

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Gaylynn and Samuel Downes	:	
	:	C-2018-3000262
v.	:	C-2018-3003298
	:	
West Penn Power Company	:	

**INITIAL DECISION**

Before  
Jeffrey A. Watson  
Administrative Law Judge

**INTRODUCTION**

This Initial Decision dismisses the formal complaints filed by Complainants for their failure to provide witness information and failure to serve full and complete discovery responses, in violation of several interim orders.

**HISTORY OF THE PROCEEDING**

On February 20, 2018, Gaylynn and Samuel Downes (Complainants) filed a Formal Complaint (First Complaint) at Docket No. C-2018-3000262 with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (Respondent or Company), alleging Respondent shut off their residential electric service in May of 2017 and installed a smart meter without proper notice. Complainants object to the smart meter which has been installed at their residence at 60 Woodland Drive Road, Daisytown, Pennsylvania (service location) and to the proposed installation of a smart meter at their residence for a planned business (commercial account) due to health and fire safety concerns and “a conflict of interest in future business.” As relief, Complainants requested removal of the smart meter already

installed at their residence and the prohibition of the installation of a smart meter for the future business. In the alternative, Complainants averred if “West Penn Power refuses, I will be in need of all of the studies and references West Penn Power has done and has so that I can trust, show and explain to my future clients.” See, attachment to Complaint, p. 3.

On March 26, 2018, Respondent filed an Answer and New Matter to the First Complaint. Respondent admits that it provides residential and commercial electric service to Samuel Downes at 60 Woodland Drive Road, Daisytown, Pennsylvania 15427 (service location). Additionally, Respondent admitted it lawfully terminated services to the residential account at the service location on May 16, 2017, but denied that Complainants were not provided with notification prior to termination.<sup>1</sup> On May 17, 2017, Complainants made a payment of \$731.49 to have their service restored to the residential account at the service location. Further, on May 17, 2017, residential service was restored; during the restoration, Complainants’ meter was removed, and a smart meter was installed. Respondent avers that Complainants have refused to allow the Company access to the Company’s meter in order to install a smart meter for the commercial account, 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 smart meters and its Smart Meter Deployment Plan (SMP), which was approved by the Commission, and that neither its tariff, Act 129 or its SMP permits 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 Complainants to opt-out of smart meter installation; and the Commission is unable to grant the relief requested by Complainants.

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<sup>1</sup> Respondent averred a service termination notice was issued on May 2, 2017 for a past due balance of \$422.01 with a proposed termination date of May 16, 2017 and that the service termination notice was not return to Respondents as undeliverable. On May 9, 2017, at 10:03 a.m. and May 10, 2017, at 6:12 p.m. Respondent attempted to contact Complainants via the telephone number listed on the account and left messages.

On March 26, 2018, Respondent also filed Preliminary Objections to the Complaint. Respondent averred, *inter alia*, 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.

Complainants did not file a response to the Respondent's Answer and New Matter or Preliminary Objections.

On July 5, 2018, Complainants filed a second Formal Complaint (Second Complaint) with the Commission against West Penn Power at Docket No. C-2018-3003298 averring that Respondent terminated their electric service because of a lapse in payment because Complainants did not receive a bill from Respondent. Complainants further averred that when the electric service was restored, Respondent installed a smart meter without notice. Complainants further aver that there are reliability, health and safety concerns issues with smart meters. As relief, Complainants requested removal of the smart meter.

On July 31, 2018, Respondent concurrently filed its Answer and New Matter, and Preliminary Objections to the Second Complaint. In its Preliminary Objections Respondent averred that both Complaints made the same averments and requested that the Commission grant its Preliminary Objection and dismiss the Formal Complaint because the Complainants already have a prior complaint pending before the Commission on identical allegations. Alternatively, West Penn Power Company requested that the Commission consolidate both Complaints. Complainants did not file a responsive pleading to the Preliminary Objections.

A Motion Judge Assignment Notice was issued on August 3, 2018 and assigned the undersigned presiding officer to the First Formal Complaint for disposition. On August 20, 2018, an Interim Order was entered denying the Preliminary Objections filed by Respondent to the First Formal Complaint.

A Motion Judge Assignment Notice was issued on September 5, 2018 and assigned the undersigned presiding officer to the Second Formal Complaint for disposition.

