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August 24, 2018

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: James Wolfgang v. Pennsylvania Electric Company
Docket No. C-2017-2613989

Dear Secretary Chiavetta:

Enclosed please find the Motion to Dismiss of Pennsylvania Electric Company with regard to the above-captioned matter. This document has been served on the Complainants as shown in the Certificate of Service.

Please contact me if you have any questions regarding this matter.

Very truly yours,


Tori Giesler

Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JAMES WOLFGANG

v.

PENNSYLVANIA ELECTRIC COMPANY

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Docket No. C-2017-2613989

**MOTION OF PENNSYLVANIA ELECTRIC COMPANY TO DISMISS COMPLAINT
OF JAMES WOLFGANG**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pennsylvania Electric Company (“Penelec” or the “Company”) by and through its attorneys, Lauren M. Lepkoski and Tori L. Giesler, hereby files this Motion to Dismiss the complaint of James Wolfgang (“Complainant”) for his failure to comply with the Prehearing Order of Administrative Law Judge (“ALJ”) Jeffrey A. Watson dated March 23, 2018. In support thereof, the Company avers as follows:

I. BACKGROUND

1. On or about July 6, 2017, the Complainant filed a Formal Complaint with the Pennsylvania Public Utility Commission (“Commission”) regarding 10208 Dunn Avenue, Lake City, Pennsylvania 16423 (“Service Location”) under Account No. 100086970025 (“Account”) which was electronically served on the Company on July 13, 2017.

2. On August 2, 2017, the Company filed its Answer and New Matter denying the material allegations. On the same day, the Company also filed Preliminary Objections to the Formal Complaint.

3. On September 6, 2017, ALJ Jeffrey A. Watson was assigned as the Presiding Officer in the above-captioned proceeding.

4. On September 14, 2017, ALJ Watson issued an Interim Order, which denied the Company's Preliminary Objections.

5. On March 23, 2018, ALJ Watson issued an Prehearing Order Setting Initial Litigation Schedule.

6. On March 30, 2018, in accordance with 52 Pa. Code § 5.341, the Company forwarded to the Complainant interrogatories and document requests ("Discovery Requests") via first class mail. In its Discovery Requests, the Company sought information and documents related to the Complainant's allegations regarding the Company's smart meters.

7. Any objections to the Discovery Requests were due on or before April 9, 2018 and Responses to Discovery Requests were due on or before April 19, 2018.

8. The Complainant did not file any objection to the Discovery Requests and has not provided any responses or the requested documents by the due date.

9. On April 26, 2018, the Company filed a Motion to Compel responses to the Discovery Requests.

10. On June 29, 2018, ALJ Watson issued an Interim Order granting the Company's Motion to Compel and ordered the Complainant to provide full and complete responses to the Discovery Requests to the Company not later than August 6, 2018.

11. The Complainant did not file any objection to the Discovery Requests and has not provided any responses or the requested documents by the due date of August 6, 2018.

12. In accordance with the Prehearing Order Setting Initial Litigation Schedule, the parties were directed to comply with an initial litigation schedule which provided, *inter alia*, that "on or before May 28, 2018, any Party wishing to present factual testimony of any person other than Complainant must provide to the other Party in writing, the name and business address of that

person and a written summary of the expected testimony of that person” and that “on or before May 28, 2018, any Party wishing to present expert testimony (including but not limited to medical, technical, etc.) must provide to the other Party in writing, the name and business address of that expert and a written summary of the expected testimony of that expert.”

13. Accordingly, and prior to filing this Motion to Dismiss, counsel for the Company attempted to contact the Complainant via telephone inquiring about the Complainant’s witnesses and responses to Discovery Requests. To date, no response has been received from Complainant. To date, no written response or telephone call has been received from Complainant.

14. In violation of the ALJ’s Prehearing Order dated March 23, 2018, the Complainant has yet to provide the required expert and factual witness lists. As discussed further below, the Complainant’s violation of the Prehearing Order of the ALJ warrants dismissal of the Formal Complaint.

15. Further, in violation of the ALJ Interim Order dated June 29, 2018, the Complainant has failed to provide any response to the Discovery Requests by the August 6, 2018 deadline.

II. MOTION TO DISMISS

16. The Complainant has violated the ALJ’s order related to witnesses. By failing to provide the information required by the ALJ’s Prehearing Order, the Complainant’s actions are in violation the Public Utility Code and the Commission’s regulations and justify dismissal of the Formal Complaint.

