

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Barbara McDonald	:	
	:	
v.	:	C-2018-3003758
	:	
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

This Initial Decision dismisses the Formal Complaint filed by Barbara McDonald for her failure to provide witness information, her failure to serve full and complete discovery responses, and her failure to respond to a motion to dismiss, in violation of interim orders.

HISTORY OF THE PROCEEDING

Barbara McDonald (Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company (Respondent or Company) on July 30, 2018, objecting to the installation of a smart meter at her residence at 243 East Broad Street, East Stroudsburg, Pennsylvania 18301 (service location), due to health and safety concerns. As relief, Complainant requested she be permitted to keep her analog meter.

On August 21, 2018, Respondent filed an Answer and New Matter to the Complaint. Respondent admits that it provides residential retail electric service to Complainant

at the service location. Respondent avers that Complainant has 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 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 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. Respondent denied the remaining material allegations set forth in the Complaint.

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 August 21, 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 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.

On September 20, 2018, the Commission issued a Motion Judge Assignment Notice, assigning the undersigned as presiding officer to this proceeding.

On August 31, 2018, Complainant filed a letter with the Commission dated August 30, 2018, requesting an extension of time to file a response to the Preliminary Objections, Answer and New Matter filed by Respondent.

On September 10, 2018, an interim order was entered granting Complainant's request for an extension of time to file a response to the Preliminary Objections, Answer and New Matter filed by Respondent until September 17, 2018.

On or about September 13, 2018, the undersigned received a second request from Complainant requesting an extension of time to file a response to the Preliminary Objections, Answer and New Matter filed by Respondent.

On September 17, 2018, an interim order was entered granting Complainant's second request for an extension of time to file a response to the Preliminary Objections, Answer and New Matter filed by Respondent, to be filed not later than October 1, 2018.

On or about October 1, 2018, Complainant filed an Amended Formal Complaint (Amended Complaint) with the Commission. Complainant averred that she is sensitive to electromagnetic field and radio frequency radiation and that she suffers from other medical conditions that would be exacerbated by the installation of a smart meter and that the smart meter would cause unsafe conditions. Complainant further averred that Respondent's smart meter "is in violation of 66 Pa.C.S. §§ 1501 and 1502 of the Public Utility Code." Complainant also referenced the Americans with Disabilities Act and raised issues including fire hazards and other health and safety issues. As relief, Complainant requests that she be permitted to keep her old analog meter, that Respondent be compelled to provide safe utility service to Complainant, and that Respondent refrain from termination of Complainant's service.

On October 22, 2018, Respondent filed an Answer and New Matter and Preliminary Objections to the Amended Complaint. In its Preliminary Objections to the Amended Complaint, Respondent averred that the request for relief for an exemption from the installation of a smart meter is not legally recoverable in the cause of action and that Complainant has failed to allege that Respondent violated any Commission statute, regulation,

order or tariff provision with regard to the installation of the smart meter. Respondent further averred it is required by Act 129 to install a smart meter at the service location and that, as a matter of law, the Company is required to install a smart meter at the service location. Finally, Respondent argued that the Amended Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief, that a hearing is not in the public interest, and that the Complaint does not meet the standards set forth in recent Commission decisions in order to survive preliminary objections.

On October 30, 2018, the undersigned Presiding Officer received correspondence from Complainant requesting an extension of time to file a responsive pleading to the Answer and New Matter and Preliminary Objections filed by Respondent on October 22, 2018.

On October 31, 2018, an interim order was entered granting Complainant's request for an extension of time to file a response to the Answer and New Matter and Preliminary Objections to the Amended Complaint, to be filed not later than November 12, 2018.

On November 10, 2018, Complainant filed a reply to the Preliminary Objections to the Amended Complaint and a reply to the Answer and New Matter.

On December 27, 2018, an interim order was entered denying the Preliminary Objections to the Amended Complaint filed by Respondent.

Also, on December 27, 2018, an interim order was entered establishing an initial litigation schedule. 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 February 22, 2019, and to conclude discovery by April 26, 2019.

On February 4, 2019, 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 February 14, 2019, and responses were due by February 25, 2019.

On February 13, 2019, Complainant submitted a letter indicating she would not be moving forward on her case. However, she stated that she was reserving her right to take up this action again.

