

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Nikisha Leach	:	
	:	
v.	:	C-2022-3036868
	:	
Philadelphia Gas Works	:	

INITIAL DECISION ON REMAND

Before
Arlene Ashton
Administrative Law Judge

INTRODUCTION

The Public Utility Commission reversed an Initial Decision issued in this matter on June 16, 2023, and remanded this matter to the Office of Administrative Law Judge for the purpose of conducting a hearing on the issues presented in this case. This Decision dismisses the Formal Complaint of Nakisha Leach for the failure to appear for the scheduled remand hearing and prosecute her Complaint despite having notice and an opportunity to be heard.

HISTORY OF THE PROCEEDING

On November 18, 2022, Nikisha Leach (Complainant or Ms. Leach) filed a Formal Complaint (Complaint) against Philadelphia Gas Works (PGW or the Respondent) with the Pennsylvania Public Utility Commission (Commission). On the Complaint form, the Complainant checked boxes indicating that the utility is threatening to shut off her service or had already done so and that she would like a payment agreement.

On December 7, 2022, the Respondent filed an Answer admitting that it had issued a shut off notice for gas service to 664 Chew Avenue, Philadelphia, PA, the address

specified by the Complainant as her home address in the Complaint.¹ PGW further averred that the Complainant's service bills, and the balance owed are correct. PGW also averred that the Complainant has defaulted on at least two PGW-issued payment agreements and one PUC-issued payment agreement. Additionally, PGW requested that the Complaint be dismissed.

By Hearing Notice dated December 13, 2022, a call-in telephonic hearing was scheduled for March 2, 2023, at 10:00 a.m., and the matter was assigned to me. The Hearing Notice advised the parties of the date and time of the scheduled hearing and how to call in. In addition, the Hearing Notice provided instructions on how to request a continuance of the hearing.

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).

The Hearing Notice warned of the following:

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.

I issued a Prehearing Order on December 14, 2022. The Prehearing Order also advised the parties of the date and time of the scheduled hearing as well as how to call in for the hearing. Additionally, the Prehearing Order directed the parties to comply with various procedural requirements, including the following instructions to a request to change the scheduled hearing:

¹ The Complaint was served on PGW on November 18, 2022.

You may request a continuance of the hearing if you have a good reason. 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, case number, and hearing date;
- (2) The reason you are requesting a continuance; and
- (3) State whether the other party(s) agrees to the request (or if you do not know).

You must submit the motion to me through my legal assistant at:

Pamela McNeal
pmcneal@pa.gov

You must submit the motion to the other party(s) at their email address.

The Prehearing Order warned both parties of potentially serious consequences if they failed to obtain a continuance and failed to attend the hearing.² It also explained that the Complainant bears the burden of proof to establish that the Respondent violated its tariff, the Public Utility Code,³ or a Commission Order or regulation, and that she is entitled to the relief requested in the Complaint.

The Hearing Notice and Prehearing Order 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.⁴ Neither the Hearing Notice nor the Prehearing Order were returned to the Commission as undeliverable.

² Specifically, the first page of Prehearing Order warned the Complainant that, “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.”

³ Public Utility Code (Code), 66 Pa.C.S. §§ 101–3316.

⁴ When Complainant registered for an eFiling account she 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.

The hearing convened as scheduled on March 2, 2023, at 10:00 a.m. and began with a rollcall of participants and a brief off-the-record discussion. The record for the hearing began at 10:07 a.m. Anita Murray, Esquire, counsel for PGW, was present with a witness and was prepared to proceed. Ms. Leach was not present.

Ms. Murray stated that on March 1, 2023, at 9:51 p.m., the evening prior to the hearing, she received an e-mail from the Complainant. In the e-mail, the Complainant explained that due to her work schedule, she could not attend the scheduled hearing on March 2, 2023, at 10:00 a.m., and requested that the hearing be delayed until noon the same day or the following day, Friday, March 3, 2023. TR. 3-4. Counsel also indicated that she had responded to the Complainant's e-mail request on the morning of the hearing at 8:00 a.m., informing the Complainant that any continuance request must be directed to the Commission and OALJ, and must conform to the requirements set out in the Prehearing Order issued in this matter. Tr. 4. I confirmed that my office had not received any communication from the Complainant and that a Motion for Continuance had not been filed with the Commission.

No witnesses were presented, and no exhibits were introduced into the record. At the hearing, Respondent's counsel moved that the Complaint be dismissed for lack of prosecution pursuant to 52 Pa. Code § 5.245.

The Complainant did not contact my office, nor did she make any filing with the Commission concerning her failure to appear at the hearing. The record closed on March 24, 2023, the date the transcript was filed with the Commission. In accordance with Commission policy, I will grant the Motion.