On September 25, 2018, Respondent filed a certificate of service regarding its service of Interrogatories and Requests for Production of Documents (Discovery Requests) upon Complainants, under both Docket Numbers. Objections were due by October 4, 2018, and responses were due by October 15, 2018.

Complainants did not file any objections or provide any responses or the requested documents to the Respondent.

On October 15, 2018, an Interim Order was entered Establishing Initial Litigation Schedule for the First Formal Complaint which set forth the schedule for discovery, the identification of witnesses, and filing of motions in this proceeding. 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 25, 2019 and to conclude discovery by April 25, 2019.

On November 9, 2018, Respondent filed a Motion to Compel Responses to Interrogatories and Document Requests (Motion to Compel) for the First Formal Complaint, averring that it had not received any response to its Discovery Requests. The Motion to Compel contained a Notice to Plead, requiring Complainants to file a response within five days of service. Complainants did not file a response to the Motion to Compel.

On January 25, 2019, in accordance with the October 15, 2018 Interim Order Establishing Initial Litigation Schedule, Respondent provided notice and summaries of testimony for its factual and expert witnesses. Complainants did not exchange any witness information.

On February 7, 2019, an Interim Order was entered Revising Initial Litigation Schedule for the First Formal Complaint which order the Parties to, *inter alia*, provide witness information to the other party by January 25, 2019 (date retained) and to conclude discovery by June 14, 2019.

Also, on February 7, 2019, an Interim Order was entered granting Respondent's Motion to Compel for the First Formal Complaint, ordering Complainants to provide full and complete responses to Respondent's Discovery Requests not later than February 20, 2019.

Lastly, on February 7, 2019, two additional Interim Orders were entered as follows: (1) denying Respondent's Preliminary Objections to the Second Formal Complaint, and (2) Establishing Initial Litigation Schedule for the Second Formal Complaint 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 witness information to the other party by April 8, 2019, and to conclude discovery by June 14, 2019.

On February 13, 2019, an Interim Order was entered consolidating the formal complaints at Docket Nos. C-2018-3000262 and C-2018-3003298 under Docket No. C-2018-3000262 for the purpose of conducting one evidentiary hearing and to issue one initial decision to address all of the matters properly raised in the proceedings.

On February 27, 2019, Respondent filed a Motion to Dismiss the consolidated Formal Complaints, as Complainants have not provided Respondent with full and complete responses to the Discovery Requests or their witness information. Respondent argued the Complaints should be dismissed in their entirety, due to Complainants' failure to respond to the Discovery Requests and provide their witness information which demonstrates Complainants' lack of cooperation and willingness to participate in the proceeding as required by the Commission's regulations.

On July 1, 2019, Respondent filed a status report, dated June 28, 2019, indicating Complainants have failed to provide their witness information, full and complete responses to the Discovery Requests, and a response to the Motion to Dismiss.

On November 1, 2019, an Interim Order was entered, providing Complainants with a final opportunity to provide full and complete discovery responses to Respondent and to exchange witness information, not later than November 15, 2019. Complainants were advised

that Complainants' failure to provide full and complete responses to all of the Discovery Requests and exchange witness information as previously ordered, on or before November 15, 2019, would result in sanctions, up to and including dismissal of the Complaints.

As of the date of this Decision no certificate of service was filed by Complainants evidencing service of their witness information or their full and complete responses to Respondent's Discovery Requests.

On December 23, 2019, an Interim Order was entered closing the record.

### FINDINGS OF FACT

1. Complainants are Gaylynn and Samuel Downes.
2. Respondent is West Penn Power Company, a jurisdictional public utility.
3. The service location is 60 Woodland Drive Road, Daisytown, Pennsylvania.
4. On February 20, 2018, Complainants filed a Formal Complaint (First Complaint) against Respondent, alleging Respondent shut off their residential electric service in May of 2017 and installed a smart meter without proper notice, and averring health concerns. Complainants object to the smart meter which has been installed at the service location and to the proposed installation of a smart meter at their residence for a planned business (commercial account) due to health and fire safety concerns and "a conflict of interest in future business." As relief, Complainants requested removal of the smart meter already installed at their residence and the prohibition of the installation of a smart meter for the future business. In the alternative, Complainants averred if "West Penn Power refuses, I will be in need of all of the studies and references West Penn Power has done and has so that I can trust, show and explain to my future clients." See, attachment to Complaint, p. 3.

