

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Mary Toleno	:	
	:	
v.	:	C-2019-3007821
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by Mary Toleno for her failure to comply with an Order Granting Motion to Compel issued August 26, 2019, compelling Complainant to serve full and complete responses to Set I Interrogatories Questions 1-7 and Requests for Production of Documents upon the Respondent no later than September 12, 2019. The Complaint is also being dismissed for Complainant's failure to comply with a Prehearing Order issued on August 5, 2019, as she did not provide a list of witnesses, any proposed expert witness' written testimony or exhibits by August 16, 2019.

HISTORY OF THE PROCEEDING

On February 11, 2019, Mary Toleno (Complainant) filed a Formal Complaint against PPL Electric Utilities Corporation (PPL or Respondent) with the Pennsylvania Public Utility Commission (Commission) seeking to prevent installation of a smart meter at 218 Bird Lane, Kunkletown, Monroe County, Pennsylvania. Complainant alleges that PPL is threatening to shut off her service even though under Act 129 (2008), she has a right to refuse the installation

of a smart meter. Complainant further avers PPL violated a trespass notice when without prior approval, PPL's employees trespassed on her property.

On March 1, 2019, PPL filed a timely Answer admitting it had attempted to install a new AMI meter at Complainant's property and had sent Complainant a termination notice on January 10, 2019 for failure to provide access to the premises to install the meter. However, PPL denied the termination notice was unlawful. PPL responded that it is legally required to install AMI meters.

On March 8, 2019, a Hearing Notice was issued scheduling a telephonic evidentiary hearing for September 24, 2019. On August 5, 2019, a Prehearing Order was issued establishing procedural rules as well as a deadline for Complainant to serve PPL her expert witness' written testimony and exhibits by August 16, 2019.

PPL served its Set I Interrogatories and Requests for Production of Documents (Set I) upon the Complainant on June 26, 2019. Objections were due on or before July 9, 2019. Responses were due on or before July 19, 2019. Complainant never served responses or objections to PPL. Complainant has not served any statements, reports or direct testimony of any expert witnesses on PPL to date. On August 13, 2019, PPL filed a Motion to Compel. Complainant did not respond to the Motion. On August 23, 2019, I issued an Order Granting Motion to Compel finding that the information requested in PPL Interrogatories 1-7 may be admissible or lead to discovery of admissible evidence at the hearing and is discoverable under the broad terms of 52 Pa. Code § 5.321.

On September 13, 2019, Respondent filed a Motion to Dismiss the Formal Complaint of Mary Toleno with a notice to plead instructing Complainant to reply within five days from the date of service of the motion pursuant to 52 Pa. Code § 5.371(b)(relating to sanctions – general). As of the date of this Initial Decision, Complainant has not filed a certificate of service regarding her service of discovery responses upon Respondent, nor has the Complaint provided a list of witnesses, any proposed expert witness' written testimony or exhibits. Complainant has not filed a response to the Motion to Dismiss. The record closed on

September 19, 2019, the day a response to the Motion to Dismiss was due. The Motion to Dismiss is ripe for a decision.

FINDINGS OF FACT

1. Complainant is Mary Toleno.
2. Respondent is PPL Electric Corporation, a jurisdictional electric distribution company.
3. The service location is 218 Bird Lane, Kunkletown, Monroe County, Pennsylvania.
4. On February 11, 2019, Complainant filed a Complaint against Respondent, challenging the planned installation of PPL's new automated metering infrastructure (AMI) meter at the service location.
5. On March 1, 2019, PPL timely filed its Answer and New Matter to the Complaint responding that Respondent was required to install an AMI meter.
6. On March 8, 2019, a Notice was issued scheduling a telephonic evidentiary hearing for September 24, 2019.
7. A Prehearing Order was issued on August 5, 2019, directing Complainant to serve copies of statements, reports and direct testimony of any expert witnesses on or before August 16, 2019.
8. Complainant did not provide a list of witnesses, any proposed expert witness' written testimony or exhibits by August 16, 2019.

9. PPL served its Set I Interrogatories and Requests for Production of Documents (Set I) upon the Complainant on June 26, 2019.

