

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tammi Vogt	:	
	:	
v.	:	C-2023-3041731
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Alphonso Arnold III
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint of Tammi Vogt against West Penn Power Company due to her failure to appear for the telephonic evidentiary hearing to prosecute her Formal Complaint.

HISTORY OF THE PROCEEDINGS

On July 14, 2023, Tammi Vogt (“Complainant”) filed a Formal Complaint (“Complaint”) with the Pennsylvania Public Utility Commission (“Commission”) against West Penn Power Company (“Respondent”) indicating that Respondent was threatening to or has already shut off her service. Complainant requested that service termination scheduled for July 17, 2023, be halted and that her budget bill amount be adjusted.

On August 3, 2023, Respondent filed an Answer with New Matter, properly endorsed with a Notice to Plead, to the Complaint asserting that Complainant is enrolled in Respondent’s customer assistance program which requires its participants to be enrolled in budget billing. Respondent argued that Complainant’s budget amount is adjusted annually and that she is

not entitled to a lower budget amount. In its New Matter, Respondent requested that this matter be referred to the Office of Administrative Law Judge's ("OALJ") Mediation Unit.

On August 25, 2023, this matter was referred to OALJ's Mediation Unit. Mediation was unsuccessful.

On November 2, 2023, the Commission issued an Initial Telephonic Hearing Notice to the parties, scheduling a telephonic evidentiary hearing in this matter for January 12, 2024, at 10:00 a.m. and assigning this matter to the undersigned.

On December 1, 2023, the Commission issued my Prehearing Order which set forth the procedures for the January 12, 2024, hearing.

On January 11, 2024, Respondent forwarded me an email from Complainant's daughter, stating that Complainant was ill and was unable to attend the January 12, 2024, evidentiary hearing. Respondent indicated that it did not object to a continuance of the hearing.

On January 12, 2024, the Commission issued a Hearing Cancellation/Reschedule Notice to the parties, cancelling the January 12, 2024, hearing and rescheduling it to March 26, 2024, at 10:00 a.m. The Notice informed the Parties that to participate in the telephonic hearing, they would need to call in to the conference line provided in the Notice and enter the PIN number also provided in the Notice. The Notice also warned the parties that they may lose their case if they do not participate in the hearing and present evidence on the issues raised.

On March 1, 2024, the Commission issued my Prehearing Order #2 to the Parties, which reminded the Parties of the date and time of the March 26, 2024, evidentiary hearing and set forth the procedures for the hearing. The Order also provided the Parties with the conference and PIN numbers for participation in the hearing. The Order warned the Parties that they may lose their case if they do not participate in the hearing and present evidence on the issues raised.

All Commission documents in this matter were electronically served (“eServed”) to the Parties, as both Parties affirmatively agreed to receive electronic service (“eService”) of Commission documents by registering with the Commission’s electronic filing system.

Complainant was not present on the hearing conference line on March 26, 2024, at 10:00 a.m. Counsel for the Respondent, Margaret Morris, Esquire, was present on the hearing conference line with a witness and was prepared to proceed. The start of the hearing was delayed while I discussed Complainant’s absence with Attorney Morris. Attorney Morris forwarded me several emails between Complainant and herself wherein Complainant expressed difficulty calling in to the conference line. Attempts from Respondent and the OALJ to connect Complainant to the hearing conference line failed. The hearing began at approximately 10:25 a.m. after Complainant indicated through email that she was unable to call in to the conference line because she did not have active phone service. Treating the emails as a request by Complainant to continue the hearing,^{1, 2} I informed Respondent that I would grant Complainant’s continuance request and schedule a further hearing on the condition that Complainant comply with an Interim Order that I would issue following the conclusion of the hearing. The hearing concluded without any evidence being admitted into the evidentiary record.

On March 27, 2024, the Commission issued my Interim Order #1, which directed Complainant to contact Attorney Morris by April 9, 2024, to discuss resolution of her Complaint. This Order further directed that Respondent file a Status Report by April 10, 2024, to address the results of the discussion held.

On April 10, 2024, Respondent filed its Status Report with the Commission indicating that Complainant did not contact Respondent as directed by Interim Order #1.

¹ Pursuant to Commission regulations, “[t]his subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.” 52 Pa. Code § 1.2(a).

