

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Daniel V. Fritzsche	:	
	:	
v.	:	C-2018-3002408
	:	
West Penn Power Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by Complainant for his failure to provide witness information and his failure to serve his discovery responses, in violation of several interim orders.

HISTORY OF THE PROCEEDING

Daniel V. Fritzsche (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (Respondent) on June 4, 2018, alleging Respondent threatened to shut off his service if he did not allow it access to install a smart meter and objecting to the installation of a smart meter at his residence¹, due to health concerns. As relief, Complainant requested he be permitted to keep his analog meter, or in the alternative, Complainant requested “at least a one (1) year postponement

¹ In his complaint, Complainant listed P.O. Box 235, Pine Grove Mills, Pennsylvania 16868 as his mailing address. When asked on the complaint form “if your complaint involves utility service provided to a different address or in a different name than your mailing address, please list this information below”, Complainant did not enter any information.

to allow him time to either move out of state or install photovoltaic cells and get off the grid.”
Complaint ¶ 5.

On June 25, 2018, Respondent filed an Answer and New Matter to the Complaint. Respondent admits that it provides residential retail electric service to Complainant at 826 Harold Road, Pine Grove Mills, Pennsylvania 16868 (service location); however, Respondent had not been provided previously Complainant’s mailing address listed on the Complaint. Respondent avers that Complainant refused to allow the Company access to the Company’s meter in order to install a smart meter, which constitutes legal grounds to terminate service to the service location. Respondent further avers it is required by Act 129 of 2008 (Act 129) to install a smart meter. Respondent denied the remaining material averments set forth in the Complaint. Respondent further avers that its Smart Meter Deployment Plan (SMP), which was approved by the Commission, contemplates the deployment of approximately 584,000 smart meters beginning in January of 2016 through mid-2019 and includes all customers. Respondent avers that neither its tariff, Act 129 or its SMP permit the Company to forbear from the smart meter installation requirement or enable the Commission or Company to permit the opt-out of smart meter installation or delay installation in contradiction to the SMP.

In its new matter, Respondent argued the Complaint should be dismissed for legal insufficiency, because it is required by Act 129 and its SMP to install a smart meter at the service location; neither Act 129 nor the SMP permit Complainant to opt-out of smart meter installation and the Commission is unable to grant the relief requested by Complainant.

On June 25, 2018, Respondent also filed Preliminary Objections to the Complaint. Respondent averred that the request for an exemption from the smart meter installation is not legally recoverable and Complainant failed to allege that Respondent violated any Commission statute, regulation, order, or tariff provision with regard to the installation of the smart meter at the service location. Respondent further averred it is required by Act 129 and its SMP to install a smart meter at the service location, and the Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief. Respondent argued a hearing is not in the public interest and the Complaint does not meet the standards set forth in recent Commission decisions in order to survive Preliminary Objections.

Complainant did not file a response to Respondent's Answer and New Matter.

On August 1, 2018, the Commission issued a Motion Judge Assignment Notice, assigning this proceeding to the undersigned as Presiding Officer. On August 6, 2018, an interim order was entered denying Respondent's Preliminary Objections.

On August 20, 2018, 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 August 30, 2018, and responses were due by September 10, 2018.

Complainant did not file any objections or provide any responses to Respondent's discovery requests.

On October 17, 2018, an interim order was entered Establishing Initial Litigation Schedule which set forth the schedule for discovery, the identification of witnesses, and the filing of motions in this proceeding. The Parties were ordered to, *inter alia*, provide the names, addresses, and written summaries of the expected testimony for each witness (witness information) to the other party by January 15, 2019, to conclude discovery by April 5, 2019, and to file a status report by April 19, 2019.

On January 15, 2019, in accordance with the October 17, 2018 interim order Establishing Initial Litigation Schedule, Respondent provided notice and summaries of testimony for its factual and expert witnesses. Complainant did not exchange any witness information.

On April 19, 2019, in accordance with the October 17, 2018 interim order Establishing Initial Litigation Schedule, Respondent filed a status report. Complainant did not file a status report.

On May 3, 2019, an interim order was entered scheduling a Prehearing Conference for June 18, 2019.

On June 18, 2019, a Prehearing Conference was held, counsel for Respondent appeared; however, Complainant did not appear at the Prehearing Conference.

On July 17, 2019, Respondent filed a Motion to Dismiss the Complaint, as Complainant had not provided Respondent with his witness information, discovery responses and did not appear at the Prehearing Conference.

On October 31, 2019, an interim order was entered , providing Complainant with a final opportunity to provide full and complete discovery responses to Respondent and to exchange witness information, not later than November 14, 2019, and to file Certificates of Service and a response to the Motion to Dismiss by the extended deadline. Complainant was advised that Complainant's failure to provide full and complete responses to the discovery requests and exchange witness information as previously ordered, on or before November 14, 2019, would result in sanctions, up to and including dismissal of the Complaint.

As of the date of this Decision no certificate of service was filed by Complainant evidencing service of his witness information, discovery responses or his response to the Motion to Dismiss upon Respondent. Additionally, no response to the Motion to Dismiss was filed with the Commission.

On December 23, 2019, an interim order was entered closing the record.

FINDINGS OF FACT

1. Complainant is Daniel V. Fritzsche.
2. Respondent is West Penn Power Company, a jurisdictional public utility.
3. The service location is 826 Harold Road, Pine Grove Mills, Pennsylvania

16868.

4. On June 4, 2018, Complainant filed a Complaint against Respondent, alleging Respondent threatened to shut off his service if he does not allow it access to install a smart meter and objecting to the installation of a smart meter at his residence, due to health concerns. As relief, Complainant requested he be permitted to keep his analog meter, or in the alternative, Complainant requested “at least a one (1) year postponement to allow him time to either move out of state or install photovoltaic cells and get off the grid.” Complaint ¶ 5.