10. Objections to Interrogatories were due July 9, 2019 and responses were due on or before July 19, 2019.

11. Complainant never served responses or objections to the discovery requests of PPL.

12. On August 13, 2019, PPL filed a Motion to Compel.

13. Complainant did not respond to the Motion to Compel.

14. On August 23, 2019, an Order Granting Motion to Compel was issued compelling full discovery responses on or before September 12, 2019.

15. On September 13, 2019, Respondent filed a Motion to Dismiss Complainant's Complaint due to Complainant's failure to comply with the Order issued on August 23, 2019.

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

DISCUSSION

To date, Complainant has not complied with Ordering Paragraph No. 9 of the Prehearing Order dated August 2, 2019, which stated: "On or before August 16, 2019, Complainant is directed to serve copies of statements, reports, and any direct written testimony of any expert witnesses he intends to call at the hearing upon Respondent pursuant to 52 Pa. Code § 5.412(a)."

In its Motion to Dismiss, Respondent argues that the Complaint should be dismissed in its entirety as a sanction pursuant to 52 Pa. Code § 5.371(a)(3) due to Complainant's failure to comply with the Order Granting Motion to Compel, requiring Complainant to serve full and complete responses to the discovery requests upon Respondent's counsel no later than September 12, 2019.

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. The Respondent served its Set I Interrogatories and Requests for Production of Documents (Set I) upon the Complainant on June 26, 2019. Although there is no certificate of service on June 26, 2019, Appendix A to the Motion to Compel contains the Interrogatories, cover letter and certificate of service indicating service was on June 26, 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. In this case, Complainant failed to file a certificate of service showing his service of objections or responses to the discovery requests, in violation of 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 its Motion to Compel, PPL sought an order compelling full responses to Set I, Questions 1-7. Specifically, PPL requested information about Complainant's above-mentioned allegations. PPL sought the identification of all wireless phones, cellphones, microwave ovens, wireless routers, wi-fi networks, tablets, computers, Bluetooth speakers, wireless security systems, smart speakers, garage door openers, baby monitors, and walkie talkies in the service property. PPL requested the amount of cell phone usage and 12 months of phone bills showing usage. PPL requested medical records, medical diagnoses and/or prescribed treatment of therapy associated with the medical conditions Complainant alleges result from exposure to meters. PPL requested the identification of every witness Complainant intended to call at the hearing, the curriculum vitae of the witness, subject matter and sources of information relied upon or referenced in the witness' testimony. Finally, PPL requested copies of all exhibits Complainant intended to present at the evidentiary hearing.

52 Pa. Code § 5.342(a)(4) provides that a party must answer fully and completely unless an objection is made. This includes the production of documents and information sought through Set I. *See* Section 5.341(c). Objections must be served within ten days of service of the interrogatories. Section 5.342(e).

The Commission has held that parties must comply with the orders of an ALJ, 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); 52 Pa. Code § 5.371. Complainant was notified that failure to comply with an Order issued by an ALJ constitutes grounds for dismissal of a case.

The Commission has been dismissing complaints in cases involving smart meters as a sanction for failure of a Complainant to comply with similar prehearing orders compelling service of witness lists and discovery responses to an electric distribution company (EDC) regarding the identification of medical records, witnesses, electronic devices in the service location emitting radio frequency fields, etc. See *B. Susanne Spohn v. Metropolitan Edison Company*, C-2018-3001725 (Final Order entered August 8, 2019); *Kimberly Beckmann v. Metropolitan Edison Company*, C-2017-2613702 (Final Order entered April 11, 2019); *Carol Sojda and Carol Lutzkanin v. Metropolitan Edison Company*, C-2017-2638350 (Final Order entered March 28, 2019); *Darlene Stanton v. Pennsylvania Electric Co.*, C-2018-3001144 (Final Order entered July 11, 2019); *Diana Cook v. West Penn Power Company*, C-2018-3003051 (Final Order entered July 11, 2019); *Ann H. Swartz v. Metropolitan Edison Company*, C-2017-2626756 (Final Order entered August 13, 2019); *Rebecca Pacifico v. Metropolitan Edison Company*, C-2018-2645607 (Final Order entered August 23, 2019); *Lewis B. Smith v. Metropolitan Edison Company*, C-2018-3000235 (Final Order entered August 23, 2019); *Dominic J. Ramaglia v. West Penn Power Company*, C-2018-3002778 (Final Order entered August 23, 2019); *Susan and Paul Hanley v. Metropolitan Edison Company*, C-2017-2631986 (Final Order entered August 28, 2019); and *Killinger v. Metropolitan Edison Company*, C-2017-2634224 (Final Order entered August 28, 2019).

