

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

James Wolfgang	:	
	:	
v.	:	C-2017-2613989
	:	
Pennsylvania Electric Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

This Initial Decision dismisses the Formal Complaint filed by James Wolfgang for his failure to comply with the interim orders entered on March 23, 2018, June 29, 2018, and November 9, 2018, requiring Complainant to provide discovery responses and witness identification information to Respondent.

HISTORY OF THE PROCEEDING

James Wolfgang (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Pennsylvania Electric Company (Respondent or Company) on July 6, 2017, alleging, *inter alia*, that Respondent threatened to terminate his electric service; that he would like to explore an alternative to the installation of a smart meter; and that he objected to the installation of a smart meter at his residence because of health and safety concerns, because it is not environmentally friendly, and because he believes it will contribute to ongoing health concerns for Complainant and his family. In his request for relief, Complainant objected to the installation of a smart meter at his home, but stated he was amenable to a safe alternative including an environmentally friendly option or a meter that does not emit dirty electricity.

On August 2, 2017, Respondent filed an Answer and New Matter to the Complaint, essentially averring that Respondent issued a service termination notice as Complainant refused access to permit Respondent to install a smart meter at his residence. Respondent further averred it is required by Act 129 of 2008,¹ to install a smart meter.

On August 2, 2017, Respondent also filed preliminary objections to the Complaint. Respondent essentially averred that the complaint failed to state a claim upon which the Commission can grant relief. Respondent also averred that holding a hearing in this proceeding was not necessary nor in the public interest. Respondent averred that the Commission does not have the power to restrict the Company from installing a smart meter at the service location. Finally, Respondent averred that the complaint failed to allege that Respondent violated a Public Utility Code provision, Commission regulation or Commission order that can be the basis of any finding against the Company, and therefore should be dismissed as being legally insufficient under 52 Pa.Code § 5.101(a)(4).

A Motion Judge Assignment Notice was issued on September 6, 2017, and assigned the undersigned presiding officer to this proceeding, including the Preliminary Objections filed by Pennsylvania Electric Company.

On September 14, 2017, an interim order was entered denying the Preliminary Objections.

On March 23, 2018, an interim order was entered setting an initial litigation schedule in this proceeding. The interim order, in part, directed any party wishing to present a factual or expert witness to provide to the other party in writing, the name and business address of that witness and a written summary of the expected testimony of that witness, not later than May 28, 2018. The interim order further provided that, on or before July 31, 2018, the parties shall conclude discovery in this proceeding. Complainant has not provided the required expert and factual witness lists and summaries to Respondent.

¹ 66 Pa.C.S. § 2806.1 *et seq.*

On March 30, 2018, the Company forwarded to Complainant interrogatories and document requests (discovery requests). In its discovery requests, the Company sought information and documents related to Complainant's allegations regarding the Company's smart meters. Objections to the discovery requests were due on or before April 9, 2018, and responses to the discovery requests were due on or before April 19, 2018.

Complainant did not file any objection to the discovery requests and did not provide any responses or the requested documents by the due date.

On April 26, 2018, the Company filed a motion to compel responses to the discovery requests.

On June 29, 2018, an interim order was entered granting the Company's motion to compel and ordering Complainant to provide full and complete responses to the discovery requests to the Company not later than August 6, 2018.

On August 24, 2018, Respondent filed a Motion of Pennsylvania Electric Company to Dismiss Complaint of James Wolfgang for failure to comply with the order entered on March 23, 2018 requiring witness identification and information not later than May 28, 2018 and for failing to comply with the order to compel Complainant to respond to the discovery requests by August 6, 2018. Respondent requested that the complaint be dismissed for failure of Complainant to comply with the orders entered on March 23, 2018 and June 29, 2018.

Complainant did not file a response to the motion to dismiss.

In order to provide Complainant with a final opportunity to comply with the interim order granting Respondent's motion to compel entered on June 29, 2018, and the interim order requiring the exchange of witness identification and information entered on March 23, 2018, an interim order was entered on November 9, 2018, holding the motion to dismiss in abeyance. Complainant was directed to serve upon counsel for Respondent, objections to any specific discovery requests served upon Complainant on March 30, 2018, and to file a certificate

of service with the Commission, not later than November 20, 2018. In addition, on or before November 26, 2018, Complainant was directed to serve upon counsel for Respondent, all information and documentation as previously ordered on June 29, 2018, including full and complete responses to the interrogatories and requests for production of documents not specifically objected to, as well as a certificate of service with the Commission on or before November 26, 2018. The interim order provided that in the event Complainant failed to fully and completely comply with the terms of the interim order, Respondent's motion to dismiss would be granted.

Complainant did not file objections to the discovery requests by the deadline of November 20, 2018. Subsequently, an interim order was entered on November 21, 2018 closing the record in this proceeding. The record was reopened by interim order entered on November 27, 2018 in order to permit Complainant to comply with the interim order entered on November 9, 2018 and to serve upon counsel for Respondent, all information and documentation as previously ordered on June 29, 2018, including full and complete responses to the interrogatories and requests for production of documents as well as a certificate of service with the Commission on or before December 7, 2018.

