

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Paul Berginc	:	
	:	
v.	:	C-2017-2632636
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by Paul Berginc for his failure to provide his witness information to Respondent and to file a status report, in violation of an Interim Order dated November 19, 2018; and his failure to serve full and complete responses to the discovery requests upon Respondent and file a certificate of service by March 28, 2019, in violation of an Interim Order issued March 4, 2019.

HISTORY OF THE PROCEEDING

Paul Berginc (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (Respondent) on October 25, 2017, averring that Respondent was threatening to terminate his electric service at his residence at 245 Penn Adamsburg Road, Penn, PA 15675 (service location) unless Complainant agreed to the installation of a smart meter; he objects to the installation of a smart meter at the service location due to health, safety, and privacy concerns; a smart meter may

interfere with a pacemaker, his voice over internet service, and the Wi-Fi connectivity in his neighborhood; and smart meters are vulnerable to power surges and hacking.

On November 27, 2017, Respondent filed an Answer and New Matter to the Complaint, admitting that it provides residential electric service to Complainant at the service location, and averring that Complainant has refused the installation of a smart meter at the service location; Respondent is required by Act 129 of 2008¹ (Act 129) and its Commission-approved Smart Meter Deployment Plan (SMP) to install a smart meter at the service location; and Complainant's refusal to allow the installation of a smart meter constitutes legal grounds to terminate service to the service location. Respondent denied the remaining material allegations set forth in the Complaint.

The New Matter included a Notice to Plead, requiring Complainant to file a response within twenty days of service. Complainant did not file a response to the New Matter.

On November 27, 2017, Respondent also filed Preliminary Objections to the Complaint, averring that the request for relief for an exemption from the installation of a smart meter is not legally recoverable; Complainant failed to allege Respondent violated any Commission statute, regulation, order, or tariff provision with regard to the proposed installation of the smart meter at the service location; and Respondent is required by Act 129 and its SMP to install a smart meter at the service location. Respondent argued that the Complaint is legally insufficient, because it fails to state a claim upon which the Commission can grant relief; a hearing is not in the public interest; and the Complaint does not meet the standards set forth in recent Commission decisions in order to survive preliminary objections.

The Preliminary Objections included a Notice to Plead, requiring Complainant to file a response within ten days of service. Complainant did not file a response to the Preliminary Objections.

¹ 66 Pa.C.S. § 2806.1 *et seq.*

On January 9, 2018, the Commission issued a Motion Judge Assignment Notice, assigning this matter to me.

On November 15, 2018, I issued an Interim Order, denying the Preliminary Objections.

On November 19, 2018, I issued an Interim Order, establishing an initial litigation schedule. I ordered the parties to, *inter alia*, provide the names, addresses, and written summaries of the expected testimony for each witness (witness information) to the other party by January 24, 2019; conclude discovery by April 19, 2019; and file a status report by May 10, 2019. The Interim Order also provided that any Party may request a prehearing conference or a settlement conference, and that any of the provisions of the Order may be modified upon motion and good cause shown by a Party. No such requests were made by Complainant in this proceeding.

On January 24, 2019, Respondent filed a certificate of service regarding its service of its witness information upon Complainant.

On January 29, 2019, Respondent filed a certificate of service regarding its service of Interrogatories and Requests for Production of Documents (discovery requests) upon Complainant. Objections were due by February 8, 2019, and responses were due by February 18, 2019.

On February 22, 2019, Respondent filed a Motion to Compel Responses to Interrogatories and Document Requests (Motion to Compel), averring that it had not received any response to its discovery requests. The Motion to Compel contained a Notice to Plead, requiring Complainant to file a response within five days of service. Complainant did not file a response to the Motion to Compel.

On March 4, 2019, I issued an Interim Order, granting Respondent's Motion to Compel and ordering Complainant to serve full and complete responses to the discovery requests

upon Respondent's counsel and file a certificate of service with the Commission's Secretary no later than March 28, 2019.

On April 18, 2019, Respondent filed a Motion to Dismiss Complaint of Paul Berginc for Failure to Comply with Orders (Motion to Dismiss), averring, *inter alia*, Complainant failed to provide his witness information to Respondent in violation of the November 19, 2018 Interim Order, and failed to provide responses to Respondent's discovery requests in violation of the March 4, 2019 Interim Order. Complainant also failed to file a status report as required by the interim order entered on November 19, 2019.

The Motion to Dismiss contained a Notice to Plead, requiring Complainant to file a response within five days of service. Complainant did not file a response to the Motion to Dismiss.

