

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kristen Flaherty	:	
	:	
v.	:	C-2023-3039314
	:	ON REMAND
Duquesne Light Company	:	

INITIAL DECISION

Before
Katrina L. Dunderdale
Administrative Law Judge

INTRODUCTION

The undersigned grants Respondent’s oral motion to dismiss a Formal Complaint because Complainant failed to appear at the initial hearing on remand and prosecute her Formal Complaint.

HISTORY OF THE PROCEEDING

On March 28, 2023, Kristen Flaherty (Ms. Flaherty or Complainant) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) against Duquesne Light Company (Duquesne Light or Respondent) at Docket No. C-2023-3039314 concerning natural gas service¹ rendered at 349 Old Gilkeson Road, Pittsburgh, Pennsylvania 15228. Complainant alleged Duquesne Light threatened to shut off her service. Complainant requested an affordable payment arrangement.

¹ Complainant mistakenly selected the box on the Formal Complaint form to indicate natural gas service, instead of selecting the box to indicate electric service.

On April 17, 2023, Duquesne Light filed its Answer and New Matter. Duquesne Light denied it provides Complainant with natural gas service but admitted it provides electric service at the service address. The Company denied all material averments and denied specifically violating the Public Utility Code, the Commission's Orders and regulations, and its own tariff. Duquesne Light also averred it issued one or more termination notices due to Complainant's persistent failure to pay her monthly bills in full and on time. In addition, Duquesne Light contended Complainant was not entitled to a payment arrangement because Complainant is enrolled in the Company's Customer Assistance Program (CAP). Lastly, Duquesne Light asserted Ms. Flaherty had not made any payment on the electric service account since establishing service in her name on August 6, 2021.

In New Matter, the Company averred Ms. Flaherty had shown a lack of good faith by her failure to make a payment on the account since its establishment. The Company also cited to a previous decision issued by the Commission on February 16, 2023,² in which the Formal Complaint there was dismissed with prejudice by a Special Agent for failure of Ms. Flaherty to sustain the burden of proof because Complainant failed to appear to prosecute the complaint therein. Duquesne Light contended in its New Matter that the Formal Complaint herein is legally insufficient because it was barred by the doctrine of *res judicata*. Respondent noted Ms. Flaherty had filed fifteen (15) complaints with the Commission involving various certificated jurisdictional utility companies in Pennsylvania.

On May 17, 2023, Duquesne Light filed a Motion for Judgment on the Pleadings with a Notice to Plead. Respondent argued the Formal Complaint herein should be dismissed because Complainant is not eligible to a payment arrangement due to her enrollment in the Company's CAP and because the instant Formal Complaint is barred by the doctrine of *res judicata*.

² The Commission entered a Final Order in *Flaherty v. Duquesne Light Co.*, at Docket No. C-2022-3035389, on March 21, 2023.

On June 6, 2023, the Commission's Office of Administrative Law Judge issued a Motion Judge Assignment Notice which assigned the matter to Administrative Law Judge Chad Allensworth (ALJ Allensworth) for disposition.

On July 21, 2023, Complainant filed another Formal Complaint using the Commission's newly revised complaint form to include her choice of the method of service. Complainant selected both eFiling and Email as her preferred methods of service and registered for the Commission's eFiling service.

On July 26, 2023, the Commission issued the Initial Decision of ALJ Allensworth, in which he dismissed the Formal Complaint without a hearing and granted Duquesne Light's Motion for Judgment on the Pleadings, asserting the doctrine of *res judicata* and barring Complainant from filing any further complaints against the utility until Complainant should pay the outstanding balance due on her account.

On November 13, 2023, the Commission issued its Opinion and Order in this proceeding. The Commission noted the doctrine of *res judicata* "reflects the refusal of the law to tolerate the re-litigation of a matter decided by a court of competent jurisdiction," and will bar a future complaint or actions involving the same cause of action between the same parties. The Commission noted ALJ Allensworth found the Formal Complaint herein was filed seven days after the Commission dismissed the prior Complaint with prejudice, raised the identical issues while Complainant made no payment on her account with Respondent, and she failed to oppose the Company's assertions that her actions show a pattern of attempts to delay termination of the electric service and/or were an abuse of process.

The Commission reversed the Initial Decision herein, because the previous Complaint (used as the basis for the dismissal as violative of the doctrine of *res judicata*) was not decided on the merits but was instead dismissed for failure to prosecute when Ms. Flaherty did not appear for the hearing in the previous proceeding. Further, the Commission found there was not a sufficient justification to bar Ms. Flaherty from filing additional complaints on the theory

there had been an abuse of process. The Commission returned the proceeding to the OALJ for further proceedings, as warranted, and for the issuance of an Initial Decision on Remand.

Thereafter, by Call-In Telephone Hearing Notice dated January 19, 2024, the OALJ notified the parties an Initial Telephonic Hearing on Remand was scheduled for March 6, 2024, with ALJ Allensworth. Also, on January 19, 2024, ALJ Allensworth issued a Prehearing Order which, *inter alia*, advised the parties that continuances would only be granted if requested, the request must be received no less than five business days prior to the hearing and requests would be granted only in rare situations where sufficient cause was shown to exist.

On March 5, 2024, the OALJ issued the Cancellation Notice that cancelled the telephonic hearing on remand scheduled for March 6, 2024. In a separate Notice issued on the same date, March 5, 2024, the OALJ issued the Judge Change Notice that transferred the instant proceeding to Administrative Law Judge Katrina Dunderdale (ALJ Dunderdale) for disposition. The same Notice rescheduled the telephonic hearing on remand to March 21, 2024, with ALJ Dunderdale.