² I forwarded these email exchanges to the Commission’s Secretary Bureau for docketing in this matter. *See, Motion for Continuance - Vogt*, docketed April 26, 2024.

On April 11, 2024, the Commission issued my Interim Order #2, formally closing the record in this proceeding. For the reasons discussed below, the Complaint will be dismissed.

FINDINGS OF FACT

1. Complainant is Tammi Vogt.
2. Respondent is West Penn Power Company.
3. On July 14, 2023, Complainant filed a Complaint with the Commission against Respondent.
4. On August 3, 2023, Respondent filed an Answer with New Matter to the Complaint.
5. On November 2, 2023, the Commission issued an Initial Telephonic Hearing Notice to the parties, scheduling a telephonic evidentiary hearing in this matter for January 12, 2024, at 10:00 a.m. and assigning this matter to the undersigned.
6. On January 11, 2024, Respondent forwarded me an email from Complainant's daughter stating that Complainant was ill and unable to attend the January 12, 2024, evidentiary hearing. Respondent indicated that it did not object to a continuance of the hearing.
7. On January 12, 2024, the Commission issued a Hearing Cancellation/Reschedule Notice to the parties, cancelling the January 12, 2024, hearing and rescheduling the hearing to March 26, 2024, at 10:00 a.m.
8. On March 1, 2024, the Commission issued Prehearing Order #2 to the Parties, which reminded the Parties of the date and time of the March 26, 2024, evidentiary hearing and set forth the procedures for the hearing.

9. The January 12, 2024, Hearing Cancellation/Reschedule Notice and Prehearing Order #2 provided the Parties with the conference and PIN numbers for participation in the March 26, 2024, hearing and warned the Parties that they may lose their case if they do not participate in the hearing and present evidence on the issues raised.

10. All Commission documents, including the Hearing Cancellation/Reschedule Notice and Prehearing Order #2, in this matter were eServed to the Parties, as both Parties affirmatively agreed to receive eService of Commission documents by registering with the Commission's electronic filing system.

11. The Commission's internal electronic activity indicates that both the January 12, 2024, Hearing Cancellation/Reschedule Notice and Prehearing Order #2 were successfully eServed to Complainant.

12. Complainant failed to appear and participate in the March 26, 2024, evidentiary hearing.

13. In a series of emails treated as a request by Complainant to continue the March 26, 2024, evidentiary hearing, Complainant indicated that she was unable to participate in the hearing due to her phone not having active service. *Motion for Continuance – Vogt.*

14. On March 27, 2024, the Commission issued my Interim Order #1, directing Complainant to contact Respondent by April 9, 2024, to discuss resolution of her Complaint.

15. As indicated in Respondent's April 10, 2024, Status Report, Complainant did not reach out to Respondent to discuss resolution of the Complaint as directed in Interim Order #1.

16. On April 11, 2024, the Commission issued Interim Order # 2, closing the record in this proceeding.

DISCUSSION

Legal Standards

Due Process and Notice

As an administrative agency of the Commonwealth, the Commission is required to provide due process to the parties appearing before it. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984) (citing *Fusaro v. Pa. Pub. Util. Comm'n*, 382 A.2d 794 (Pa. Cmwlth. 1978)). Due process is satisfied when the parties are afforded notice and the opportunity to appear and be heard. *Id.*

The Commission is required to fix the time and place of a hearing in a complaint proceeding and to serve notice thereof upon the parties in interest. *See* 66 Pa.C.S. § 703(a)-(b). Service on interested persons is sufficient to provide notice. 52 Pa. Code § 5.201(a). Further, electronic service which is not indicated as undeliverable is presumed to be received by the parties. *Zirkel v. Phila. Gas Works*, Docket No. C-2016-2561176 (Order entered Jan. 27, 2017) (“*Zirkel*”); *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Order entered Nov. 16, 2016) (“*Morella*”).

Once 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. *Mumma v. PPL Elec. Utils. Corp.*, Docket No. C-00014869 (Opinion and Order entered Jan. 24, 2002) (“*Mumma*”).

