

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Sage Gardner	:	
	:	
v.	:	C-2018-3003550
	:	
Duquesne Light Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by Sage Gardner for her failure file a certificate of service regarding her service of her witness information upon Respondent by January 4, 2019, in violation of an Interim Order dated October 3, 2018; and her failure to serve responses to the discovery requests upon Respondent and file a certificate of service by February 1, 2019, in violation of an Interim Order issued January 7, 2019.

HISTORY OF THE PROCEEDING

Sage Gardner (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Duquesne Light Company (Respondent) on July 17, 2018, averring that Respondent was threatening to terminate her electric service at her residence at 4134 Gladstone Street, Pittsburgh, PA 15207 (service location) unless Complainant agreed to the installation of a smart meter; she does not want a smart meter installed on her property due to health, safety, and privacy concerns; and that “it would be a death trap to have one installed especially since [she] is hypersensitive to

electromagnetic frequencies and microwave radiation....” Complainant also alleges that the installation of a smart meter would “go against the 4th Amendment and the commerce clause.” As relief, Complainant requested the Commission allow her to keep her analog meter.

On August 13, 2018, 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 it terminated Complainant’s service due to non-payment in July 2018, but restored service after Complainant made the required payments; Complainant has refused the installation of a smart meter at the service location; Respondent is required by Act 129 of 2008¹ (Act 129) and Respondent’s Commission-approved Smart Meter Plan (SMP) to install a smart meter at the service location; Complainant has refused installation of a smart meter; state law does not permit the exemption sought by Complainant; and Respondent’s smart meters are accurate, safe, and reliable. Respondent denied the remaining material allegations set forth in the Complaint.

On August 13, 2018, Respondent also filed Preliminary Objections to the Complaint, averring that portions of the Complaint should be dismissed as legally insufficient or for lack of jurisdiction. Respondent argued the Complaint is legally insufficient because, *inter alia*, it is required by Act 129 and its SMP to install a smart meter at the service location, and the request for an exemption from the installation of a smart meter is not legally recoverable. Furthermore, Respondent argued the Commission does not have jurisdiction over the claims invoking the Fourth Amendment to the United States Constitution or the Federal Commerce Clause. Respondent argued that the portions of the Complaint that seek to opt-out of smart meter installation and that raise allegations of violations of state and federal constitutions should be dismissed.

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 September 4, 2018, Respondent filed a certificate of service regarding its service of First Set of Discovery Requests Directed to Complainant (discovery requests) upon Complainant.

On September 17, 2018, the Commission issued a Motion Judge Assignment Notice, assigning this matter to me.

On October 3, 2018, I issued an Interim Order, granting in part and denying in part Respondent's Preliminary Objections. The Preliminary Objections were granted in that Complainant's claims that Respondent violated her rights under the Fourth Amendment to the United States Constitution and the United States Commerce Clause were dismissed. The Preliminary Objections were denied in all other respects.

On October 3, 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 4, 2019.

On November 12, 2018, Respondent filed a Motion to Compel Discovery Responses (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 twenty days of service.

Complainant did not file a response to the Motion to Compel.

On January 4, 2019, Respondent filed a certificate of service regarding its service of its witness information upon Complainant.

On January 7, 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 February 1, 2019.

On March 4, 2019, Respondent filed a status report, averring, *inter alia*, it had not received any response to its discovery requests, Complainant had not sent a copy of her witness list, and Complainant had taken no other steps to prosecute her Complaint.

On March 5, 2019, Respondent filed a Motion to Dismiss Formal Complaint for Failure to Answer Discovery and Prosecute Formal Complaint (Motion to Dismiss), arguing, *inter alia*, the Complaint should be dismissed due to Complainant's failure to answer the discovery requests and otherwise failing to prosecute her Complaint. Respondent averred, *inter alia*, Complainant did not submit responses to the discovery requests, in violation of the Interim Order dated January 7, 2019, and did not provide her witness information to Respondent, in violation of the Interim Order dated October 3, 2018.

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

As of the date of this Initial Decision, Complainant has not filed certificates of service regarding her service of responses to the discovery requests or her service of her witness information upon Respondent.

The record closed by interim order entered on July 1, 2019.

FINDINGS OF FACT

1. Complainant is Sage Gardner.
2. Respondent is Duquesne Light Company, a jurisdictional public utility.
3. The service location is 4134 Gladstone Street, Pittsburgh, PA.

4. On July 17, 2018, Complainant filed a Complaint against Respondent, alleging, *inter alia*, Respondent was threatening to terminate her electric service unless she agreed to the installation of a smart meter at her residence.

5. On August 13, 2018, 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 August 13, 2018, Respondent filed Preliminary Objections, arguing that the portions of the Complaint that raised state and federal constitutional claims should be dismissed for lack of jurisdiction, and the portions of the Complaint that sought an exemption from smart meter installation should be dismissed as legally insufficient.

7. On September 4, 2018, Respondent filed a certificate of service regarding its service of discovery requests upon Complainant.

8. On October 3, 2018, an Interim Order was issued, granting in part and denying in part Respondent's Preliminary Objections. The Preliminary Objections were granted such that Complainant's claims that Respondent violated her rights under the Fourth Amendment to the United States Constitution and the United States Commerce Clause were dismissed. The Preliminary Objections were denied in all other respects.

9. On October 3, 2018, an Interim Order was issued, establishing an initial litigation schedule and ordering the Parties to, *inter alia*, exchange witness information by January 4, 2019.

10. On November 12, 2018, Respondent filed a Motion to Compel responses to the discovery requests, averring that Complainant had not served any response to the discovery requests.

11. Complainant did not file a response to the Motion to Compel.

12. On January 4, 2019, Respondent filed a certificate of service regarding its service of its witness information upon Complainant.

13. On January 7, 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 February 1, 2019.

14. On March 5, 2019, Respondent filed a Motion to Dismiss Complainant's Complaint, averring, *inter alia*, Complainant failed to serve her witness information upon Respondent by January 4, 2019, in violation of the Interim Order dated October 3, 2018; and failed to serve full and complete responses to the discovery requests upon Respondent and file a certificate of service by February 1, 2019, in violation of the Interim Order dated January 7, 2019.

15. Complainant did not file a response to the Motion to Dismiss.

16. Complainant has not filed a certificate of service regarding her service of responses to the discovery requests upon Respondent.

17. Complainant has not filed a certificate of service regarding her service of her witness information upon Respondent.

DISCUSSION

In its Motion to Dismiss, Respondent argues that the Complaint should be dismissed in its entirety due to Complainant's failure to respond to the discovery requests, in violation of the January 7, 2019 Interim Order, and exchange witness information, in violation of the October 3, 2018 Interim Order. Respondent argues Complainant's actions demonstrate her lack of willingness to prosecute her 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 September 4, 2018.

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 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 November 12, 2018, averring that 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 January 7, 2019. The January 7, 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 February 1, 2019.

On October 3, 2018, I issued an Interim Order, directing the Parties to, *inter alia*, exchange witness information by January 4, 2019. On January 4, 2019, Respondent filed a certificate of service regarding its service of its witness information upon Complainant. In its 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 her service of her witness information upon Respondent, in violation of the Interim Order issued October 3, 2018. Complainant has not filed a certificate of service showing her service of full and complete responses to the discovery requests upon Respondent, in violation of the Interim Order issued January 7, 2019.

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 because the complainant has failed to effectively prosecute her complaint by responding

to discovery and providing witness information. 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. 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).

