

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Nancy and James Colbert	:	
	:	
v.	:	C-2016-2561993
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Darlene D. Heep
Administrative Law Judge

This decision dismisses this matter given that the Complainants have stated that they will not attend a hearing and they have failed to comply with orders issued.

HISTORY OF THE PROCEEDINGS

Nancy Colbert filed a Complaint against PECO Energy Company (PECO) on August 8, 2016. In that Complaint, she indicated that she was filing the Complaint concerning her electric service and under an area labeled "Other", wrote "Corruption." In a document attached to the Complaint by Mrs. Colbert it states that there was an "unpromulgated regulation" at issue. The Complaint also references a complaint that was filed at C-2015-2515607.

On September 6, 2016, PECO filed an Answer denying the material allegations of the Complaint. PECO also stated in the Answer that Mrs. Colbert opposes the installation of a smart meter at her residence in Phoenixville, Pennsylvania. According to the Answer, PECO sent Mrs. Colbert notice that a smart meter would be installed, and the smart meter was refused by Mrs. Colbert.

The Answer also states that Nancy and James Colbert filed a formal Complaint at Docket Number C-2015-2515607 objecting to installation of a smart meter in accordance with Act 129. That matter was dismissed by Administrative Law Judge Salapa as legally insufficient by order dated January 7, 2016. See *Nancy and James Colbert v. PECO*, C-2015-2515607 (Initial Decision issued January 7, 2016). The Colberts filed Exceptions and the Exceptions were denied, and the Commission dismissed the Complaint. See *Nancy and James Colbert v. PECO Energy Company*, C-2015-2515607 (Order entered June 30, 2016). PECO asserted that the instant Complaint was an attempt by the Colberts to relitigate the issue and in a New Matter, PECO asserted that this Complaint should be dismissed on the grounds of *res judicata*. (Answer at 5-6).

On September 19, 2016, the Colberts filed a response to PECO's Answer, stating, *inter alia*, that they did not receive advanced notice of the installation of a smart meter, that Mrs. Colbert refused installation, that smart meters violate privacy and cause ill health effects and questioning the interpretation of Act 129. ¹

On September 27, 2016, PECO filed a Motion for Judgment on the Pleadings, asserting that the matter should be dismissed. The Colberts filed a response on October 11, 2016, opposing the Motion. The matter was assigned to Administrative Law Judge (ALJ) Joel Cheskis, who denied the Motion by Order dated February 8, 2017. ALJ Cheskis treated the Complaint as a Petition for Rescission or Amendment of a Final Order of the Commission and the matter was transferred to the Commission's Office of Special Assistants.

The Commission then took up the Complaint, treated the Complaint as characterized by ALJ Cheskis, and granted the relief sought by the Complainants given the decision of the Commonwealth Court in *Romeo v. Pa. Pub. Util. Comm'n*, 154 A.3d 422 (Pa. Cmwlth. 2017).² The matter was remanded to the Office of Administrative Law Judge and assigned to the undersigned.

¹ Both Nancy and James Colbert participated in the matter after the Complaint was filed and the caption reflects their participation as joint complainants.

² In *Romeo*, the Court found that where an electric utility's customer objected to the installation of a smart meter based on allegations of adverse effects to health, safety and privacy rights, the complainant was not required to allege facts to which the complainant "could personally testify." *Id.* at 427.

On October 18, 2018, a Corrected Status Conference Notice was mailed to all parties informing them that a Call-In Telephonic Status Conference would be held on October 26, 2018 at 2:00 p.m. A toll-free call-in telephone number was also provided on the notice.

A standard document captioned in error "Prehearing Order" was mailed to all parties on October 23, 2018. This Order contained the call-in number and the date and time to call in.

The Status Conference began as scheduled at 2:00 p.m. on October 26, 2018. Ward Smith, Esq., appeared by telephone on behalf of PECO. The Colberts did not call-in. The Conference was delayed to allow the Colberts time to call-in. The Colberts were called at the telephone number in the record and there was no answer. The conference resumed at 2:12 p.m. where there was discussion about possible hearing dates and the procedure given the remand.

On November 1, 2018, a Hearing Notice was mailed to all parties informing them that an Initial Hearing would be held on February 12-13, 2019, beginning at 9:30 a.m. Also on November 1, 2018, the undersigned was notified that the Colberts had sent a letter to the Commission contesting notice of a hearing five days before it was scheduled, given the Prehearing Order caption on the document sent. Also on November 1, 2018, the Secretary of the Commission sent the Colberts a letter informing them that because the matter was pending before the Commission, that they should not engage in further *ex-parte* communication.

On November 20, 2018, a Prehearing Order was issued. This Prehearing Order again advised the parties that the hearing would be held February 12-13, 2019 and also provided discovery and exhibit exchange deadlines. The Prehearing Order also informed all parties of the procedure for requesting a change in the hearing dates.