Complainant failed to comply with the interim orders entered on November 9, 2018 and November 27, 2018 and to serve upon counsel for Respondent, all information and documentation as previously ordered on June 29, 2018, including full and complete responses to the interrogatories and requests for production of documents not specifically objected to, as well as a certificate of service with the Commission on or before December 7, 2018.

The record closed on December 8, 2018.

FINDINGS OF FACT

1. Complainant is James Wolfgang.

2. Respondent is Pennsylvania Electric Company, a jurisdictional public utility.

3. On July 6, 2017, Complainant filed a Complaint against Respondent, alleging, *inter alia*, that Respondent threatened to terminate his electric service as a result of his objection to the installation of a smart meter at his residence.

4. On August 2, 2017, Respondent filed an Answer and New Matter to the Complaint, essentially averring that Respondent issued a service termination notice as Complainant refused access to permit Respondent to install a smart meter at his residence.

5. On March 23, 2018, an interim order was entered setting an initial litigation schedule, directing the parties to exchange the identities and summaries of the expected testimony of fact and expert witnesses not later than May 28, 2018.

6. Complainant did not comply with the interim order entered on March 23, 2018.

7. On March 30, 2018, Respondent forwarded discovery requests to Complainant seeking information and documents related to Complainant's allegations regarding the Company's smart meters. Objections to the discovery requests were due on or before April 9, 2018, and responses to the discovery requests were due on or before April 19, 2018.

8. Complainant did not file objections to the discovery requests and did not provide 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, an interim order was entered granting the Company's motion to compel and ordering Complainant to provide full and complete responses to the discovery requests to the Company not later than August 6, 2018.

11. On August 24, 2018, Respondent filed a Motion of Pennsylvania Electric Company to Dismiss Complaint of James Wolfgang for failure to comply with the interim orders entered on March 23, 2018 and June 29, 2018.

12. Complainant did not file a response to the motion to dismiss.

13. In order to provide Complainant with a final opportunity to comply with the interim orders entered on June 29, 2018 and March 23, 2018, an interim order was entered on November 9, 2018, holding the motion to dismiss in abeyance.

14. Complainant was directed to serve upon counsel for Respondent, objections to any specific discovery requests served upon Complainant on March 30, 2018, and file a certificate of service with the Commission, not later than November 20, 2018. In addition, on or before November 26, 2018, Complainant was directed to serve upon counsel for Respondent, all information and documentation as previously ordered on June 29, 2018, including full and complete responses to the interrogatories and requests for production of documents not specifically objected to, as well as a certificate of service with the Commission on or before November 26, 2018.

15. The interim order provided that in the event Complainant failed to fully and completely comply with the terms of the order, Respondent's motion to dismiss would be granted.

16. Complainant did not file objections to the discovery requests by the deadline of November 20, 2018, or provide responses to the discovery requests by November 26, 2018.

DISCUSSION

The Commission's regulations permit the discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." 52 Pa.Code § 5.321(c). Generally speaking, the 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. 52 Pa.Code § 5.321(c).

In this proceeding, Respondent is entitled to engage in discovery in order to obtain information that is relevant and material to the issues raised by Complainant. Complainant did not object to any discovery requests propounded by the Company. Under the circumstances, Respondent is entitled to the requested information to enable it to fully investigate and defend against Complainant's allegations.

The Commission's regulations at 52 Pa.Code § 5.371 address the consequences of a participant's failure to comply with the Commission's discovery regulations and provides that the Commission or the presiding officer may, on motion, make an appropriate order if a party fails to appear, answer, file sufficient answers, file objections, make a designation or otherwise respond to discovery requests.

Further, 52 Pa.Code § 5.372 provides that the presiding officer may impose appropriate sanctions upon a party found to be in violation of the obligations set forth in the Commission's regulations.

Complainant failed to provide the witness identification and information required in the interim order entered on March 23, 2018. In addition, Complainant failed to provide any response to the Company's discovery requests and failed to comply with the interim order granting the motion to compel entered on June 29, 2018.

In addition, Complainant failed to comply with the interim order entered on November 9, 2018, which provided Complainant with a final opportunity to comply with the orders entered on June 29, 2018 and March 23, 2018, wherein Complainant was directed to serve objections to any specific discovery requests served not later than November 20, 2018, and to serve Respondent with all information and documentation as previously ordered on June 29, 2018, including full and complete responses to the interrogatories and requests for production of documents not specifically objected to, on or before November 26, 2018.

Respondent argues that the failure to comply with the interim orders dated March 23, 2018, June 29, 2018, and November 9, 2018, demonstrate Complainant's complete lack of cooperation and unwillingness to participate in this proceeding as required under the Commission's regulations. Respondent argues that, under the circumstances, the Complaint in this proceeding should be dismissed in its entirety with prejudice.