On February 22, 2019, in accordance with the December 27, 2018 interim order establishing a litigation schedule, Respondent provided notice and summaries of testimony for its factual and expert witnesses. Complainant did not exchange any witness information.

On April 12, 2019, Complainant submitted an additional letter indicating her request to withdraw her Amended Complaint. Complainant indicated she “would like to reserve my right, should and if ever in the ‘future’ I decide to take up this issue – at which time I will definitely need an attorney, and that is if I can find one, which has been very, very difficult.”

On May 9, 2019, Respondent filed a Motion to Dismiss the Complaint in this proceeding, with prejudice. Respondent argued that as a result of the Complainant’s failure to provide any response to the Company’s discovery requests, failure to provide notification of any potential witnesses in contradiction to the interim order, and her written letters stating that she no longer intends to pursue the Amended Complaint, she has demonstrated her lack of cooperation and willingness to participate in this proceeding as required under the Commission’s regulations. As a result, Respondent argued the Formal Complaint in this proceeding should be dismissed in its entirety. The Motion to Dismiss was held in abeyance by Interim Order entered on June 5, 2019.

On May 14, 2019, Complainant filed a letter which, among other things, requested an extension of time to respond to discovery requests and requested to withdraw her Amended Complaint because she cannot find an attorney to represent her.

On May 24, 2019, an interim order was entered requiring that the parties participate in a prehearing conference on Tuesday, June 4, 2019, at 10:30 a.m. The interim order reminded the parties that a complaint may only be withdrawn upon the entry of an initial

decision of the administrative law judge approving the request, which has not occurred. The parties were further advised that the request of the Complainant to withdraw her Amended Complaint would be addressed at the prehearing conference on June 4, 2019. The parties were also advised that they were expected to be prepared to fully address the litigation schedule in this matter and to address all concerns identified by Complainant in her correspondence dated February 13, 2019, April 12, 2019, and May 14, 2019, and any outstanding issues in this case. In addition, the interim order discussed the withdrawal of a Complaint with prejudice, and explained this means, in part, that Complainant will not be able to file another complaint raising the issues in dispute in this case.

Complainant and Lauren Lepkoski, Esquire, counsel for Respondent, attended the prehearing conference. Complainant stated that it was her desire to withdraw her Amended Complaint but to refile the Amended Complaint if she would obtain legal counsel. Counsel for Respondent stated that Respondent did not object to the withdrawal of the Amended Complaint with prejudice but objected to the withdrawal of the Amended Complaint without prejudice. Counsel argued that permitting Complainant to withdraw a complaint that has been the subject of litigation since July 30, 2018 and to permit Complainant to refile the Amended Complaint was not in the public interest and would result in a further expenditure of Company and Commission resources which would unnecessarily be borne by ratepayers.

Complainant requested a delay in the proceeding for a period of two years in order to obtain legal counsel and indicated that it is difficult to locate an attorney in Pennsylvania. Under the circumstances, the parties were advised that this proceeding would be stayed until August 30, 2019, to permit Complainant time to secure counsel and have counsel file and serve his or her entry of appearance.

On September 9, 2019, I received correspondence from Complainant dated September 6, 2019, requesting to withdraw her Amended Complaint without prejudice. Complainant indicated, among other things, that she was not able to obtain legal counsel. The letter was treated as Complainant's Petition to Withdraw the Amended Complaint without prejudice.

On September 9, 2019, an interim order was entered permitting Respondent to file a response to the Petition to Withdraw the Amended Complaint without prejudice, by September 20, 2019.

On September 20, 2019, Respondent filed a letter with the Commission objecting to the Withdrawal of the Amended Complaint, without prejudice, under the circumstances, and renewed its Motion to Dismiss the Complaint filed by Complainant with prejudice.

On October 11, 2019, an interim order was entered extending Complainant's deadline to file a response to the Motion to Dismiss the Amended Complaint, with prejudice, filed by Respondent on May 9, 2019, and the letter from Respondent dated September 20, 2019, renewing the Motion to Dismiss with prejudice, until October 30, 2019.

Complainant did not file a response to the averments set forth in the Motion to Dismiss, but filed a letter dated October 30, 2019 stating, "Again, I wish to withdraw my complaint Without Prejudice."

As of the date of this Initial Decision, Complainant has not filed certificates of service regarding her service of witness information or discovery responses upon Respondent.

The record closed on December 17, 2019, by interim order.