17. Section 332(f) of the Public Utility Code provides, in relevant part: “If the actions of a party or counsel in a proceeding shall be determined by the commission, after due notice and

opportunity for hearing, to be obstructive to the orderly conduct of the proceeding and inimical to the public interest, the commission may reject or dismiss any rule or order....”¹

18. At almost every procedural step within this proceeding, the Complainant has refused to comply with the ALJ’s directives in a manner that has deeply interfered with the orderly conduct of this proceeding.

19. The Commission’s regulations permit the discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action.”²

20. Generally speaking, this Commission applies a standard of relevance which is less restrictive than that required by parties to present information into the evidentiary record. It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.³

21. Discovery may be obtained regarding any matter relevant to the subject matter. Relevant evidence is evidence that tends to make an act at issue more or less probable. Moreover, evidence is relevant if it advances the inquiry in some degree and, thus, has probative value. Although the law does not furnish an absolute test of relevancy, the Pennsylvania Supreme Court follows a two-part analysis for determining relevance: “[i]t must be determined first if the inference sought to be raised by the evidence bears upon a matter at issue in this case and, second, whether the evidence renders the desired inference more probable than it would be without the evidence.”⁴

22. The information sought in the Discovery Requests of the Company is relatively simple and straightforward. It is directly relevant and material to the issues raised by the

¹ 66 Pa.C.S. § 332(f).

² 52 Pa. Code § 5.321(c).

³ 52 Pa. Code § 5.321(c).

⁴ *Commonwealth v. Stewart*, 336 A.2d 282, 284 (Pa. 1975).

Complainant. The Company is entitled to the requested information to enable it to fully investigate and defend against the Complainants' allegations.⁵

23. The Complainant has ignored the deadline established by the ALJ for providing notice of witnesses and responses to the Company's Discovery Requests. The Company has not received any notice of potential witnesses from the Complainant and no response whatsoever to the Discovery Requests.

24. Further, with respect to the sanctions available to a presiding officer, Section 5.372(a)(3) provides that the presiding officer may enter "a judgment against the disobedient party."

25. Further, Commission case law states that dismissal of a complaint is warranted due to any violation of an order of the presiding officer, discovery-related or otherwise.⁶ "An ALJ's Orders must be complied with, and such a lack of compliance presents sufficient basis to dismiss the Complaint without a hearing."⁷

26. Here, the Complainant has violated the Prehearing Order of the presiding officer by failing to provide any information related to proposed fact or expert witnesses by the required deadlines within the ALJ's order.

27. The Complainant violated the Prehearing Order by failing to provide his fact and expert witness lists by May 28, 2018. As of the date of this pleading, the Company still has never received any witness list from the Complainants whatsoever.

⁵ See Company's Motion to Compel dated February 8, 2018.

⁶ "Failure to comply with a presiding officer's order directing an action to be taken can warrant the dismissal of a formal complaint." *Randal v. Metropolitan Edison Co.*, Docket No. C-2013-2367046 (Initial Decision dated Aug. 27, 2013), citing *Snyderville Community Development Corp. v. Philadelphia Gas Works*, Docket No. C-20055032 (Order entered July 31, 2006); see also *Rovder v. Pennsylvania Electric Co.*, Docket No. C-2011-2227715 (Final Order dated Nov. 2, 2011).

⁷ See *id.*, citing *Treffinger v. PPL Electric Utilities Corp.*, Docket No. C-2027978 (Order entered Mar. 3, 2003).

28. The Complainant's failure to provide witness lists and responses to the Discovery Requests constitutes systematic and flagrant violations of the presiding officer's orders in this proceeding in violation of 66 Pa.C.S. § 332(f) and the Commission's discovery regulations. The Complainant's actions have risen to the level of bad faith, and seriously jeopardized the orderly conduct of this proceeding. Consistent with the Public Utility Code, the Commission's regulations, and Commission precedent, in light of the Complainant's failure to comply with ALJ Watson's orders, the Formal Complaint should be dismissed in its entirety.

WHEREFORE, Pennsylvania Electric Company respectfully requests that the Commission dismiss in its entirety the Formal Complaint of James Wolfgang.

Respectfully submitted,

Dated: August 24, 2018



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Motion to Dismiss of Pennsylvania Electric Company upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, as follows:

James Wolfgang
10208 Dunn Avenue
Lake City, PA 16423

Administrative Law Judge Jeffrey A. Watson
Pennsylvania Public Utility Commission
Office of Administrative Law Judge
Piatt Place, Suite 220
301 5th Avenue
Pittsburgh, PA 15222

Dated: August 24, 2018



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