Continuance of a hearing

A party to a proceeding has the right to request a continuance of a hearing, which may be granted by the presiding officer for “good cause.” *See* 52 Pa. Code § 1.15(b). Pursuant to the Commission’s Regulations, a continuance request is required to be in writing and filed with the presiding officer at least five days prior to the hearing date, except that, during a hearing, an oral request for hearing continuance may be made before the presiding officer. *Id.*

When “good cause” is shown for a hearing continuance, the Commission has acknowledged that the public interest is better served when all litigants, particularly *pro se* litigants, are afforded a meaningful opportunity to be heard. *See, e.g., Loucks v. Metro. Edison Co.*, Docket No. C-2017-2619974 (Opinion and Order entered May 16, 2018).

Failure to appear for a hearing

If a party fails to attend a scheduled hearing, such failure to appear will be deemed a waiver of the party’s opportunity to participate in a hearing, unless the presiding officer determines that such failure was “unavoidable” and that the interests of the other parties and of the public would not be “prejudiced” by permitting such reopening or further examination. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b). To meet the “unavoidable” standard, the Commission will require a complainant to show, with supporting information, that the failure to appear was due to exigent circumstances. *See, e.g., El-Ayazra v. West Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016) (affirming ALJ’s decision to dismiss complaint *with prejudice* because the complainant failed to follow the call-in instructions for the telephonic hearing); *Nichols v. Bell-Atlantic-Pa.*, Docket No. C-00956667 (Opinion and Order entered Aug. 4, 1995) (“*Nichols*”) (affirming ALJ’s decision to dismiss the complaint finding that the complainant’s excuse as stated in the complainant’s exceptions – that he worked the graveyard shift and overslept and missed the hearing – “was not caused by unavoidable circumstances, but instead was caused by his own lack of diligence”).

Moreover, the Commission will exercise its discretion and excuse a complainant’s failure to appear at a hearing if the complainant demonstrates that he/she made a good faith attempt to attend the hearing. *See, e.g., Then v. Phila. Gas Works*, Docket No. F-2012-2318264 (Opinion and Order entered June 13, 2013) (vacating ALJ’s decision to dismiss complaint with prejudice and remanded for hearing because complainant attempted to attend the scheduled hearing, and appeared in the correct building, but was unable to locate the hearing room in the building due to language challenges).

However, if a complainant's failure to appear was not unavoidable, or if the complainant did not make a good faith attempt to attend the duly scheduled hearing, the

Commission has recognized that any further procedural activity in the docket would prejudice the public interest due to the wasteful use of the agency's and the respondent's time and resources in addressing the complaint. *See Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892, at 5 (Order entered December 26, 1995) (“We are concerned with regard to the consequences that these “no-show” cases have on the already strained budget of the Commission. Such cases waste the time and resources of the Commission and the utility. We cannot condone the wastefulness of [a procedure] that permits a “no-show complainant” to refile a complaint and thereby institute yet another stay of termination on the account. Such misuse of the process as in the case before us cannot be tolerated.”). In such instances, to preserve judicial economy, the Commission typically will dismiss a complaint, *with prejudice*, barring the complainant from filing another complaint raising the same claims and issues presented in the dismissed complaint. *Id.*

Burden of Proof

Section 332(a) of the Code provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa.C.S. § 332(a). The evidentiary burden of proof is the “preponderance of the evidence” standard. *Suber v. Pa. Comm’n on Crime and Delinquency*, 885 A.2d 678, 682 (Pa. Cmwlth. 2005); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (Pa. Cmwlth. 1990). To establish a fact or claim by a preponderance of the evidence means to offer evidence that is more convincing than, by even the smallest amount, the probative value of the evidence presented by the other party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

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 be a violation of the Code, a Commission Regulation or Order, or a Commission-approved tariff. 66 Pa.C.S. § 701.

Analysis

Complainant agreed to receive service of Commission documents in this proceeding through eService when she agreed to open and use an electronic filing account through the Commission's website. Therefore, the Commission eServed the January 12, 2024, Hearing Cancellation/Reschedule Notice ("Notice") and Prehearing Order #2 to Complainant via the email address that she provided to the Commission when opening her electronic filing account. The Commission's internal electronic activity indicates that both documents were successfully eServed to Complainant. Therefore, Complainant is presumed to have received the Notice and Prehearing Order #2. *Zirkel; Morella*. Both documents contained the date and time of the March 26, 2024, evidentiary hearing; therefore, Complainant had notice of the date and time of the March 26, 2024 evidentiary hearing. Notably, both the Notice and Prehearing Order #2 indicated that the hearing would take place telephonically, that the Parties would need to call a conference line and then enter a PIN number to participate in the hearing, and that the Complainant would lose her case if she failed to appear for the hearing and present evidence on the issues raised.