Also, on November 20, 2018, the Commission received a letter from the Colberts stating that they would no longer attend a hearing in this matter. Given the confusion regarding the Prehearing Order and Status Conference, staff in the office of the undersigned attempted to contact the Colberts to confirm whether they wanted to pursue this matter. The Colberts did not answer when telephoned.

On November 26, 2018, PECO filed a Motion to Compel Answers to Interrogatories and Requests for Production Documents.

On December 27, 2018, PECO filed a Motion to Dismiss this action, given the letter from the Colberts stating that they would no longer appear for a hearing.

On January 4, 2019, an Order was issued stating that the Colberts must file a response to the Motion to Dismiss or inform the Commission that they no longer intended to pursue this matter by no later than January 16, 2019. The Order also stated that if the Colberts did wish to pursue the matter, the hearing would be held as scheduled on February 12-13, 2019 and the parties must exchange witness and exhibit lists by no later than January 29, 2019. The parties were also required to discuss settlement by telephone by no later than January 22, 2019.

On January 16, 2019, PECO filed a letter stating that their efforts to communicate with the Colberts were to no avail and that the company had not received any documents from the Colberts.

PECO served its hearing exhibit upon the Complainants on January 29, 2019.

A Hearing Cancellation Notice was issued on January 31, 2019.

On February 1, 2019, PECO filed a letter stating that the company had received a telephone message from Nancy Colbert stating that she and her husband had "cancelled" their Complaint.

This matter is ready for a decision and the record is closed as of the date of this Initial Decision.

FINDINGS OF FACT

1. The Complainants are Nancy and James Colbert.
2. The Respondent is PECO Energy Company.
3. The Colberts did not participate in the October 26, 2018 telephonic Status Conference.
4. On November 20, 2018, the Commission received a letter from the Colberts stating that they would no longer attend a hearing in this matter.
5. The Prehearing Order issued on November 20, 2018, required that the parties exchange witness and expert lists by December 17, 2018, and exchange hearing exhibits by January 29, 2019.
6. On January 4, 2019, an Order was issued stating that the Colberts must file a response to PECO's Motion to Dismiss or inform the Commission that they no longer intended to pursue this matter no later than January 16, 2019.
7. The January 4, 2019 Order also stated that if the Colberts did wish to pursue the matter, the parties were required to discuss settlement by telephone by no later than January 22, 2019 and to exchange witness and exhibit lists by January 29, 2019.
8. On January 16, 2019, PECO counsel filed a letter stating that their efforts to communicate with the Colberts were unsuccessful.
9. The Complainants did not comply with the deadlines set forth in the November 20, 2018, Pre-Hearing Order or the January 4, 2019 Order.
10. The Colberts have not contacted the Commission since the issuance of the January 4, 2019 Order.

11. A Hearing Cancellation Notice was issued on January 31, 2019.
12. The Colberts did not participate in a settlement conference by January 22, 2019.
13. The Colberts have not contacted the Commission since the Hearing Cancellation Notice was issued.
14. The Colberts have not exchanged hearing exhibits with PECO or provided a witness or exhibit list to PECO.

DISCUSSION

The Commission's Rules of Practice and Procedure at 52 Pa.Code § 5.94 permit parties to withdraw pleadings in a contested proceeding. It provides as follows:

§ 5.94. Withdrawal of pleadings in a contested proceeding.

(a) Except as provided in subsection (b), a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties. The petition must set forth the reasons for the withdrawal. A party may object to the petition within 10 days of service. After considering the petition, an objection thereto and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted.

52 Pa. Code § 5.94.

The Colberts sent a letter to the Commission on November 20, 2018, stating that they "will no longer attend a hearing" and that there is "no need for another hearing," contending that it is "predetermined" that they will lose their case.

The Colberts' letter of November 20, 2018 shall be treated as a Petition to Withdraw. A party wishing to withdraw a pleading may do so by filing a petition pursuant to 52 Pa.Code § 5.94. While the Colberts' November 20, 2018, letter does not technically comply with Section 5.94, Commission regulations provide that the rules of procedure may be "liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable" and that "The . . . 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).

It would not be in the public interest to continue with this matter. Also, given that the Colberts have stated that they no longer want a hearing and have provided reasons therefore and there will be no prejudice to PECO, this matter can be dismissed pursuant to 52 Pa.Code § 5.94.

Also, failure to comply with the order of an Administrative Law Judge is grounds for dismissal. *Snyderville Community Development Corporation v. Verizon Pennsylvania, Inc.*, Docket No. C-20055032 (Opinion and Order entered July 31, 2006.)

Additionally, this matter can be dismissed as an appropriate sanction under 52 Pa.Code § 5.371. The Colberts did not comply with the Prehearing Order deadlines for exchanging exhibits and witness lists. The Colberts also did not comply with the January 4, 2019 Order; they did not participate in a settlement conference by January 22, 2019, did not inform the presiding officer of their intentions in this matter by January 16, 2019 and did not exchange witness and exhibit lists by January 29, 2019.

This matter will be dismissed.

CONCLUSIONS OF LAW

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