On April 24, 2019, Respondent filed an Amended Motion to Dismiss Complaint of Paul Berginc for Failure to Comply with Orders (Amended Motion to Dismiss), averring, *inter alia*, that after filing the Motion to Dismiss, Respondent received incomplete responses to the discovery requests from Complainant. Respondent averred Complainant failed to provide any response to Discovery Request Nos. 1, 2d-g, 3, 4b-c, 5-6, 7a, 7c, 9b, 15b-c, 16-17, 19a, 19c, 21-25, 26a-d, and 27a-d, even though the order granting the motion to compel required Complainant to file full and complete responses to all of Respondent's discovery requests by March 28, 2019. Respondent also averred Complainant provided no documentation in response to Discovery Request Nos. 28-38. Respondent averred that at no time did Complainant contact Respondent to discuss the discovery requests. Respondent argued that Complainant's responses to the discovery requests were not full and complete, as required by the March 4, 2019 Interim Order.

Respondent averred it still had not received Complainant's witness information, and argued the Complaint should be dismissed in its entirety, because Complainant's failure to provide full and complete responses to the discovery requests and provide his witness information demonstrates Complainant's lack of cooperation and willingness to participate in the proceeding as required by the Commission's regulations.

The Amended Motion to Dismiss contained a Notice to Plead, requiring Complainant to file a response within five days of service. Complainant did not file a response to the Amended Motion to Dismiss.

On May 13, 2019, Respondent filed a status report dated May 10, 2019, averring that Complainant had not yet provided his witness information or full and complete responses to the discovery requests. Complainant did not file a status report.

The record closed on May 13, 2019, the deadline for filing status reports in this proceeding.

FINDINGS OF FACT

1. Complainant is Paul Berginc.
2. Respondent is West Penn Power Company, a jurisdictional public utility.
3. The service location is 245 Penn Adamsburg Road, Penn, PA 15675.
4. On October 25, 2017, Complainant filed a Complaint against Respondent, alleging that Respondent was threatening to terminate his electric service unless he agreed to the installation of a smart meter at his residence.
5. On November 27, 2017, Respondent filed an Answer and New Matter to the Complaint, averring that Respondent was required to install a smart meter at the service location.
6. On November 27, 2017, Respondent filed Preliminary Objections, arguing that Complainant failed to state a claim upon which the Commission can grant relief and failed to allege a violation of any law which the Commission has jurisdiction to administer, or of any regulation or order of the Commission.

7. On November 15, 2018, an Interim Order was issued, denying the Preliminary Objections.
8. On November 19, 2018, an Interim Order was issued, establishing an initial litigation schedule and ordering the parties to, *inter alia*, exchange witness information by January 24, 2019.
9. On January 24, 2019, Respondent filed a certificate of service regarding its service of its witness information upon Complainant.
10. On January 29, 2019, Respondent filed a certificate of service regarding its service of discovery requests upon Complainant.
11. On February 22, 2019, Respondent filed a Motion to Compel responses to the discovery requests, averring that Complainant had not served any response to the discovery requests.
12. Complainant did not file a response to the Motion to Compel.
13. On March 4, 2019, an Interim Order was issued, granting Respondent's Motion to Compel and ordering Complainant to serve full and complete responses to the discovery requests upon Respondent's counsel and file a certificate of service no later than March 28, 2019.
14. On April 18, 2019, Respondent filed a Motion to Dismiss Complainant's Complaint, averring, *inter alia*, Complainant failed to serve his witness information upon Respondent, in violation of the Interim Order dated November 19, 2018; and failed to serve full and complete responses to the discovery requests upon Respondent and file a certificate of service by March 28, 2019, in violation of the Interim Order dated March 4, 2019.
15. Complainant did not file a response to the Motion to Dismiss.

16. On April 24, 2019, Respondent filed an Amended Motion to Dismiss, averring, *inter alia*, that subsequent to filing the Motion to Dismiss, it received incomplete responses to the discovery requests from Complainant and had not yet received Complainant's witness information.

17. Complainant did not file a response to the Amended Motion to Dismiss.

18. On May 13, 2019, Respondent filed a status report, averring, *inter alia*, Complainant had not yet provided his witness information or provided full and complete responses to the discovery requests.

19. Complainant did not file a status report.

20. Complainant has not filed a certificate of service regarding his service of full and complete discovery responses upon Respondent.

