

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

James Wolfgang	:	
	:	
v.	:	C-2017-2613989
	:	
Pennsylvania Electric Company	:	

INITIAL DECISION ON REMAND

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

This Initial Decision on Remand dismisses the Formal Complaint filed by James Wolfgang for his failure to serve his witness information upon Respondent by June 10, 2019, in violation of a Prehearing Order dated May 2, 2019; and his failure to serve full and complete discovery responses upon Respondent and file a certificate of service by August 16, 2019, in violation of an Interim Order issued July 23, 2019.

HISTORY OF THE PROCEEDING

James Wolfgang (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Pennsylvania Electric Company (Respondent) on July 6, 2017, alleging, *inter alia*, that Respondent threatened to terminate his electric service at his residence at 1028 Dunn Avenue, Lake City, PA 16423; that he would like to explore an alternative to the installation of a smart meter; that he objected to the installation of a smart meter at his residence because of health and safety concerns and it will contribute to ongoing health concerns for Complainant and his family; and that a smart meter is not

environmentally friendly. For relief, the Complainant requested that Respondent provide either an opt-out option for the smart meter or a safe alternative including an environmentally friendly option for a meter that does not emit “dirty electric [sic].”

On August 2, 2017, Respondent filed an Answer and New Matter to the Complaint, admitting that it provides residential electric service to Complainant at the service location and that Complainant has refused access for the installation of a smart meter. PECO also asserted that Complainant’s refusal to allow the installation of a smart meter constitutes legal grounds to terminate service in accordance with Act 129 of 2008 (Act 129)¹ and Section 56.81(3) of the Public Utility Code (Code). Respondent denied the remaining material allegations set forth in the Complaint. *Id.*

By Initial Decision issued on December 19, 2018, the Complaint was dismissed with prejudice, for failure of the Complainant to comply with interim orders entered March 23, 2018, June 29, 2018, and November 9, 2018, requiring the Complainant to provide discovery responses and to identify witnesses.

On April 10, 2019, the Commission entered a Final Order vacating the Initial Decision and remanding this case so that Complainant could be advised of his options for transmitting information, and the types of protection that are available to him for transmitting information which is confidential in nature.² The Final Order cautioned the Complainant that he is “expected to respond to the motions and orders in this matter, and that failure to do so again will result in the dismissal of his Complaint.” *James Wolfgang v. Pennsylvania Electric Company*, Docket No. C-2017-2613989, p. 10 (Opinion and Order entered April 10, 2019).

On May 2, 2019, the undersigned Administrative Law Judge issued a Second Prehearing Order, establishing an initial litigation schedule. I ordered the parties to, *inter alia*,

¹ 66 Pa.C.S. § 2806.1 *et seq.*

² Complainant submitted correspondence in response to the Initial Decision wherein he stated that he submitted a request in June of 2018 seeking information on how to submit confidential information including medical records.

provide the names, addresses, and written summaries of the expected testimony for each witness (witness information) to the other party by June 10, 2019 for expert witnesses and July 10, 2019, for factual witnesses and to conclude discovery by July 31, 2019.

On May 15, 2019, Respondent for the second time filed a certificate of service regarding its service of Interrogatories and Requests for Production of Documents (Discovery Requests) upon Complainant. Objections to the Discovery Requests were due by May 25, 2019, and responses to the Discovery Requests were due by June 4, 2019. Mailed along with the Discovery Requests was a proposed Stipulated Protective Agreement (SPA) signed by Respondent's counsel in an attempt to address Complainant's concerns regarding confidential information.

Complainant did not submit any objections to the Respondent's Discovery Requests by the May 25, 2019 deadline and failed to submit responses by the June 4, 2019 deadline.

On June 13, 2019, Complainant sent an untimely and incomplete response to the Respondent's Discovery Requests. For example, Complainant made a statement regarding questions 2d-h that responses would be submitted "when, and only when our medical records can be sent without compromise." In response to nearly all of Respondent's Discovery Requests, Complainant simply wrote "yes" which was non-responsive to the question and provided no detail nor documentation as requested. Additionally, Respondent received the SPA from Complainant, Complainant did not sign his name on the signature line, he instead wrote "N/A."

On July 10, 2019, Respondent filed concurrently a certificate of service regarding its service of its witness information upon Complainant and a Motion to Compel Responses to Interrogatories and Document Requests (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 five days of service. Complainant did not file a response to the Motion to Compel.

On July 23, 2019, I issued an Interim Order, granting Respondent's July 10, 2019 Motion to Compel and ordering Complainant to serve full and complete responses to the Discovery Requests upon Respondent's counsel and to file a certificate of service with the Commission's Secretary no later than August 16, 2019.

On August 27, 2019, Respondent filed a Motion to Dismiss Complaint of James Wolfgang for Failure to Comply with Orders (Motion to Dismiss), averring, *inter alia*, Complainant failed to provide his witness information to Respondent in violation of the May 2, 2019 Prehearing Order, and he failed to provide responses to Respondent's discovery requests in violation of the July 23, 2019 Interim Order. Respondent argued the Complaint should be dismissed in its entirety, due to Complainant's failure to respond to the Discovery Requests and provide witness information, which demonstrates Complainant's consistent lack of cooperation and unwillingness 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 (September 2, 2019). Complainant did not file a response to the Motion to Dismiss.

