

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

**Rulemaking to Amend Regulations Governing
the Public Utility Commission's General
Provisions at 52 Pa. Code Chs. 1, 3, and 5
(relating to Rules of Administrative Practice
and Procedure; Special Provisions; and
Formal Proceedings)**

**Public Meeting of October 1, 2026
3041347-LAW
Docket No. L-2023-3041347**

STATEMENT OF VICE CHAIR KIMBERLY BARROW

To begin this discussion,¹ I first note that, while an administrative agency is not bound by the rule of stare decisis, an agency does have the obligation to render consistent opinions, and should either follow, distinguish or overrule its own precedent.² I believe that the Commission has been interpreting and applying Section 332(f) of the Public Utility Code (Code) incorrectly, and as that Section is the impetus for how Section 5.245 of the Commission's Regulations should be modified or interpreted moving forward, I believe it is important to explain why the Commission's precedent needs to be overruled. A failure to do so ignores decades of administrative law and put us in the precarious position of having "crossed the line from the tolerably terse to the intolerably mute."³

The requirements for the application of res judicata or claim preclusion require: 1) identity of things sued for; 2) identity of the cause of action; 3) identity of persons and parties to the actions; and 4) identity of the quality or capacity in the persons for or against whom the claim is made.⁴ Importantly, "[u]nder the doctrine of res judicata, **a judgment on the merits** in a prior suit bars a second suit on the same cause of action[.]"⁵ Collateral estoppel, also referred to as issue preclusion, is a broader concept than res judicata and "operates to prevent a question of law or issue of fact which has **once been litigated and fully determined** in a court of competent jurisdiction."⁶ Thus, the issues must have been fully and actually litigated, and determined by valid and final judgment before res judicata applies.⁷

Section 332(f) of the Code provides:

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**

¹ I also note that the case law relied upon by the majority is based upon an unreported, per curiam memorandum opinion of the Commonwealth Court. The Commonwealth Court's unreported memorandum opinions may be cited for its persuasive value, but not as a binding precedent. See Section 414 of the Commonwealth Court's Internal Operating Procedures.

² *M.T. v. Department of Education*, 56 A.3d 1, 13 (Pa.Cmwlt.2010) (citing *The Standard Fire Insurance Company v. Insurance Department*, 611 A.2d 356, 359 (Pa. Cmwlt. 1992)).

³ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.1971).

⁴ *GPU Industrial Intervenors v. Pennsylvania Public Utility Commission*, 628 A.2d 1187 (Pa. Cmwlt. 1993).

⁵ *Wilmington Tr., Nat'l Ass'n v. Unknown Heirs*, 219 A.3d 1173, 1179 (Pa. Super. 2019)(emphasis added).

⁶ *Vignola v. Vignola*, 39 A.3d 390, 393 (Pa. Super. 2012) (emphasis added).

⁷ *County of Berks, ex. rel. Mark C. Baldwin, District Attorney v. Pennsylvania Labor Relations Board*, 678 A.2d 355 (Pa. 1996); see also *LP Water & Sewer Co. v. Pennsylvania Pub. Util. Comm'n*, 722 A.2d 733, 739 (Pa. Cmwlt. 1998).

any matter accomplished thereat, or to recall for further examination of witnesses who were excused, unless the presiding officer shall determine that failure to be represented was unavoidable and that the interests of the other parties and the public would not be prejudiced by permitting such reopening or further examination.⁸

In practice, once a *pro se* complainant fails to attend a pre-hearing conference or evidentiary hearing, the Administrative Law Judge will inquire whether counsel for the company has a motion for their consideration and then will close the record, advising counsel that the motion is under consideration and an Initial Decision will be issued. At no point during the pre-hearing conference or evidentiary hearing is evidence submitted to the record or witnesses examined. In reading the plain language of Section 332(f), the *pro se* complainant is prevented from reopening the “disposition of any matter accomplished.” Given that no witnesses were presented and subsequently excused at the missed hearing, and no evidence was offered and admitted into the record, nothing was “accomplished” at the missed hearing to which the complainant would be barred from reopening.⁹ Moreover, the plain reading of the statute does not mandate a dismissal with prejudice for failure to appear.

