

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Kyle A. Toffey	:	
	:	
v.	:	C-2019-3006931
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by Kyle A. Toffey for his failure to comply with an Order Granting Motion to Compel issued on August 7, 2019, compelling Complainant to serve full and complete responses to Set I Interrogatories Questions 2, 3, and 4(b)-(e) and Requests for Production of Documents upon the Respondent no later than September 9, 2019. The Complaint is also being dismissed for Complainant’s failure to comply with a Prehearing Order issued on February 1, 2019, as he did not provide any statements, reports or direct testimony of any expert witnesses intended to be called by Complainant by May 30, 2019.

HISTORY OF THE PROCEEDING

On January 7, 2019, Kyle A. Toffey (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 an automated metering infrastructure (AMI or smart) meter at his service address.

On January 28, 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 for failure to provide access to the premises to install the meter. However, PPL denied the termination notice was unlawful and denied the AMI meter is a health hazard. PPL responded that it is legally required to install AMI meters.

On February 1, 2019, a Prehearing Order was issued establishing procedural rules as well as a deadline for Complainant to serve PPL his statements, reports or direct testimony of any expert witnesses intended to be called by Complainant by May 30, 2019. Also on February 1, 2019, a Notice was issued scheduling a telephonic evidentiary hearing for August 6, 2019.

PPL served its Set I Interrogatories and Requests for Production of Documents (Set I) upon the Complainant on May 8, 2019. Objections were due on or before May 20, 2019. Responses were due on or before May 28, 2019. Complainant never served objections to PPL. On May 23, 2019, Complainant served written responses to Complainant Set 1; however, Complainant has not responded or provided information and materials requested to Complainant Set I, Questions 2, 3 and 4 (b)-(e). On July 1, 2019, PPL served its written direct testimony and exhibits pursuant to the Prehearing Order. On July 12, 2019, PPL filed a Motion to Compel and a Motion for Protective Order. On July 26, 2019, PPL filed a letter requesting that the August 6, 2019 hearing be rescheduled for January 14, 2020. On July 29, 2019, a Notice was issued rescheduling the hearing for January 14, 2020.

On August 7, 2019, an Order Granting Motion to Compel was issued compelling Complainant to provide responses to Set I Interrogatories Questions 2-3 and 4(b)-(e). Also on August 7, 2019, a Protective Order was entered. Complainant has not served any statements, reports or direct testimony of any expert witnesses on PPL to date. Complainant did not respond to the Motion. On September 13, 2019, PPL filed a Motion to Dismiss. Complainant has not responded to the Motion to Dismiss. The record closed on September 18, 2019, the date a response was due. The Motion to Dismiss is ripe for a decision and will be granted for the following reasons.

FINDINGS OF FACT

1. Complainant is Kyle A. Toffey.
2. Respondent is PPL Electric Corporation, a jurisdictional electric distribution company.
3. The service property is located at 118 Savitz Road, Hamlin, Pennsylvania.
4. On January 7, 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 January 7, 2019, the Complaint was served upon Respondent.
6. On January 28, 2019, PPL timely filed its Answer and New Matter to the Complaint responding that Respondent was required to install an AMI meter.
7. A Prehearing Order was issued on February 1, 2019, directing Complainant to serve copies of statements, reports and direct testimony of any expert witnesses on or before May 30, 2019.
8. PPL served its Set I Interrogatories and Requests for Production of Documents (Set I) upon the Complainant on May 8, 2019.
9. Objections to Interrogatories were due May 20, 2019 and responses were due on or before May 28, 2019.
10. Complainant never served objections to the discovery requests of PPL.
11. Complainant served partial responses on May 23, 2019.

12. PPL filed a Motion to Compel on July 12, 2019.
13. Complainant did not respond to the Motion to Compel.
14. On August 7, 2019, an Order Granting Motion to Compel and a Protective Order were issued.
15. The Order Granting Motion to Compel compelled Complainant to respond to discovery Questions 2, 3 and 4(b)-(e) by September 9, 2019.
16. No complete responses to PPL Complainant Set I, Questions 2, 3 and 4(b)-(e) have been received by PPL.
17. 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 7, 2019.
18. Complainant did not file a response to the Motion to Dismiss.
19. Complainant did not file a certificate of service showing any service of discovery responses upon Respondent or any statements, reports or direct testimony of any expert witnesses.
20. Complainant has not provided any statements, reports or direct testimony of any expert witnesses intended to be called by Complainant by May 30, 2019.

DISCUSSION

To date, Complainant has not complied with Ordering Paragraph No. 9 of the Prehearing Order dated February 1, 2019, which stated: "On or before **May 30, 2019**, Complainant is directed to serve copies of statements, reports, and any direct written testimony

of any expert witnesses she 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 issued on August 7, 2019, requiring Complainant to serve full and complete responses to the discovery requests upon Respondent’s counsel no later than September 9, 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, and it filed a certificate of service showing its service of discovery requests upon Complainant on May 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. In this case, Complainant failed to file a certificate of service showing his service of 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 2-4(b)-(e). 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.

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* 52 Pa. Code § 5.341(c). Objections must be served within ten days of service of the interrogatories. 52 Pa. Code § 5.342(e).

The Order Granting Motion to Compel directed Complainant to serve full and complete responses to the discovery requests upon Respondent's counsel no later than September 9, 2019. As of the date of this Initial Decision, Complainant has not filed a certificate of service showing his service of discovery responses upon Respondent in violation of the August 7, 2019 Order.

On August 7, 2019, I issued an Order Granting Motion to Compel finding that information requested in PPL Interrogatories Questions 2-4(b)-(e) 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.

In the event no response was filed on or before September 9, 2019, Respondent PPL Electric Utilities Corporation was entitled to file a motion for sanctions pursuant to 52 Pa. Code § 5.371. Complainant was notified that failure to comply with an Order issued by an Administrative Law Judge (ALJ) constitutes grounds for dismissal of a case.

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 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 (Initial Decision issued June 28, 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 8/23/19); *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 health, safety, and data privacy reasons. These Complainants did not comply with orders compelling 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 became final by operation of law pursuant to 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 he failed to serve statements of expert witnesses or exhibits by the 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, served non-responsive responses to Set I, Questions 2 and 3 because he did not identify the appliances and devices requested in the interrogatories and objected to the relevancy of the questions after the deadline of May 20, 2019 to serve objections had passed. Complainant's responses to Question 4(b)-(e) were non-responsive and incomplete and his objection on the grounds of relevancy was untimely. 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. In contrast, 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 issued on August 7, 2019, compelling Complainant to serve full and complete responses to the discovery requests upon Respondent no later than September 9, 2019 and for failure to comply with a Prehearing Order issued on February 1, 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, 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 (Initial Decision issued June 28, 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 8/23/19); 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).