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).

On June 16, 2023, an Initial Decision was issued in this matter granting Respondent's motion and dismissing, with prejudice, the Complaint filed by the Complainant in this matter for lack of prosecution (Initial Decision).

On October 19, 2023, the Commission entered an Opinion and Order (Opinion and Order), reversing the Initial Decision and remanding the matter to the Office of Administrative Law Judge (OALJ) for a hearing, consistent with the Remand Opinion and Order.

By Hearing Notice dated March 8, 2024, a Telephonic Hearing on Remand was scheduled for May 14, 2024.

The Hearing on Remand Notice was 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. The Hearing Notice was not returned to the Commission as undeliverable.

On May 14, 2024, the hearing on remand convened as scheduled. Counsel for the Respondent, Anita Murray, called in with a witness available to testify. The Complainant failed to call in to the hearing. A recess was taken from 10:04 a.m. until 10:15 a.m. to allow the Complainant additional time to call and participate in the hearing; however, she failed to do so. Tr. 10-11.

No witnesses were presented, and no exhibits were introduced into the record. At the hearing, counsel for PGW moved that the Complaint be dismissed with prejudice for lack of prosecution pursuant to 52 Pa. Code § 5.245. PGW Counsel observed that PGW representative David Kauffman had spoken to the Complainant on May 6, 2024, in an effort to resolve the matter but was unable to do so. Tr. 12. In addition, Ms. Murray indicated that on May 7, 2024, she had sent proposed exhibits to be introduced at the remand hearing to the Complainant via email and had received a response from the Complainant confirming that the Complainant wished to obtain a payment plan. Further, counsel stated that in the e-mail exchange, the

Complainant did not indicate that she would not appear at the hearing or request any type of continuance or rescheduling of the hearing. Tr. 13.

As of the date of this remand decision, the Complainant has not contacted OALJ to explain the reason for her failure to appear at the remand hearing.

The record closed on June 4, 2024, upon the filing of the transcript for the remand hearing with the Commission.

FINDINGS OF FACT

1. The Complainant is Nikisha Leach.
2. The Respondent is Philadelphia Gas Works.
3. Respondent provided gas service to Complainant.
4. On November 8, 2022, Ms. Leach filed a Formal Complaint against Respondent.
5. On December 7, 2022, Respondent timely filed an Answer to the Complaint.
6. On March 2, 2023, an initial telephonic hearing was held.
7. At the March 2, 2023, initial telephonic hearing, counsel for the Respondent appeared with one witness, prepared to present PGW's case; however, the Complainant did not call in to participate in the hearing at the scheduled time. Tr. 4.
8. On June 16, 2023, the Commission issued my Initial Decision in this matter, granting PGW's motion and dismissed the Complaint, with prejudice, for failure of the

Complainant to appear and prosecute her case despite being given notice and an opportunity to appear and be heard. I.D. at 1 and 6-8.

9. On October 19, 2023, the Commission adopted an Opinion and Order in this matter in which it expressed “concerns regarding the Commission’s practice of routinely dismissing pro se complaints, with prejudice, as being inconsistent with due process.” Opinion and Order at 7.

10. The Opinion and Order reversed the Initial Decision and ordering further proceedings and the issuance of an Initial Decision on Remand in this matter.

11. On March 8, 2024, an Initial Call-In Telephonic Hearing on Remand Notice (Remand Hearing Notice) was eServed on the Complainant and the Company scheduling an initial telephonic hearing on May 14, 2024, at 10:00 a.m.

12. The Remand Hearing Notice provided certain hearing information and rules that govern the proceeding including how to request a continuance, if necessary, and warned of the consequences of failing to appear at the hearing and present evidence, including the dismissal of the Complaint.

13. The Remand Hearing Notice was not returned to the Commission as undeliverable.

14. On May 14, 2024, the Complainant failed to appear and participate in the scheduled remand hearing.

15. To date, the Complainant has not contacted the undersigned or the Office of Administrative Law Judge to explain why her failure to appear at the remand hearing was unavoidable.

DISCUSSION

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) (*Schneider*). This due process requirement is satisfied when the parties are provided notice and the opportunity to be heard. *Id.* As the proponent of any request for relief, the complainant bears the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). Additionally, the Commission's decision must be supported by substantial evidence. 2 Pa.C.S. § 704.