Rather, Section 332(f) mandates that the party (1) “shall be deemed to have waived the opportunity to participate” in the conference or hearing, (2) “shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat,” and (3) may not recall witnesses who were excused. Dismissal, much less dismissal with prejudice, is not stated among the consequences for failure to appear.

Additionally, Section 332(f) does not state that the complaint shall be dismissed for failure to appear. The plain language provides that “[a]ny 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.**”¹⁰ It does not say that the complaint shall be dismissed nor that the underlying claim is waived, just the opportunity to participate in the conference or hearing. The next part of the sentence provides the exception, i.e., if the absence was unavoidable and reopening would not prejudice another party or the public, the presiding officer may reopen what was decided at the missed hearing or recall witnesses who were excused.

While administrative practice is its own discipline,¹¹ it is nevertheless useful in establishing fair and reasonable rules to be guided by the well-tested Pennsylvania civil practice case history. In Pennsylvania practice, there have been two kinds of compulsory nonsuit. I observe that the one which most closely aligns with the Commission’s “failure to appear” practice is the type, similar to a *non pros*, where the plaintiff declines or is unable to proceed and the defendant moves to have the action dismissed for want of prosecution. *Non pros* is an abbreviation of “*non prosequitur*,” meaning that one does not pursue.¹²

⁸ 66 Pa.C.S. § 332(f)(emphasis added).

⁹ This practice is also similar to how New Matter and Preliminary Objections are treated, i.e., all of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objection, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees’ Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

¹⁰ 66 Pa.C.S. § 332(f)(emphasis added).

¹¹ See e.g., *Catalytic, Inc. v. Workmen’s Comp. Appeal Bd. (Gwin)*, 516 A.2d 854, 855–56 (Pa. Commw. Ct. 1986) (affirming modification of a dismissal entered after the claimant failed to appear from with prejudice to without prejudice because there had been no merits decision).

¹² *Bucci v. Detroit Fire & Marine Ins. Co.*, 167 A. 425 (Pa. Super. 1933).

Our civil courts consistently have held that a judgment of *non pros* may not form the basis for the application of *res judicata* because it is not an adjudication on the merits.¹³ Similarly, a dismissal for want of diligent prosecution has no *res judicata* effect¹⁴ because it is not a judgment on the merits, and it does not preclude a second cause of action, at least if the statute of limitations has not expired,¹⁵ and it is not intended to be *res judicata* of the merits to the controversy.¹⁶ As a Superior Court Judge once explained:

When an action is dismissed, with prejudice, for failure to prosecute a claim, it is contemplated that that action is terminated unless the plaintiff takes positive steps to reinstate the cause of action within the applicable period of the statute of limitations. As the Commonwealth Court explained in *Thompson v. Cortese*, 41 Pa.Comm.w. 174, 398 A.2d 1079 (1979), when an action is dismissed with prejudice for failure to prosecute a claim, it is not a denial of relief to the plaintiff because it is not an adjudication on the merits; rather, it means only that the plaintiff whose complaint is thus dismissed cannot reinstate that complaint unless he first petitions the court to exercise its discretion to remove the non pros and establishes certain fact. *Id.* at 178, 398 A.2d at 1082. The underlying reasons for such a policy are clear—prompt, final conclusion of pending matters, and removal from the docket of cases which would otherwise clutter it for an unreasonable length of time.¹⁷

Further, more recently, the Superior Court analyzed:

As explained above, both *res judicata* and collateral estoppel require that an initial action result in a final judgment on the merits before either doctrine can be applied to bar a second action raising similar claims or issues. Instantly, Appellant's first PFA petition was not adjudicated on the merits. Rather, it was dismissed without prejudice because Appellant failed to appear at the hearing. As such, the doctrines of *res judicata* and collateral estoppel do not apply to bar Appellant's second PFA petition and the trial court erred as a matter of law when the court dismissed Appellant's second PFA petition with prejudice.¹⁸

Moreover, the Commission's Regulations require liberal construction in proceedings involving *pro se* litigants.¹⁹ The Commission's precedent on handling failure to appear cases varies,²⁰ and that precedent

¹³ *Huey v. Parris*, 12 Pa. D. & C.4th 16, 1991 WL 424578 (C.P. 1991); *A Pocono Country Place Inc. v. Steinhäuser*, 45 Pa. D. & C.3d 368, 1987 WL 47820 (C.P. 1987); *Gutman v. Giordano*, 557 A.2d 782 (Pa. Super. 1989).

