the responsibility of Mr. Brady to notify the presiding officer immediately about the impediment or dilemma.⁸

Section 332(f) of the Public Utility Code, 66 Pa.C.S. § 332(f), provides in pertinent part:

Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat[.]

⁶ *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 *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993); *Mumma v. PPL Elec. Utils. Corp.*, Docket No. C-00014869 (Opinion and Order entered Jan. 24, 2002).

⁸ *Williams v. PECO Energy Co.*, Docket No. C-2018-3000734 (Opinion and Order entered Mar. 14, 2019).

In this proceeding, Mr. Brady did not call into the telephonic hearing as specified in the Hearing Notice and in the Prehearing Order. The Hearing Notice clearly indicated Complainant was to call into the hearing and provided Complainant with the Commission's toll-free conference bridge number and PIN number to do so. The Hearing Notice also provided an address and telephone number where Mr. Brady could reach the presiding officer if additional information or a continuance was needed prior to the hearing.

Further, the Commission provided Mr. Brady with notice of the consequences if he did not appear and participate in the hearing. The Hearing Notice stated as follows:

FAILURE TO APPEAR: You 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.

CONTINUANCES. You may request a continuance of the hearing if you have a good reason. All continuances will be granted only for good cause. To request a continuance, you must submit a written request (a “motion”) at least five (5) days before the hearing. Your motion should include: 1) The case name, number, and hearing date; 2) The reason for the request; and 3) Whether the other party agrees (or if you do not know).

Since Mr. Brady did not appear or participate in the hearing, despite receiving two written notices of the date and time of the hearing, the hearing was held in accordance with 66 Pa.C.S. § 332(f) and 52 Pa. Code § 5.245. Accordingly, Respondent's attorney moved to dismiss with prejudice the Complaint for failure of Complainant to appear.

The party who fails to appear at the hearing has the burden of explaining why his failure to appear was unavoidable.⁹ When there are no facts in the record that the party's failure

⁹ 66 Pa.C.S. § 332(a); *Herr v. West Duquesne Light Co.*, Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022).

to appear was unavoidable, a complaint should be dismissed with prejudice.¹⁰ To date, there has been no communication to the OALJ or the presiding officer by, or on behalf of, Complainant explaining why Complainant's failure to appear at the hearing was unavoidable.

Because Mr. Brady did not contact the presiding officer or the OALJ to explain his absence or to explain why he was unavailable at the time of the hearing, Mr. Brady failed to take advantage of the opportunity provided to him in which to appear and prosecute the Complaint against Respondent by presenting evidence to support the allegations. As a result, Complainant failed to sustain the burden of proof. Accordingly, Respondent's oral Motion to Dismiss the Complaint will be granted, and the Complaint will be dismissed in the Ordering Paragraphs below.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter in this proceeding. 66 Pa. C.S. § 701.
2. The due process rights of Complainant have been fully protected in this proceeding. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993).
3. Complainant, as the proponent of a rule or order, has the burden of proof in this matter. 66 Pa.C.S. § 332(a).
4. Complainant, by failing to appear at the scheduled hearing, waived the opportunity to participate in the hearing. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

¹⁰ *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered Apr. 22, 2022); *Volgstadt v. UGI Penn Natural Gas*, Docket No. F-02266429 (Opinion and Order entered Sept. 12, 2008); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995); *El-Ayazra v. West Duquesne Light Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016).

5. Notice eServed to a party's registered email address with no notification that service failed to be delivered to that email address is presumed to have been 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).

6. Once notice of a hearing and the opportunity to be heard has been provided, it is the responsibility of the parties to appear and participate in the hearing. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993).

7. When a complainant fails to appear for a scheduled conference or hearing and a complainant's failure to appear does not appear to be 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); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995); *El-Ayazra v. West Duquesne Light Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa. Code § 5.245.

8. The party who fails to appear at the hearing has the burden of explaining why his failure to appear was unavoidable. 66 Pa. C.S. § 332(a); *Herr v. West Duquesne Light Co.*, Docket No. C-2021-3028202 (Opinion and Order entered Sept. 15, 2022).

9. By failing to appear for the hearing and proffer any evidence to support the Formal Complaint, Complainant failed to meet the burden of proving that Complainant is entitled to the relief requested. 66 Pa.C.S. § 332(a).