5. On March 26, 2018, Respondent filed an Answer and New Matter to the First Complaint, averring it lawfully terminated services to the residential account at the service location on May 16, 2017, but denied that Complainants were not provided with notification prior to termination; that on May 17, 2017, residential service was timely restored, and that during the restoration process Complainants' meter was removed and a smart meter was installed; that Complainants have refused to allow the Company access to the Company's meter in order to install a smart meter for the commercial account at the service location, which constitutes legal grounds to terminate service to the service location.

6. Also on March 26, 2018, Respondent filed Preliminary Objections, arguing that Complainants failed to state a claim upon which the Commission can grant relief and had failed to allege a violation of any law which the Commission has jurisdiction to administer, or of any regulation or order of the Commission.

7. Complainants did not file a response to Respondent's Answer and New Matter or its Preliminary Objections.

8. On July 5, 2018, Complainants filed a second Formal Complaint (Second Complaint) with the Commission against West Penn Power at Docket No. C-2018-3003298 averring that Respondent terminated their electric service because of a lapse in payment because Complainants did not receive a bill from Respondent. Complainants further averred that when the electric service was restored, Respondent installed a smart meter without notice. Complainants further objected to the installation of a smart meter at their property. Complainants further aver that there are reliability, health and safety concerns with smart meters.

9. On July 31, 2018, Respondent concurrently filed its Answer and New Matter, and Preliminary Objections to the Second Complaint; in its Preliminary Objections Respondent averred that both Complaints made the same averments and requested that the Commission dismiss the Formal Complaint because the Complainants already have a prior complaint pending before the Commission on identical allegations. Alternatively, West Penn Power Company requested that the Commission consolidate both Complaints. Complainants did not file a responsive pleading to the Preliminary Objections.

10. A Motion Judge Assignment Notice was issued on August 3, 2018 and assigned the undersigned presiding officer to the First Complaint for disposition.

11. On August 20, 2018, Respondent filed a certificate of service regarding its service of its Discovery Requests upon Complainants.

12. A Motion Judge Assignment Notice was issued on September 5, 2018 and assigned the undersigned presiding officer to the Second Complaint for disposition.

13. On September 25, 2018, Respondent filed a certificate of service regarding its service of Interrogatories and Requests for Production of Documents (Discovery Requests) upon Complainants, under both Docket Numbers Objections were due by October 4, 2018, and responses were due by October 15, 2018.

14. Complainants did not file any objections or provide any responses to Respondent's Discovery Requests.

15. On October 15, 2018, an Interim Order was entered Establishing Initial Litigation Schedule for the First Complaint which set forth the schedule for discovery, the identification of witnesses, and filing of motions in this proceeding. 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 25, 2019 and to conclude discovery by April 25, 2019.

16. On November 9, 2018, Respondent filed a Motion to Compel Responses to Interrogatories and Document Requests (Motion to Compel) for the First Complaint, averring that it had not received any response to its Discovery Requests. The Motion to Compel contained a Notice to Plead, requiring Complainants to file a response within five days of service.

17. Complainants did not file a response to the Motion to Compel.

18. On January 25, 2019, in accordance with the October 15, 2018 Interim Order Establishing Initial Litigation Schedule, Respondent provided notice and summaries of testimony for its factual and expert witnesses. Complainants did not exchange any witness information.

19. On February 7, 2019, an Interim Order was entered Revising Initial Litigation Schedule for the First Formal Complaint which order the Parties to, *inter alia*, provide witness information to the other party by January 25, 2019 and to conclude discovery by June 14, 2019.

20. Also, on February 7, 2019, an Interim Order was entered granting Respondent's Motion to Compel for the First Formal Complaint, ordering Complainants to provide full and complete responses to Respondent's Discovery Requests not later than February 20, 2019.

21. Lastly, on February 7, 2019, two additional Interim Orders were entered: (1) denying Respondent's Preliminary Objections to the Second Formal Complaint and (2) Establishing Initial Litigation Schedule for the Second Formal Complaint which set forth the schedule for discovery, the identification of witnesses, and filing of motions in this proceeding. Parties were ordered to, *inter alia*, provide witness information to the other party by April 8, 2019, and to conclude discovery by June 14, 2019.

22. On February 13, 2019, an Interim Order was entered consolidating the formal complaints at Docket Nos. C-2018-3000262 and C-2018-3003298 under Docket No. C-2018-3000262 for the purpose of conducting one evidentiary hearing and to issue one initial decision to address all of the matter properly raised in the proceeding.