¹⁴ *Municipality of Monroeville v. Liberatore*, 736 A.2d 31 (Pa. Cmwlth. 1999).

¹⁵ *Hatchigian v. Koch*, 553 A.2d 1018 (Pa. Super. 1989).

¹⁶ *Municipality of Monroeville v. Liberatore*, 736 A.2d 31 (Pa. Cmwlth. 1999).

¹⁷ *Robinson v. Trenton Dressed Poultry Co.*, 496 A.2d 1240, 1243 (Pa. Super. 1985).

¹⁸ *Moyer v. Shaffer*, 305 A.3d 1064, 1068 (Pa. Super. 2023).

¹⁹ 52 Pa. Code § 1.2 (These liberal construction provisions apply with particularity in proceedings involving *pro se* litigants.).

²⁰ *Compare, Roy Winston v. Philadelphia Gas Works*, Docket No. C-2010-2181504, at 5–6 (Opinion and Order entered Apr. 16, 2012) (holding that *res judicata* did not apply even though the same parties, issues, causes of action, and capacities were present because the prior no-show complaint had merely been dismissed rather than dismissed with prejudice and had not been litigated on the merits; stating that Winston was free to proceed again on the same facts and legal arguments); *Timothy Horton v. National Fuel Gas Distribution Corporation*, Docket No. C-2009-2097173 (Opinion and Order entered Oct. 13, 2009) (holding that, although *res judicata* was arguably inapplicable because the first dismissal was procedural, the prior express dismissal with prejudice independently foreclosed relitigation); *Jim Smith t/a Foremost Medical System v. Allegiance Telecom of PA, Inc.*, Docket No. C-00015101 (Opinion and Order entered Oct. 1, 2001) (stating that it was “well-settled” that a complainant who failed to appear must be dismissed with prejudice); *Althea Poe-Henderson v. Philadelphia Gas Works*, Docket No. F-2019-3010206 (Opinion and Order entered Aug. 6, 2020) (leaving a with-prejudice dismissal in place after a fact-specific due-process review of unusually deliberate nonparticipation); *Christopher Foti v. PPL Electric Utilities Corporation*, Docket No. C-2020-3015285 (Opinion and Order entered Dec. 24, 2020) (agreeing that dismissal was proper but modifying the disposition from with prejudice to without prejudice, notwithstanding PPL's request for dismissal with

does not preclude the Commission from reviewing and analyzing the statutory question of whether Section 332(f) mandates a dismissal with prejudice. The Commission has the power to follow, distinguish, or overrule its own precedent,²¹ and agency decisions cannot override or be enforced contradictory²² to the governing statute. The Superior Court said it best:

While we share the trial court's interest in the expeditious administration of justice, we are mindful of our supreme court's admonition that it must always be borne in mind that lawsuits are more than numbers or punches in computer cards. Individual cases are, of course, of great importance to the litigants involved, and courts must not overreach in their zeal to move cases to such an extent as to allow for no deviations from strict and literal adherence to policies justifiably laid down to improve the condition of the courts. *Budget Laundry Co. v. Munter*, 450 Pa. 13, 21–22, 298 A.2d 55, 58 (1972). **Moreover, “the quality of justice must not be subordinated to arbitrary insistence upon compliance with procedural rules.”** *Dublin Sportswear v. Charlett*, 485 Pa. 633, 639, 403 A.2d 568, 571 (1979).²³

Accordingly, I disagree with the disposition of Section 5.245 of the Commission's Regulations.

Additionally, in reference to Section 1.51 and 5.365, I agree with the Office of Consumer Advocate's proposal that the Commission accept PFAs or other orders, which show clear evidence of domestic violence, issued by courts in jurisdictions other than the Commonwealth. In support of this modification, I find value in the working group that was created in 2019²⁴ to address three issues that were deferred during the Final Form Rulemaking Order²⁵ which revised Chapter 56 of the Commission's Regulations in light of the amended Chapter 14.²⁶

The prior Section 1417 of the Public Utility Code provided that the Chapter would not apply to victims under a protection from abuse order as under 23 Pa.C.S. Ch. 61 or a court order issued by a court of competent jurisdiction in this Commonwealth which provides clear evidence of domestic violence.²⁷ Many stakeholders participated in the working group and a Tentative Order was issued stating that PFAs issued outside of the Commonwealth are entitled to the protections of subchapters L-V.²⁸ Relying upon the applicable Chapter 14 provisions, a Final Order was subsequently issued reiterating that

prejudice); *William T. Swartz v. Metropolitan Edison Company*, Docket No. F-2023-3040411 (Opinion and Order entered Aug. 22, 2024) (partially rescinding a final order solely to remove the with-prejudice effect where no abuse was shown and leaving the complaint dismissed without prejudice).