The Commission has held that the orders of an administrative law judge must be complied with and that a failure to do so is a sufficient basis to support dismissal of the matter. *Snyderville Community Development Corporation v. Philadelphia Gas Works*, Docket No. C-20055032 (Opinion and Order entered July 31, 2006). Complainant's conduct in this proceeding involves not just failing to comply with several orders of the administrative law judge, but involves a failure to provide Respondent with initial responses to discovery requests and an identification of Complainant's expert and factual witnesses, in order to provide Respondent with an opportunity to prepare a defense to the claims advanced by Complainant. Here, Complainant has failed to comply with three orders. In addition, the interim order entered on November 9, 2018, specifically stated that Complainant was being provided one final opportunity to comply with the order granting Respondent's motion to compel and the order requiring the exchange of witness information and documentation. Complainant failed to comply with any provision of that order and failed to respond to Respondent's motion to dismiss.

Well-established Commission precedent tends to afford unrepresented complainants the opportunity to orally set forth their cases on the record, and cautions against dismissing cases on a preliminary basis. In the often-cited case of *Carlock v. United Telephone*

Company of Pennsylvania, Docket No. F-00163617 (Order entered July 14, 1993) (*Carlock*), the Commission determined that unrepresented complainants should have an opportunity to be heard orally, and not have their case dismissed because of a preliminary pleading. *Id.* at 7 (in many cases unrepresented complainants can explain their dispute orally much better than they can communicate their grievance in written form and to deny unrepresented complainants a meaningful opportunity to be heard in such cases can be viewed as a gross abuse of authority), citing, *Halpern v. Bell Telephone Company of Pennsylvania*, Docket No. C-00923950 (Order entered October 1992) and *Schleisher v. Bell Telephone Company of Pennsylvania*, Docket No. F-00161252 (Order entered December 17, 1992); see also, *Gera v. PPL Electric Utilities Corporation*, Docket No. C-20054657 (Opinion and Order entered November 2, 2005).

In this case, the parties were permitted to engage in discovery and were ordered to identify expert and factual witnesses on or before May 28, 2018. Complainant did not respond to Respondent's discovery requests served on March 30, 2018. Respondent's motion to compel was granted, however Complainant failed or refused to provide discovery responses to Respondent. Subsequently, Respondent filed its motion to dismiss the complaint and Complainant did not provide a response. Instead of granting the request to dismiss the complaint, Complainant was given another opportunity to provide discovery responses and witness information to Respondent by interim order entered on November 9, 2018. Again, Complainant failed to provide the requested information to Respondent, to ask for additional time, or to file any response to the motions filed by Respondent.

While every opportunity has been provided to Complainant to comply with Commission regulations and orders, Respondent also has due process rights that must be protected.

To allow the Complaint to go forward would result in the denial of Respondent's due process rights. Complainant was given sufficient opportunities to provide the information requested by Respondent and the undersigned presiding officer but failed to do so. Complainant could have provided the information, as requested, or he could have requested additional time to comply with the orders. Complainant apparently chose to ignore the terms of the interim orders

entered on March 23, 2018, June 29, 2018, and November 9, 2018. As such, a hearing in this matter is not necessary or appropriate and is not in the public interest. Accordingly, the Complaint will be dismissed with prejudice.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this Complaint. 66 Pa.C.S. § 701.
2. A formal complaint must set forth “the act or thing done or omitted to be done” by a public utility “in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” 66 Pa.C.S. § 701; 52 Pa.Code § 5.22(a)(4).
3. The Commission’s regulations permit the discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” 52 Pa.Code § 5.321(c).
4. The Commission’s regulations at 52 Pa.Code § 5.371 address the consequences of a participant’s failure to comply with the Commission’s discovery regulations and provides that the Commission or the presiding officer may, on motion, make an appropriate order if a party fails to appear, answer, file sufficient answers, file objections, make a designation or otherwise respond to discovery requests. 52 Pa.Code § 5.371.
5. 52 Pa.Code § 5.372 provides that the presiding officer may impose appropriate sanctions upon a party found to be found in violation of the obligations set forth in the Commission’s regulations. 52 Pa.Code § 5.372.
6. The Commission has held that the orders of an administrative law judge must be complied with and that a failure to do so is a sufficient basis to support dismissal of the

matter. *Snyderville Community Development Corporation v. Philadelphia Gas Works*, Docket No. C-20055032 (Opinion and Order entered July 31, 2006).

7. The Commission’s regulations specify certain sanctions that are available when a party fails to comply with an order of the Commission “as is just.” 52 Pa.Code § 5.372(a). Under the circumstances, the dismissal of the Complaint for failure to comply with three interim orders requiring Complainant to identify and exchange witness information and to respond to discovery requests is just.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of Pennsylvania Electric Company to Dismiss Complaint of James Wolfgang filed on August 24, 2018, at Docket No. C-2017-2613989 is granted.

2. That the Complaint filed by James Wolfgang against Pennsylvania Electric Company at Docket No. C-2017-2613989 is hereby dismissed with prejudice for Complainant’s failure to comply with the interim orders entered on March 23, 2018, June 29, 2018, and November 9, 2018, requiring Complainant to provide discovery responses and witness identification information to Respondent.

3. That the Secretary’s Bureau shall mark Docket No. C-2017-2613989 as closed.

Date: December 10, 2018

/s/
Jeffrey A. Watson
Administrative Law Judge