5. On June 25, 2018, Respondent concurrently filed an Answer and New Matter to the Complaint, averring that Respondent was required to install a smart meter at the service location, and Preliminary Objections, arguing that Complainant failed to state a claim upon which the Commission can grant relief and failed to allege a violation of any law which the Commission has jurisdiction to administer, or of any regulation or order of the Commission.

6. Complainant did not file a response to Respondent’s Answer and New Matter or its Preliminary Objections.

7. On August 6, 2018, an interim order was entered denying Respondent’s Preliminary Objections.

8. On August 20, 2018, Respondent filed a certificate of service regarding its service of discovery requests upon Complainant.

9. Complainant did not file any objections or provide any responses to Respondent’s discovery requests.

10. On October 17, 2018, an interim order was entered Establishing Initial Litigation Schedule which set forth the schedule for discovery, the identification of witnesses, and filing of motions in this proceeding. The Parties were ordered to, *inter alia*, provide the names, addresses, and written summaries of the expected testimony for each witness (witness information) to the other party by January 15, 2019, to conclude discovery by April 5, 2019, and to file a status report by April 19, 2019.

11. On January 15, 2019, Respondent provided notice and summaries of testimony for its factual and expert witnesses. Complainant did not exchange any witness information.

12. On April 19, 2019, in accordance with the October 17, 2018 interim order Establishing Initial Litigation Schedule, Respondent filed a status report. Complainant did not file a status report.

13. On May 3, 2019, an interim order was entered scheduling a Prehearing Conference for June 18, 2019.

14. On June 18, 2019, a Prehearing Conference was held, counsel for Respondent appeared; however, Complainant did not appear at the Prehearing Conference.

15. On July 17, 2019, Respondent filed a Motion to Dismiss the Complaint, as Complainant had not provided Respondent with his witness information, discovery responses and did not appear at the Prehearing Conference.

16. On October 31, 2019, an interim order was entered, providing Complainant with a final opportunity to provide full and complete discovery responses to Respondent and to exchange witness information, not later than November 14, 2019, and to file Certificates of Service and a response to the Motion to Dismiss by the extended deadline. Complainant was advised that Complainant's failure to provide full and complete responses to the discovery requests and exchange witness information as previously ordered, on or before November 14, 2019, would result in sanctions, up to and including dismissal of the Complaint.

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

18. Complainant has not filed a certificate of service regarding his service of discovery responses or witness information upon Respondent.

DISCUSSION

In its Motion to Dismiss, Respondent argues that the Complaint should be dismissed in its entirety due to Complainant's failure to provide his witness information or respond to its discovery requests, in violation of the October 17, 2018 interim order and the October 31, 2019 interim order. Respondent argues Complainant's actions demonstrate his 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 August 20, 2018.

The Commission's regulations at 52 Pa.Code §§ 5.342(d) and (e) provide that a party must serve answers to interrogatories within twenty (20) days of service and objections within ten (10) days of service. In this case, Complainant's objections, if any, to the discovery requests were due by August 30, 2018, and his responses were due by September 10, 2018. Complainant did not file any objections or full and complete responses to Respondent's discovery requests.

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. As such, on October 31, 2019, I issued an interim order

providing Complainant with a final opportunity to provide full and complete discovery responses upon Respondent and to exchange witness information, not later than November 14, 2019, and to file certificates of service and a response to the Motion to Dismiss by the extended deadline. Complainant was advised that Complainant's failure to provide full and complete responses to the discovery requests and exchange witness information as previously ordered, on or before November 14, 2019, would result in sanctions, up to and including dismissal of the Complaint.

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 violated several interim orders entered in this case. As of the date of this Initial Decision, Complainant has not filed a certificate of service showing his service of witness information or full and complete responses to the discovery requests upon Respondent, in violation of the interim orders issued on October 17, 2018 and October 31, 2019, respectively. At no point did Complainant request that any of his deadlines be extended. In addition, Complainant failed to attend the prehearing conference scheduled in this proceeding.

The Commission recently considered similar cases where a complainant filed a complaint objecting to the installation of a smart meter and subsequently failed to comply with an order requiring the complainant to exchange witness information and failed to comply with an order requiring the service of discovery responses. *See Kimberly Beckmann v. Metropolitan Edison Company*, Docket No. C-2017-2613702 (Final Order entered April 11, 2019); *Diana Cook v. West Penn Power*, Docket No. C-3003051 (Final Order entered July 11, 2019); *Darlene Stanton v. Pennsylvania Electric Company*, Docket No. C-2018-3001144 (Final Order entered July 11, 2019); *B. Susanne Spohn v. Metropolitan Edison Company*, Docket No. C-2018-3001725 (Final Ordered entered August 8, 2019). In each of these cases, the Commission upheld the administrative law judge's decision to dismiss the complaint with prejudice. *Id.*

Both parties have due process rights that must be protected. Respondent attempted to gather information about Complainant's claims through discovery. Complainant

has failed to respond to the discovery requests. 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 are 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 West Penn Power Company to Dismiss the Complaint of Daniel V. Fritzsche filed on June 4, 2018 at Docket No. C-2018-3002408, is granted.

2. That the Complaint filed by Daniel V. Fritzsche against West Penn Power Company at Docket No. C-2018-3002408 is hereby dismissed with prejudice.

3. That the Secretary's Bureau shall mark Docket No. C-2018-3002408 as closed.

Date: March 18, 2020

_____/s/
Jeffrey A. Watson
Administrative Law Judge

C-2018-3002408 - DANIEL V FRITZSCHE v. WEST PENN POWER COMPANY

(Revised 5.3.19)

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