²¹ *PECO Energy Company v. Pa. Pub. Util. Comm'n*, 791 A.2d 115, 116 (Pa. 2002).

²² An argument is commonly made concerning the applicability of Section 316 to Section 332(f). 66 Pa.C.S. §§ 316, 332(f). However, that argument is baseless as Section 316 provides finality to an entered Commission order. Section 316 protects the disposition of a Commission order, it does not establish that the Commission was required to find a with-prejudice disposition in the first place. Even then, if the Commission were to review a matter and determine that the underlying result was legally incorrect, Section 316 allows the Commission to set aside, annul, or modify the underlying order.

²³ *Stock v. Arnott*, 608 A.2d 552, 556 (Pa. Super. 1992)(emphasis added).

²⁴ *Chapter 56 Working Group: Form of Medical Certificate, Other Court Order, Privacy Guidelines*, Docket No. L-2015-2508421 (Secretarial Letter dated August 28, 2019).

²⁵ *Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 56 to Comply with the Amended Provisions of 66 Pa.C.S. Chapter 14*, Docket No. L-2015-2508421 (entered February 28, 2019).

²⁶ While Chapter 14 has since expired and is no longer applicable, the comments and discussion provided in the working group still provide value. See 66 Pa.C.S. § 1419.

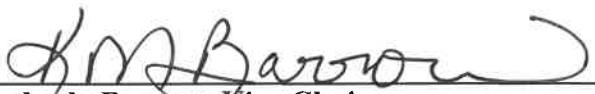
²⁷ 66 Pa.C.S. § 1417 (expired).

²⁸ *Working Group on medical certificate, other court order and privacy guidelines relating to the Rulemaking to Amend the Provisions of 52 Pa. Code, Chapter 56 to Comply with the Amended Provisions of 66 Pa.C.S. Chapter 14*, Docket No. L-2015-2508421, Tentative Order (entered February 25, 2021).

PFAs, including those outside the Commonwealth, and non-PFA court orders or court orders issued by a court of competent jurisdiction in this Commonwealth are entitled to protections.²⁹

However, as Chapter 14 has since expired and the Commission is not limited,³⁰ I support the rationale from both the working group and the OCA's proposals to accept PFAs or other orders, which provide clear evidence of domestic violence, issued by courts in jurisdictions other than the Commonwealth. Individuals who are suffering from domestic violence generally move from the location where the violence occurs or the individual causing the violence resides, and thus it is common for a person to seek a PFA or other court order from a court outside the Commonwealth, prior to moving to Pennsylvania. Our regulations should not act as a barrier to those individuals who want to remain safe.³¹ Moreover, I support the proposition that PFA protections should be expanded to include written certifications from a domestic violence counselor or advocate.³²

October 1, 2026


Kimberly Barrow, Vice Chair

²⁹ *Id.*

³⁰ I further note that the Chapter 56 Rulemaking is currently pending before the Commission, and thus any changes made in this Rulemaking could be easily addressed for consistency purposes. *Rulemaking to Further Amend the Provisions of 52 Pa. Code Chapter 56*, Docket No. L-2025-3058767 (Notice of Proposed Rulemaking Order entered February 19, 2026).

³¹ See *Violence Against Women Act Reauthorization Act of 2022 to the Violence Against Women Act of 1994*, as amended, 34 U.S.C. § 12291 *et seq.* (a federal law which provides legal, housing, and immigration protections for individuals who are survivors of domestic violence, dating violence, sexual assault, and stalking).

³² See *Pennsylvania Public Utility Commission, et al. v. UGI Utilities, Inc.- Gas Division*, Docket Nos. R-2025-3059523, *et al.*