The Commission is required to fix the time and place of a hearing in a complaint proceeding and serve notice thereof upon the parties in interest. 66 Pa.C.S. § 703(a)-(b). Service on interested persons is sufficient to provide notice. 52 Pa. Code § 5.61(a). As the Commission explained, “[i]t is well-established law that once timely notice of a hearing and the opportunity to be heard have been provided, it is the responsibility of the parties to be present and participate in the hearing.” *Mumma v. UGI Elec. Utils. Corp.*, No. C-00014869 at 3 (Opinion and Order entered Jan. 28, 2002) (citing *Schneider*).

In the instant case, the March 8, 2024 Remand Hearing Notice scheduled a hearing on May 14, 2024, and included the telephone number to call, and the passcode to enter, for the parties to participate in the hearing.

The Remand Hearing Notice was eServed on the Complainant. The Remand Hearing Notice was not returned to the Commission as undeliverable. Accordingly, it must be presumed that this email was received by Complainant. *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).

Both the Public Utility Code and the Commission's regulations provide that, after being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing, not be permitted thereafter to reopen the disposition

of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f), 52 Pa. Code § 5.245(a). However, neither of these provisions apply if the presiding officer determines that the failure to appear was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitting the reopening or further examination. 66 Pa.C.S. § 332(f), 52 Pa. Code § 5.245(b).

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). When there are no facts in the record that the party's failure to appear was unavoidable, the complaint should be dismissed with prejudice. *Brown v. PECO Energy Co.*, Docket No. C-2019-3009486 (Opinion and Order entered Apr. 22, 2022); *Little v. Pittsburgh Water & Sewer Auth.*, Docket No. F-2021-3027107 (Opinion and Order entered Feb. 7, 2022); *Williams v. PECO Energy Co.*, Docket No. C-2018-3000734 (Opinion and Order entered Mar. 14, 2019); *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995); 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

To date, no communication has been received by the undersigned or OALJ regarding Complainant's absence. Therefore, I find that Complainant has waived the opportunity to participate in a hearing on the matters raised in the Complaint and Complainant's absence was not unavoidable. Thus, by her failure to appear, Complainant did not meet her burden of proof.

Consequently, it is appropriate to dismiss Ms. Leach's Complaint. As the Commission has explained, when a complainant fails to appear for a scheduled hearing without good cause, the public interest is prejudiced by the wasteful use of the agency's and the respondent's time and resources. *See, e.g., Elliott v. Pa. Elec. Co.*, No. F-2018-3003502 (Opinion and Order entered Feb. 6, 2020) and the cases cited therein.

Accordingly, Respondent's Motion to dismiss the Complaint will be granted.⁵

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of 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).

3. Notice served via electronic transmission to a party and not returned to the Commission as undeliverable is presumed received. *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);

4. After being notified, a party who fails to appear at a scheduled hearing shall be deemed to have waived the opportunity to participate in the hearing, not be permitted thereafter to reopen the disposition of the matter accomplished at the hearing, and not be permitted to recall excused witnesses. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

5. If the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitting the reopening or further examination, the presiding officer may find that a party

⁵ In light of the ruling on the Motion, I have omitted any discussion of whether the Formal Complaint could be dismissed on other grounds such as the wasteful use of the Commission and the Respondent's time and resources in addressing the Formal Complaint. See *Jefferson v. UGI Utils., Inc.*, Docket No. Z-00269892 (Opinion and Order entered Dec. 26, 1995) (*Jefferson*), see also, e.g., *Nichols III v. Bell-Atlantic-Pa.*, Docket No. C-00956667 (Opinion and Order entered Aug. 4, 1995). The Commission has, on many occasions, dismissed complaints filed by *pro se* complainants with prejudice for failure to appear at a hearing. See e.g., *Williams v. PECO Energy Co.*, Docket No. C-2028-3000734 (Opinion and Order entered Mar. 14, 2019); *Smith v. PECO Energy Co.*, Docket No. F-2014-2446204 (Opinion and Order entered Sept. 3, 2015); *Day v. PECO Energy Co.*, Docket No. C-2010-2181515 (Opinion and Order entered June 10, 2011); *Geary v. Verizon Pa., Inc.*, Docket No. C-2009-2118625 (Opinion and Order entered Sept. 16, 2010).

did not waive the opportunity to participate in the hearing. 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(b).

6. Complainant's due process rights have been fully protected and Complainant's failure to appear was not unavoidable. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984); 66 Pa.C.S. § 332(f); 52 Pa. Code § 5.245(a).

7. As the party seeking relief, Complainant bears the burden of proof by a preponderance of the evidence. 66 Pa.C.S. § 332(a), *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

8. The Complainant has failed to meet her 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 Nikisha Leach at Docket No. C-2022-3036868 is granted.

2. That the Formal Complaint of Nikisha Leach in *Nikisha Leach v. Philadelphia Gas Works* at Docket No. C-2022-3036868 is dismissed.