On March 21, 2024, the presiding officer convened the hearing as scheduled, at 10:01 a.m. Complainant was not present and did not appear. Further, no individual appeared to represent Complainant. Respondent was represented by David Beane, Esquire, who appeared with Roxanne Morris, the Supervisor of Regulatory Consumer Relations for Duquesne Light. ALJ Dunderdale took a brief recess to provide Complainant with time in which to join the Commission's conference bridge or to communicate if she was unavailable.

ALJ Dunderdale re-convened the telephonic hearing at 10:11 a.m., at which time Complainant continued to be absent from the hearing. Duquesne Light made an oral motion to dismiss the proceeding for failure of Complainant to appear and to prosecute the Formal Complaint. Ms. Morris testified about the location of the service address, the payment history on the service account, and the current status of the service account. The hearing concluded at

10:16 a.m. The hearing record closed on March 21, 2024, upon the conclusion of the telephonic hearing pursuant to 52 Pa. Code § 5.431(a) and (b).³

FINDINGS OF FACT

1. Complainant is Kristen Flaherty who resides at 349 Old Gilkeson Road, Pittsburgh, Pennsylvania (service address) where she received electric service from Respondent.

2. Respondent is Duquesne Light Company, an electric distribution company, which provided electric service to Complainant as the account holder at the service address.

3. Respondent established electric service at the service address in Complainant's name on August 6, 2021, and terminated electric service at the service address on September 1, 2023.

4. Complainant did not make a successful payment on the electric service account from August 6, 2021, to the present.

5. The unpaid balance on Complainant's electric service account with Respondent is \$1,704.74, as of the date of the hearing.

6. The Prehearing Order dated January 19, 2024, and the hearing notices dated January 19, 2024, and March 5, 2024, were eServed on Complainant to the email address provided and registered by Complainant to the Commission and were not returned as undeliverable.

7. The hearing notices and Prehearing Order warned Complainant the Formal Complaint might be dismissed if Complainant failed to appear at the telephonic hearing.

³ The provisions at 52 Pa. Code § 5.431(a) state the hearing "record will be closed at the conclusion of the hearing unless otherwise directed by the Presiding Officer or the Commission."

8. Complainant was not present at the initial hearing on remand on March 21, 2024, and Respondent was ready to proceed with its witness at the date and time scheduled for the hearing.

9. Complainant did not contact the presiding officer or the OALJ to indicate she would be unavailable to participate at the hearing on March 21, 2024, nor did she contact the presiding officer or the OALJ to explain why her 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, Ms. Flaherty, as a complainant, is the proponent of a rule or order. Therefore, Complainant 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.⁴ Ms. Flaherty must show the utility is responsible or accountable for the problem described in the Formal Complaint.⁵ 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.⁶

⁴ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

⁵ *Feinstein v. Phila. Suburban Water Co.*, 50 Pa.P.U.C. 300 (1976).

⁶ *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

Notice of Hearing and Appearance at Hearing

Ms. Flaherty did not appear at the time scheduled for the hearing on March 21, 2024, and no one appeared to represent Ms. Flaherty at the hearing. Information concerning the date, time and the location of the hearing, as well as how to call into the telephonic hearing, was listed in the hearing notice, dated January 19, 2024; in the Prehearing Order, dated January 19, 2024; and in the hearing notice dated March 5, 2024.

The OALJ eServed both hearing notices and the Prehearing Order to Complainant via her requested method by serving the same at the email address Ms. Flaherty provided in her Formal Complaint and registered with the Commission. Further, counsel for Respondent averred at the initial telephonic hearing on remand that Respondent sent the proposed exhibits to Complainant via email on February 28, 2024, and the email was not returned to Respondent as undeliverable. Accordingly, it must be presumed that these documents sent to Complainant were received by Complainant.⁷

Once notice of a hearing and the opportunity to be heard was provided, it was the responsibility of Ms. Flaherty to appear and participate in the hearing.⁸ If Ms. Flaherty could not appear or was unavailable, for any reason, then it was the responsibility of Ms. Flaherty to notify the presiding officer immediately about the impediment or dilemma.⁹

Section 332(f) of the Public Utility Code 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

⁷ *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).

⁸ *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. 28, 2002).

⁹ 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).

conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat[.]

66 Pa.C.S. § 332(f).

Conclusion

In this proceeding, Ms. Flaherty did not call into the telephonic hearing as specified in the January 19, 2024, Prehearing Order or the March 5, 2024, hearing notice. The January 19, 2024, Prehearing Order and the March 5, 2024, hearing notice clearly indicated Complainant was to call and provided Complainant with the Commission's toll-free conference bridge number and PIN number. The hearing notice also provided an address and telephone number where Ms. Flaherty could reach the presiding officer if additional information was needed prior to the hearing or to explain if an impediment existed which would prevent her from participating in the hearing.

Since Ms. Flaherty did not appear or participate in the hearing, despite receiving notice 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. Respondent's attorney moved to dismiss the Formal Complaint for failure of Complainant to appear and prosecute her Formal Complaint. 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.¹⁰

In addition, because Ms. Flaherty did not contact the presiding officer or the OALJ to explain her absence or to explain if she was unavailable, Complainant failed to take advantage of the opportunity provided in which to appear and prosecute her Formal 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 Formal

¹⁰ *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.

Complaint will be granted, and the Formal Complaint will be dismissed in the Ordering Paragraphs below.¹¹

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 pursuant to 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).

5. Notice electronically served 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).

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).

¹¹ *Little v. Pittsburgh Water & Sewer Auth.*, F-2021-3027107 (Opinion and Order entered Feb. 7, 2022); *Volgstadt v. UGI Penn Nat. 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. W. Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016).