Complainant's due process rights have been protected in this proceeding. As Complainant had notice of the hearing, it was her responsibility to appear and participate in the hearing. *Mumma*. Complainant did not appear and participate in the hearing.

As shown in a series of emails exchanged between the Parties, Complainant had trouble calling into the hearing conference line on the date and time of the hearing. According to Complainant, she was unable to call into the hearing conference line because she did not have active phone service. I treated these series of emails as a Motion for Continuance ("Motion") of the hearing. The Motion was granted on the condition that Complainant contact Respondent by April 9, 2024, pursuant to my Interim Order #1, to discuss resolution of the Complaint. As indicated by Respondent in its April 10, 2024, Status Report, Complainant did not contact

Respondent as directed. As Complainant did not comply with the condition I placed on the granting of her Motion, her Motion will be denied.

In further support of denying Complainant's Motion is the fact that "good cause" has not been shown by Complainant for continuance of the hearing. Through the Notice (served on January 12, 2024) and Prehearing Order #2 (served on March 1, 2024), Complainant was on notice well in advance of the hearing that the hearing would be held telephonically, and that she would need to call into a conference line and enter a PIN number to participate. Therefore, it was incumbent upon Complainant to have access to a phone capable of calling into the hearing on the date of the hearing. Complainant did not contact OALJ or myself in advance of the hearing to inform me that she did not have active phone service. As such, Complainant being unable to call into the hearing conference line because she did not have a phone with service is not "good cause" to grant a continuance of the hearing.

As Complainant's Motion will be denied, I must determine if Complainant's failure to appear at the evidentiary hearing was unavoidable or if she made a good faith attempt to attend the scheduled hearing.

I find that Complainant's failure to appear for the hearing was due to her lack of diligence in assuring that she had a phone capable of calling in to the conference line on the date and time of the scheduled hearing. As stated, the Notice and Prehearing Order #2, both served well in advance of the hearing, clearly indicated that the March 26, 2024, hearing was to be held telephonically, and that she would need to call a hearing conference line in order to participate. As such, Complainant's failure to appear for the hearing was not caused by unavoidable circumstances but was instead caused by her own lack of diligence. *See Nichols*. Moreover, for the same reasons, I also find that Complainant did not make a good faith attempt to attend the scheduled hearing.

In conclusion, Complainant had notice of the scheduled hearing and failed to appear to prosecute her Complaint. The failure of Complainant to appear at this scheduled hearing is unexcused. As the party with the burden of proof, by failing to participate and proffer

any evidence to support the Complaint, Complainant has failed to meet her burden. 66 Pa.C.S. § 332(a). Thus, the Complaint will be dismissed in the Ordering paragraphs below.

CONCLUSIONS OF LAW

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

2. The Commission is required to provide due process to the parties appearing before them; 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) (citing *Fusaro v. Pa. Pub. Util. Comm'n*, 382 A.2d 794 (Pa. Cmwlth. 1978)).

3. A 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. *Zirkel v. Phila. Gas Works*, Docket No. C-2016-2561176 (Order entered Apr. 7, 2017); *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Order entered Jan. 31, 2017).

4. A party to a proceeding has the right to request a continuance of a hearing, which may be granted by the presiding officer for "good cause." *See* 52 Pa. Code § 1.15(b).

5. If a party fails to attend a scheduled hearing, such failure to appear will be deemed a waiver of the party's opportunity to participate in a hearing, unless the presiding officer determines that such failure was "unavoidable" and that the interests of the other parties and of the public would not be "prejudiced" by permitting such reopening or further examination. 66 Pa. C.S. § 332(f); 52 Pa. Code § 5.245(a)-(b).

6. To meet the "unavoidable" standard, the Commission requires a complainant to show, with supporting information, that the failure to appear was due to exigent circumstances. *See, e.g., El-Ayazra v. West Penn Power Co.*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); *Nichols v. Bell-Atlantic-Pa.*, Docket No. C-00956667 (Opinion and Order entered Aug. 4, 1995).

