

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

James Savage	:	
	:	
v.	:	C-2018-3006179
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by James Savage for his failure to provide his witness information to Respondent by April 12, 2019, in violation of an Interim Order dated February 27, 2019; failure to serve full and complete discovery responses upon Respondent and file a certificate of service by April 12, 2019, in violation of an Interim Order issued March 27, 2019; and failure to appear at a prehearing conference on June 18, 2019, in violation of an Interim Order dated May 3, 2019.

HISTORY OF THE PROCEEDING

James Savage (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (Respondent) on November 15, 2018, averring that he objected to the installation of a smart meter at his residence at 421 S. Mt. Vernon Avenue Ext., Uniontown, PA 15401 (service location) due to health and safety concerns. As relief, Complainant requested that the smart meter be replaced with an analog meter.

On December 17, 2018, Respondent filed an Answer and New Matter to the Complaint. Respondent admitted that it provides residential electric service to Complainant at the service location. Respondent averred that a smart meter was installed at the service location on August 7, 2018; Complainant contacted Respondent on November 1, 2018 stating that his wife was experiencing health issues since the smart meter was installed; Complainant requested that the smart meter be removed; and Respondent advised him that it could not be removed. Respondent essentially denied the remaining material averments set forth in the Complaint.

In its New Matter, Respondent averred that the Complaint should be dismissed for legal insufficiency, because it was required by Act 129 of 2008¹ (Act 129) and its Smart Meter Deployment Plan (SMP) to install a smart meter and the Commission is unable to grant the relief requested by Complainant.

On February 8, 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 18, 2019, and responses were due by February 28, 2019. Complainant did not file any objections or responses to the discovery requests.

On February 27, 2019, I issued an Interim Order, establishing an initial litigation schedule. The February 27, 2019 Interim Order directed the Parties to, *inter alia*, provide the names and addresses of each fact and expert witness, as well as written summaries of the expected testimony for each witness (witness information) to the other Party by April 12, 2019; conclude discovery by May 31, 2019; and submit a status report by June 7, 2019.

On March 12, 2019, Respondent filed a Motion to Compel responses to the discovery requests, 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.

¹ 66 Pa.C.S. § 2806.1 *et seq.*

On March 27, 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 April 12, 2019.

On May 3, 2019, I issued an Interim Order, directing the Parties to "attend and fully participate" in a prehearing conference scheduled for June 18, 2019, at 10:30 a.m. The Interim Order included instructions on how to call into the conference bridge, and provided the toll-free bridge number and PIN number. I wrote in the Interim Order that, "**Complainant's failure to attend and fully participate in the prehearing conference will result in the Complaint being dismissed with prejudice, meaning you will lose your case and you will not be allowed to refile your Complaint in the future.**" (emphasis in original).

On May 7, 2019, the Commission issued a Call-In Telephone Prehearing Conference Notice, scheduling a prehearing conference for June 18, 2019, at 10:30 a.m. The Notice provided the toll-free bridge number and PIN number and included instructions on how to connect to the conference bridge. The Notice advised the Parties, "**At the above date and time, you must call into the conference. If you fail to do so, your case will be dismissed. You will not be called by the Administrative Law Judge.**" (emphasis in original).

The May 3, 2019 Interim Order and the May 7, 2019 Notice were mailed via regular first-class mail to the address listed for Complainant in the Complaint and were not returned as undeliverable.

On May 15, 2019, Respondent filed a Motion to Dismiss Complaint of James Savage for Failure to Comply with Orders (Motion to Dismiss), averring that Complainant failed to provide his witness information to Respondent, in violation of the February 27, 2019 Interim Order; and failed to provide responses to Respondent's discovery requests, in violation of the March 27, 2019 Interim Order. Respondent argued the Complaint should be dismissed in its entirety, because Complainant's actions demonstrate a lack of cooperation and willingness to participate in the proceeding as required by the Commission's regulations.

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.

Respondent submitted a status report dated June 6, 2019 advising it had not received Complainant's discovery responses or witness information. Complainant did not submit a status report.

On June 18, 2019, I convened a telephone prehearing conference at 10:30 a.m. Counsel for Respondent had called into the conference bridge, but Complainant had not. I had my legal assistant check to see if Complainant contacted my office regarding his appearance at the conference. Complainant had not contacted my office or otherwise requested a continuance. Complainant did not call into the conference bridge, and the prehearing conference proceeded in his absence.

Respondent's counsel advised it had not yet received Complainant's witness information or his discovery responses. Respondent advised that, other than filing his Complaint, Complainant had not participated in the proceedings. Respondent's counsel renewed the Motion to Dismiss. I advised Respondent I would grant the Motion to Dismiss. The conference concluded at 10:48 a.m.

The record closed on June 18, 2019, the date of the prehearing conference.

FINDINGS OF FACT

1. Complainant is James Savage.
2. Respondent is West Penn Power Company, a jurisdictional public utility.
3. The service location is 421 S. Mt. Vernon Avenue Ext., Uniontown, PA 15401.

4. On November 15, 2018, Complainant filed a Complaint against Respondent, alleging that he objected to the smart meter that Respondent installed at his residence.

