

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Patrick and Sharon Malcolm	:	
	:	
v.	:	C-2018-3005902
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
Elizabeth H. Barnes
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by customers against an electric distribution company (EDC) for their failure to comply with an Order Granting Motion to Compel issued September 30, 2019, compelling the customers to serve full and complete responses to Set I Interrogatories Questions 1-7 and Requests for Production of Documents upon the EDC no later than October 20, 2019. The Complaint is also being dismissed for failure to comply with a Second Prehearing Order issued on August 2, 2019, as the customers did not provide a list of witnesses, any proposed expert witness' written testimony or exhibits by September 15, 2019.

HISTORY OF THE PROCEEDING

On October 15, 2018, Patrick and Sharon Malcolm (Complainants) 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 1629 Blanding Drive, Blakeslee, Monroe County, Pennsylvania. Complainants allege that they want

to keep their analog meter because of the electromagnetic frequency (EMF) waves emitted by a smart meter. Complainants request to opt-out of a smart meter installation at their residence for health and safety reasons.

On November 9, 2018, PPL was served with the Complaint. On November 29, 2018, PPL filed a timely Answer admitting it had attempted to install a new automated metering infrastructure (AMI) meter at Complainants' property. However, PPL denied installation is unlawful and denied the AMI meter is a health or safety hazard. PPL responded that it is legally required to install AMI meters.

On December 7, 2018, a Notice was issued scheduling a telephonic evidentiary hearing for July 2, 2019. On December 12, 2018, a Prehearing Order was issued establishing procedural rules as well as a deadline for Complainants to serve PPL their expert witness' written testimony and exhibits by April 25, 2019. Complainants did not serve any list of witnesses, written testimony or exhibits by April 25, 2019. On June 25, 2019, PPL filed a request for a continuance of the hearing, which was granted. The hearing was rescheduled to November 21, 2019 and a Second Prehearing Order was issued on August 2, 2019, directing Complainants to serve copies of statements, reports and any direct written testimony of any expert witnesses they intended to call at the hearing upon Respondent by September 15, 2019.

PPL served its Set I Interrogatories and Requests for Production of Documents (Set I) upon Complainants on April 3, 2019. Responses were due on or before April 23, 2019. Complainants never served objections or responses to PPL. On September 12, 2019, PPL filed a Motion to Compel. An Order Granting Motion to Compel was issued on September 30, 2019, compelling Complainants to answer Set I Interrogatories Questions 1-7 by October 20, 2019.

In the event no response was filed on or before October 20, 2019, Respondent was entitled to file a motion for sanctions pursuant to 52 Pa. Code § 5.371. On October 21, 2019, Respondent filed a Motion to Dismiss the Formal Complaint of Patrick and Sharon Malcolm with a notice to plead instructing Complainants 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, Complainants have not filed a certificate of service regarding their service of responses to Set I Interrogatories Questions 1-7 and Requests for Production of Documents upon Respondent, nor have they provided a list of witnesses, any proposed expert witness' written testimony, or exhibits. Complainants have not filed a response to the Motion to Dismiss. The record closed on October 28, 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. Complainants are Patrick and Sharon Malcolm.
2. Respondent is PPL Electric Utilities Corporation, a jurisdictional electric distribution company.
3. The service location is 1629 Blanding Drive, Blakeslee, Monroe County, Pennsylvania.
4. On October 15, 2018, Complainants filed a Complaint against Respondent, challenging the planned installation of PPL's new automated metering infrastructure (AMI) meter at the service location.
5. On November 9, 2018, the Complaint was served upon Respondent.
6. On November 29, 2018, 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 December 12, 2018, directing Complainants to serve copies of statements, reports and direct testimony of any expert witnesses on or before April 25, 2019.

8. PPL served its Set I Interrogatories and Requests for Production of Documents (Set I) upon the Complainants on April 3, 2019.

9. Responses to Interrogatories were due on or before April 23, 2019.

10. Complainants never served responses or objections to the discovery requests of PPL.

11. On September 12, 2019, PPL filed a Motion to Compel.

12. Complainants did not respond to the Motion to Compel.

13. On June 25, 2019, PPL filed a letter requesting that the July 2, 2019 hearing be continued until November 21, 2019 because one of its witnesses could no longer attend the hearing on that date.

14. The request for continuance was granted and the hearing was rescheduled to November 21, 2019 by the issuance of a Telephone Hearing Notice dated June 26, 2019.

15. A Second Prehearing Order was issued on August 2, 2019, directing Complainants to serve their witness list, exhibits and direct testimony of expert witnesses by September 15, 2019 upon PPL.

16. On September 30, 2019, an Order Granting Motion to Compel was issued compelling full discovery responses on or before October 20, 2019.

17. On October 21, 2019, Respondent filed a Motion to Dismiss Complainant's Complaint due to Complainants' failure to comply with the Order issued on September 30, 2019.

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

19. Complainants 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. Complainants have not provided a list of witnesses, any proposed expert witness' written testimony or exhibits to date.

DISCUSSION

To date, Complainants have not complied with Ordering Paragraph No. 9 of the Second Prehearing Order, which stated: "On or before September 15, 2019, Complainant is [sic] directed to serve copies of statements, reports, and any direct written testimony of any expert witnesses she [sic] 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 Complainants' failure to comply with the Order Granting Motion to Compel requiring Complainants to serve full and complete responses to the discovery requests upon Respondent's counsel no later than October 20, 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 Complainants, and it filed

a certificate of service showing its service of discovery requests upon Complainants on April 3, 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, Complainants failed to file a certificate of service showing their 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 1-7. Specifically, PPL requested information about Complainants' 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 Complainants alleges result from exposure to meters. PPL requested the identification of every witness Complainants 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 Complainants 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).

Respondent filed a Motion to Compel on September 12, 2019, which was granted by Order dated September 30, 2019. The Order directed Complainants to serve full and complete responses to the discovery requests upon Respondent's counsel no later than October 20, 2019. As of the date of this Initial Decision, Complainants have not filed a certificate of service showing service of discovery responses upon Respondent in violation of the September 30, 2019 Order.

I issued an Order Granting Motion to Compel finding that 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. In the event no response was filed on or before October 20, 2019, Respondent PPL Electric Utilities Corporation was entitled to file a motion for sanctions pursuant to 52 Pa. Code § 5.371. Complainants were 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. Complainants were 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 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, or 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 Complainants were 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 their case. Additionally, the Complainants in the instant case violated two interim orders by not only failing to provide discovery responses, but also because they failed to serve any witness list, statements of expert witnesses or exhibits by the September 15, 2019 deadline in the Second 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 Complainants were unable or unwilling to provide responses to the discovery requests, Complainants could have filed objections or asked for additional time to respond. Complainants did neither and, in fact, filed no response at all. Additionally, Complainants did not serve any written expert testimony, statements or pre-marked exhibits intended for the November 21, 2019 hearing by the deadline provided in a Second Prehearing Order.

Both parties have due process rights that must be protected. Complainants did not file a certificate of service showing service of responses to the discovery requests upon Respondent. Complainants' actions have denied Respondent the opportunity to prepare a defense to Complainants' claims and have demonstrated a lack of intent to prosecute the 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 Complainants' failure to comply with the Order Granting Motion to Compel compelling Complainants to serve full and complete responses to the discovery requests upon Respondent no later than October 20, 2019 and for failure to comply with a Second Prehearing Order as they did not provide a list of witnesses, any proposed expert witness' written testimony or exhibits by September 15, 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 (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).