The Complainants in these aforementioned cases also requested to opt out of an AMI meter installation for various reasons including: health, safety, and data privacy reasons. These Complainants did not comply with orders compelling the production of witness lists and other discovery responses either. Motions to dismiss the complaints as sanctions were granted by the ALJ through Initial Decisions because these Complainants failed to comply with an ALJ's order compelling discovery responses. Those decisions were allowed to become final by operation of law by the Commission. 66 Pa. C.S. § 332(h).

The instant case is similar to caselaw precedent in that the Complainant was warned that failure to comply with an order compelling discovery responses could result in the filing of a motion for sanctions and possible dismissal of his case. Additionally, the Complainant in the instant case violated two interim orders by not only failing to provide

discovery responses, but also because she failed to serve any witness list, statements of expert witnesses or exhibits by the August 16, 2019 deadline in the Prehearing Order. In consideration of the prior cases noted above, under the principle of *stare decisis*, I am following this policy for consistency as the facts are more similar than distinguishable. *George Crawford v. National Fuel Gas Distribution Corporation*, C-20066348 (Opinion and Order entered December 6, 2017) at 3-4.

In the instant case, if Complainant was unable or unwilling to provide responses to the discovery requests, Complainant could have filed objections or asked for additional time to respond. Complainant did neither and, in fact, filed no response at all. Additionally, Complainant did not serve any written expert testimony, statements or pre-marked exhibits intended for the hearing by the deadline provided in a Prehearing Order. Whereas Respondent complied with the Prehearing Order in meeting its deadline.

Both parties have due process rights that must be protected. Complainant did not file a certificate of service showing service of his responses to the discovery requests upon Respondent. Complainant's actions have denied Respondent the opportunity to prepare a defense to Complainant's claims and have demonstrated a lack of intent to prosecute his claims. To proceed with this matter 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 due to Complainant's failure to comply with the Order Granting Motion to Compel, compelling Complainant to serve full and complete responses to the discovery requests upon Respondent no later than September 12, 2019 and for failure to comply with a Prehearing Order issued on August 5, 2019 as she did not provide a list of witnesses, any proposed expert witness' written testimony or exhibits by August 16, 2019.

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 found 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 has dismissed complaints regarding smart meters for failure of a Complainant to comply with prehearing orders and provide discovery responses to an EDC regarding medical records, witness lists, types of equipment in the service location emitting radio frequency fields, etc. See *Kimberly Beckmann v. Metropolitan Edison Company*, C-2017-2613702 (Final Order entered April 11, 2019); *Carol Sojda and Carol Lutzkanin v. Metropolitan Edison Company*, C-2017-2638350 (Final Order entered March 28, 2019); *Darlene Stanton v. Pennsylvania Electric Co.*, C-2018-3001144 (Final Order entered July 11, 2019); *Diana Cook v.*

West Penn Power Company, C-2018-3003051 (Final Order entered July 11, 2019); *Ann H. Swartz v. Metropolitan Edison Company*, C-2017-2626756 (Final Order entered August 13, 2019); *Rebecca Pacifico v. Metropolitan Edison Company*, C-2018-2645607 (Final Order entered August 23, 2019); *Lewis B. Smith v. Metropolitan Edison Company*, C-2018-3000235 (Final Order entered August 23, 2019); and *Dominic J. Ramaglia v. West Penn Power Company*, C-2018-3002778 (Final Order entered August 23, 2019).

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).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion of PPL Electric Utilities Corporation to Dismiss the Amended Complaint of Mary Toleno, filed at Docket No. C-2019-3007821, is granted.
2. That the Complaint filed by Mary Toleno against PPL Electric Utilities Corporation at Docket No. C-2019-3007821 is hereby dismissed with prejudice.
3. That the hearing scheduled for September 24, 2019 shall be cancelled.
4. That the Secretary's Bureau shall mark Docket No. C-2019-3007821 as closed.

Date: September 20, 2019

/s/
Elizabeth H. Barnes
Administrative Law Judge