5. On December 17, 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 February 8, 2019, Respondent filed a certificate of service regarding its service of discovery requests upon Complainant. Objections to the discovery requests were due on February 18, 2019, and responses to the discovery requests were due on February 28, 2019. Complainant did not file any objections or responses to the discovery requests.

7. On February 27, 2019, an Interim Order was issued, establishing an initial litigation schedule and ordering the Parties to, *inter alia*, exchange witness information by April 12, 2019.

8. On March 12, 2019, Respondent filed a Motion to Compel responses to the discovery requests, averring that Complainant had not served any response to the discovery requests.

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

10. On March 27, 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 April 12, 2019.

11. On May 3, 2019, an Interim Order was issued, directing the Parties to appear for and participate in a prehearing conference scheduled for 10:30 a.m. on June 18, 2019.

12. On May 7, 2019, the Commission issued a Call-In Telephone Prehearing Conference Notice, scheduling the prehearing conference for 10:30 a.m. on June 18, 2019.

13. The Commission sent copies of the May 3, 2019 Interim Order and May 7, 2019 Notice to Complainant by regular first-class mail to the address Complainant provided on the Complaint.

14. Complainant's copies of the May 3, 2019 Interim Order and May 7, 2019 Notice were not returned as undeliverable.

15. The May 3, 2019 Interim Order and May 7, 2019 Notice advised the Parties that they must call into the prehearing conference on the scheduled date and time using the toll-free bridge number and PIN number; the ALJ would not call them for the June 18, 2019 prehearing conference; and they may lose their case if they did not call into the June 18, 2019 prehearing conference.

16. The May 3, 2019 Interim Order advised Complainant that his failure to attend and fully participate in the prehearing conference would result in the Complaint being dismissed with prejudice.

17. On May 15, 2019, Respondent filed a Motion to Dismiss Complainant's Complaint, averring that Complainant failed to serve his witness information upon Respondent, in violation of the Interim Order dated February 27, 2019; and failed to serve full and complete responses to the discovery requests upon Respondent, in violation of the Interim Order dated March 27, 2019.

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

19. Complainant did not call into the conference on June 18, 2019.

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

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

22. Complainant did not settle or withdraw this matter.

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 and exchange witness information. Respondent argues Complainant's actions demonstrate his lack of cooperation and willingness to participate in this proceeding as required under the Commission's regulations. Subsequent to Respondent filing the Motion to Dismiss, Complainant failed to appear at the June 18, 2019 prehearing conference.

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 February 8, 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.

In this case, Respondent filed a Motion to Compel on March 12, 2019, averring that Complainant had not served any response to the discovery requests. The Motion to Compel contained a Notice to Plead, requiring Complainant to file a response within five days of service. Complainant filed no response. The Motion to Compel was granted by an Interim Order dated March 27, 2019. The March 27, 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 April 12, 2019.

On February 27, 2019, I issued an Interim Order, directing the Parties to, *inter alia*, exchange witness information by April 12, 2019. In its Motion to Dismiss, Respondent averred it had not yet received Complainant's witness information.

Finally, Complainant failed to appear at the prehearing conference on June 18, 2019. Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlth. 1984). This due process requirement is satisfied, however, when the administrative agency provides the parties notice and the opportunity to be heard.

In this case, a prehearing conference was scheduled for June 18, 2019. Complainant received notice of the prehearing conference via an Interim Order issued May 3, 2019 and a Call-In Telephone Prehearing Conference Notice issued May 7, 2019. Copies of the Interim Order and Notice were mailed to Complainant via regular first-class mail to the address Complainant provided on the Complaint, and they were not returned as undeliverable. Since the Interim Order and Notice were mailed in the ordinary course of business, I must presume

Complainant received them. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 449 A.2d 658 (Pa.Super. 1982).

The May 3, 2019 Interim Order and May 7, 2019 Notice advised Complainant of the importance of appearing for the June 18, 2019 prehearing conference, instructed him on how to call in to the conference bridge, and warned him that his case may be dismissed if he did not participate. Complainant did not call into the conference bridge.

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 three 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 February 27, 2019. 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 27, 2019. Finally, Complainant failed to appear at the prehearing conference on June 18, 2019, in violation of the May 3, 2019 Interim Order.

Respondent has due process rights that must be protected. Respondent attempted to gather information about Complainant's claims through discovery and appeared for the prehearing conference that Complainant chose not to attend. Complainant's actions have denied Respondent the opportunity to prepare a defense to Complainant's claims. Complainant has failed to engage in these proceedings in any way since he filed his Complaint. 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 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).
7. The due process rights of Complainant have been fully protected in this proceeding. *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of West Penn Power Company to Dismiss the Complaint of James Savage filed on November 15, 2018 at Docket No. C-2018-3006179, is granted.

2. That the Complaint filed by James Savage against West Penn Power Company at Docket No. C-2018-3006179 is hereby dismissed with prejudice due to Complainant's failure to provide his witness information to Respondent, in violation of an Interim Order dated February 27, 2019; serve full and complete responses to the discovery requests upon Respondent and file a certificate of service, in violation of an Interim Order issued March 27, 2019; and appear at a prehearing conference on June 18, 2019, in violation of an Interim Order dated May 3, 2019.

3. That the Secretary's Bureau shall mark Docket No. C-2018-3006179 as closed.

Date: August 5, 2019

/s/
Jeffrey A. Watson
Administrative Law Judge