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

The record closed on September 2, 2019, the deadline for filing a response to Respondent's Motion to Dismiss.

FINDINGS OF FACT

1. The Complainant in this case is James Wolfgang.
2. The Respondent in this case is Pennsylvania Electric Company.

3. On May 2, 2019, a Second Prehearing Order was issued, establishing an initial litigation schedule ordering the parties to, *inter alia*, exchange witness information by June 10, 2019, for expert witnesses and July 10, 2019 for factual witnesses and to conclude discovery by July 31, 2019.

4. On May 15, 2019, Respondent filed concurrently a certificate of service regarding its service of discovery requests upon Complainant and a Stipulated Protective Agreement.

5. Complainant did not submit any objections to Respondent's Discovery Request by the May 25, 2019 deadline and failed to submit responses by the June 4, 2019.

6. On June 13, 2019, Complainant sent concurrently an untimely and incomplete response to Respondent's Discovery Request and the Stipulated Protective Agreement with "N/A" on the signature line.

7. On July 10, 2019, Respondent filed concurrently a certificate of service regarding its service of its witness information upon Complainant and a Motion to Compel Responses to Interrogatories and Document Requests.

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

9. Complainant did not file a certificate of service regarding his service of his witness information upon Respondent.

10. On July 23, 2019, an Interim Order was issued, granting Respondent's Motion to Compel and ordering Complainant to serve full and complete responses to all of the Discovery Requests upon Respondent's counsel and file a certificate of service no later than August 16, 2019.

11. Complainant did not file a certificate of service regarding his service of discovery responses upon Respondent.

12. On August 27, 2019, Respondent filed a Motion to Dismiss Complainant's Complaint, averring, *inter alia*, Complainant failed to serve his witness information upon Respondent by June 10, 2019, for expert witnesses and July 10, 2019, for factual witnesses, in violation of the Prehearing Order dated May 2, 2019, and he failed to serve full and complete responses to the discovery requests upon Respondent and to file a certificate of service by August 16, 2019, in violation of the Interim Order dated July 23, 2019.

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

14. Complainant neither settled nor withdrew his Complaint.

DISCUSSION

Initially, regarding the Commission's remand of this matter, all concerns involving the transmission of confidential information have been resolved through both the May 2, 2019 Prehearing Order and the Stipulated Protective Agreement (SPA) served by Respondent to Complainant along with Respondent's Discovery Requests. In the May 2, 2019 Prehearing Order, the parties were advised of the Commission's regulations providing protection of confidential information in order to ensure that adequate procedural safeguards were put in place to make certain that sensitive information would not improperly be disclosed to the public. In the SPA, Complainant was advised of his options for transmitting information, importantly, the types of protection that are available to him for transmitting information confidential in nature. As such, the Commission's concerns regarding guidance to Complainant's request for a secure method in which to transmit his family's medical records have been duly observed and resolved in this remanded proceeding.

In its Motion to Dismiss, Respondent argues that the Complaint should be dismissed in its entirety due to Complainant's failure exchange witness information, in violation

of the May 2, 2019 Prehearing Order, and to respond to the discovery requests, in violation of the July 23, 2019 Interim Order. Respondent argues Complainant's actions demonstrate a consistent lack of willingness to prosecute his 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 July 10, 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.

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, on May 2, 2019, I issued a Prehearing Order, directing the parties to, *inter alia*, exchange witness information by June 10, 2019, for expert witnesses and July 10, 2019, for factual witnesses. On July 10, 2019, Respondent filed a certificate of service regarding its service of its witness information upon Complainant.

Additionally, on July 10, 2019 Respondent filed a Motion to Compel, averring that Complainant had not provided full and complete 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 July 23, 2019. The July 23, 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 August 16, 2019.

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 Orders issued in this case. As of the date of this Initial Decision on Remand, Complainant has not exchanged witness information with Respondent and has not filed a certificate of service showing his service of his witness information, in violation of the Prehearing Order issued May 2, 2019. Additionally, Complainant has not provided full and complete discovery responses and has not filed a certificate of service showing his service of responses to the discovery requests, in violation of the Interim Order issued July 23, 2019.

Both parties have 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. By failing to respond to discovery and provide his witness information, Complainant has denied Respondent the opportunity to prepare a defense to his 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. Accordingly, the Complaint will be dismissed with prejudice. The dismissal of the Complaint with prejudice is consistent with recent Commission precedent.

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’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 Pennsylvania Electric Company to Dismiss the Complaint of James Wolfgang filed on July 6, 2017 at Docket No. C-2017-2613989, is granted.

2. That the Complaint filed by James Wolfgang against Pennsylvania Electric Company at Docket No. C-2017-2613989 is hereby dismissed with prejudice due to Complainant’s failure to file a certificate of service regarding his service of expert and factual witness information by June 10 and July 10, 2019, respectively, in violation of an Prehearing Order dated May 2, 2019, and his failure to serve full and complete responses to the discovery requests upon Respondent and to file a certificate of service by August 16, 2019, in violation of an Interim Order issued July 23, 2019.

3. That the Secretary’s Bureau shall mark Docket No. C-2017-2613989 as closed.

Date: December 2, 2019

/s/
Jeffrey A. Watson
Administrative Law Judge