21. Complainant has not filed a certificate of service regarding his service of his witness information upon Respondent.

DISCUSSION

In its Amended Motion to Dismiss, Respondent argues that the Complaint should be dismissed in its entirety due to Complainant's failure to provide full and complete responses to the discovery requests, in violation of the March 4, 2019 Interim Order, and exchange witness information, in violation of the November 19, 2018 Interim Order. Respondent argues Complainant's actions demonstrate his lack of willingness to prosecute his Complaint.

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. As

long as the information sought in a discovery request appears reasonably calculated to lead to the discovery of admissible evidence, a party may not object to the discovery request on the basis that the information sought will be inadmissible at a hearing. 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, and it filed a certificate of service showing its service of discovery requests upon Complainant on January 29, 2019.

The Commission's regulations at 52 Pa.Code §§ 5.342(d) and (e) provide that a party must serve answers to interrogatories within twenty days of service and objections within ten days of service. The Commission's regulations at 52 Pa.Code §§ 5.371 and 5.372 authorize the presiding officer to make an appropriate order if a party fails to respond to discovery requests and impose appropriate sanctions on a party found to be in violation of the obligations set forth in the Commission's regulations.

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 provide 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.

In this case, Respondent filed a Motion to Compel on February 22, 2019, averring, *inter alia*, Complainant had not provided any response to the discovery requests. Complainant did not file a response to the Motion to Compel. The Motion to Compel was granted by an Interim Order dated March 4, 2019. The March 4, 2019 Interim Order directed

Complainant to serve full and complete responses to the discovery requests upon Respondent's counsel and file a certificate of service no later than March 28, 2019.

On November 19, 2018, I issued an Interim Order, directing the parties to, *inter alia*, exchange witness information by January 24, 2019. The Interim Order also provided that any Party may request a prehearing conference or a settlement conference, and that any of the provisions of the Order may be modified upon motion and good cause shown by a Party. No such request was made by Complainant.

On January 24, 2019, Respondent filed a certificate of service regarding its service of its witness information upon Complainant. In its Amended Motion to Dismiss, Respondent averred it had not yet received Complainant's witness information.

The Commission has held that parties must comply with the orders of an administrative law judge, and a complainant's 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 has violated two Interim Orders issued in this case. As of the date of this Initial Decision, Complainant has not filed a certificate of service showing his service of his witness information upon Respondent, in violation of the Interim Order issued November 19, 2018. Additionally, Complainant has not filed a certificate of service showing his service of full and complete responses to the discovery requests upon Respondent, in violation of the Interim Order issued March 4, 2019. Although Complainant provided some responses subsequent to Respondent's filing of the Motion to Dismiss, these responses were incomplete. The March 4, 2019 Interim Order clearly ordered Complainant to serve full and complete responses by March 28, 2018, which Complainant did not do. At no point did Complainant request an extension of time to respond to the discovery requests or contact Respondent to discuss the discovery requests. Instead, he chose to serve incomplete responses, well beyond the deadline set by the March 4, 2019 Interim Order. In addition, Complainant did not file a status report in this proceeding.

Respondent has due process rights that must be protected. Respondent filed a certificate of service regarding its service of its witness information upon Complainant by the deadline and attempted to gather information about Complainant's claims through discovery. Complainant's actions have denied Respondent the opportunity to prepare a defense to Complainant's claims. To proceed with this matter in these circumstances would result in the denial of Respondent's due process rights.

A hearing in this matter is not necessary or appropriate and is not in the public interest. Accordingly, the Complaint will be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this Complaint. 66 Pa.C.S. § 701.
2. 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).
3. The Commission's regulations at 52 Pa.Code § 5.371 address the consequences of a party'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.
4. The Commission's regulations at 52 Pa.Code § 5.372 provide 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. 52 Pa.Code § 5.372.
5. The Commission has held that parties must comply with the orders of an administrative law judge, and a complainant's 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).

6. 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).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Amended Motion of West Penn Power Company to Dismiss the Complaint of Paul Berginc filed on October 25, 2017 at Docket No. C-2017-2632636, is granted.

2. That the Complaint filed by Paul Berginc against West Penn Power Company at Docket No. C-2017-2632636 is hereby dismissed with prejudice due to Complainant’s failure to provide his witness information to Respondent, in violation of an Interim Order dated November 19, 2018, and his failure to serve full and complete responses to the discovery requests upon Respondent and file a certificate of service by March 28, 2019, in violation of an Interim Order issued March 4, 2019.

3. That the Secretary’s Bureau shall mark Docket No. C-2017-2632636 as closed.

Date: June 21, 2019

/s/
Jeffrey A. Watson
Administrative Law Judge