23. On February 27, 2019, Respondent filed a Motion to Dismiss the consolidated Formal Complaints, as Complainants had not provided Respondent with full and complete responses to the Discovery Requests or their witness information. Respondent argued the Complaints should be dismissed in their entirety, due to Complainants' failure to respond to the Discovery Requests and provide their witness information, which demonstrates their

consistent lack of willingness to participate in this proceeding as required under the Commission's regulations.

24. On July 1, 2019, Respondent filed a status report, dated June 28, 2019, indicating Complainants have failed to provide their witness information, full and complete responses to the Discovery Requests, or a response to the Motion to Dismiss.

25. On November 1, 2019, an Interim Order was entered, providing Complainants with a final opportunity to provide full and complete discovery responses to Respondent and to exchange witness information, not later than November 15, 2019. Complainants were advised that Complainants' failure to provide full and complete responses to all of the Discovery Requests and exchange witness information as previously ordered, on or before November 15, 2019, would result in sanctions, up to and including dismissal of the Complaints.

26. On February 27, 2019, Respondent filed a Motion to Dismiss the two consolidated Formal Complaints.

27. Complainants have not filed a certificate of service regarding their service of discovery responses or witness information upon Respondent.

### DISCUSSION

In its Motion to Dismiss, Respondent argues that the consolidated Formal Complaints should be dismissed in their entirety due to Complainants' failure to provide their witness information, in violation of the October 15, 2018 Interim Order and the November 1, 2019 Interim Order, their failure to provide full and complete responses to its Discovery Requests, in violation of the February 7, 2019 Interim Order and the November 1, 2019 Interim Order. Respondent argues Complainants' actions demonstrate their consistent lack of willingness to participate in this proceeding as required under the Commission's regulations.

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, 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 September 25, 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 days of service and objections within ten days of service. In this case, Complainants' objections, if any, to the Discovery Requests were due by October 4, 2018, and their responses were due by October 15, 2018.

On November 9, 2018, Respondent filed a Motion to Compel in the First Formal Complaint proceeding, averring Complainants had not filed any objections or submitted any response to the Discovery Requests. Complainants did not file a response to the Motion to Compel.

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 February 1, 2019, an Interim Order was entered granting the Motion to Compel and directing Complainants to serve full and complete responses to the Discovery Requests upon Respondent's counsel and file a certificate of service with the Commission's Secretary by February 20, 2019.

In its Motion to Dismiss, Respondent averred it had not yet received Complainants' witness information or full and complete discovery responses.

Furthermore, on November 1, 2019, an Interim Order was entered providing Complainants with a final opportunity to provide full and complete discovery responses upon Respondent and to exchange witness information, not later than November 15, 2019, and to file certificates of service and a response to the Motion to Dismiss by the extended deadline. Complainants were advised that their failure to provide full and complete responses to all of the Discovery Requests and exchange witness information as previously ordered, on or before November 15, 2019, would result in sanctions, up to and including dismissal of the Complaints.

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).

Complainants have violated several interim orders entered in this case. As of the date of this Initial Decision, Complainants have not filed a certificate of service showing their service of witness information in violation of the October 15, 2018 Interim Order and the November 1, 2019 Interim Order, their service of full and complete responses to the Discovery Requests, in violation of the February 7, 2019 Interim Order and the November 1, 2019 Interim Order. At no point did Complainants request that any of their deadlines be extended.

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 granting a motion to compel. *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 Complainants' claims through discovery. Complainants have decided not to engage by failing to respond to Discovery Requests, Complainants have denied Respondent the opportunity to prepare a defense to their 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 consolidated Formal Complaints will be dismissed with prejudice. The dismissal of the Complaints with prejudice is consistent with recent Commission precedent.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of these two Complaints. 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 West Penn Power Company to Dismiss the consolidated Complaints of Gaylynn and Samuel Downes filed on February 20, 2018 at Docket No. C-2018-3000262 and filed on July 5, 2018 at Docket No. C-2018-3003298 is granted.

2. That the Complaints filed by Gaylynn and Samuel Downes against West Penn Power Company at Docket Nos. C-2018-3000262 and C-2018-3003298 are hereby dismissed with prejudice.

3. That the Secretary's Bureau shall mark Docket Nos. C-2018-3000262 and C-2018-3003298 as closed.

Date: April 17, 2020

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/s/  
Jeffrey A. Watson  
Administrative Law Judge