FINDINGS OF FACT

1. Complainant is Barbara McDonald.
2. Respondent is Metropolitan Edison Company, a jurisdictional public utility.

3. The service location is 243 East Broad Street, East Stroudsburg, Pennsylvania 18301.

4. On July 30, 2018, Complainant filed a Complaint against Respondent, objecting to the installation of a smart meter at her residence due to health and safety concerns. As relief, Complainant requested she be permitted to keep her analog meter.

5. On August 21, 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, failed to allege a violation of any law which the Commission has jurisdiction to administer, or of any regulation or order of the Commission, and failed to contact the Company prior to filing the Complaint as required by 66 Pa.C.S. § 1410 (1).

6. On August 31, 2018, Complainant filed a letter with the Commission dated August 30, 2018, requesting an extension of time to file a response to the Preliminary Objections, Answer and New Matter filed by Respondent.

7. On September 10, 2018, an interim order was entered granting Complainant's request for an extension of time to file a response to the Preliminary Objections, Answer and New Matter filed by Respondent until September 17, 2018.

8. On or about September 13, 2018, the undersigned received a second request from Complainant requesting an extension of time to file a response to the Preliminary Objections, Answer and New Matter filed by Respondent.

9. On September 17, 2018, an interim order was entered granting Complainant's second request for an extension of time to file a response to the Preliminary Objections, Answer and New Matter filed by Respondent, to be filed not later than October 1, 2018.

10. On or about October 1, 2018, Complainant filed an Amended Formal Complaint (Amended Complaint) with the Commission. Complainant averred that she is sensitive to electromagnetic field and radio frequency radiation and that she suffers from other medical conditions that would be exacerbated by the installation of a smart meter and that the smart meter would cause unsafe conditions. Complainant further averred that Respondent's smart meter "is in violation of 66 Pa.C.S. §§ 1501 and 1502 of the Public Utility Code." Complainant also referenced the Americans with Disabilities Act and raised issues including fire hazards and other health and safety issues. As relief, Complainant requested that she be permitted to keep her old analog meter, that Respondent be compelled to provide safe utility service to Complainant, and that Respondent refrain from termination of Complainant's service.

11. On October 22, 2018, Respondent filed an Answer and New Matter and Preliminary Objections to the Amended Complaint.

12. On October 30, 2018, the undersigned presiding officer received correspondence from Complainant requesting an extension of time to file a responsive pleading to the Preliminary Objections, Answer and New Matter filed by Respondent on October 22, 2018.

13. On November 10, 2018, Complainant filed a reply to the Preliminary Objections to the Amended Complaint and a reply to the Answer and New Matter.

14. On December 27, 2018, an interim order was entered, denying Respondent's Preliminary Objections.

15. Also, on December 27, 2018, an interim order was entered establishing an initial litigation schedule setting forth deadlines for witness information no later than February 22, 2019 and to conclude discovery by April 26, 2019.

16. On February 4, 2019, Respondent filed a certificate of service evidencing its service of discovery requests upon Complainant.

17. On February 14, 2019, Complainant submitted a letter indicating she would not be moving forward on her case. However, she stated that she was reserving her right to take up this action again.

18. On February 22, 2019, Respondent provided notice and summaries of testimony for its factual and expert witnesses.

19. Complainant did not provide the required witness information.

20. On April 17, 2019, Complainant submitted an additional letter indicating her request to withdraw her Amended Complaint. Complainant indicated she “would like to reserve my right, should and if ever in the ‘future’ I decide to take up this issue – at which time I will definitely need an attorney, and that is if I can find one, which has been very, very difficult.”

21. On May 9, 2019, Respondent filed a Motion to Dismiss the Amended Complaint in this proceeding, with prejudice. Respondent argued that as a result of the Complainant’s failure to provide any response to the Company’s discovery requests, failure to provide notification of any potential witnesses in contradiction to the interim order, and her written letters stating that she no longer intends to pursue the Amended Complaint, she has demonstrated her lack of cooperation and willingness to participate in this proceeding as required under the Commission’s regulations. As a result, Respondent argued the Amended Complaint in this proceeding should be dismissed in its entirety. The Motion to Dismiss was held in abeyance by interim order entered on June 5, 2019.

22. On May 14, 2019, Complainant filed a letter which, among other things, requested an extension of time to respond to discovery requests and requested to withdraw her Amended Complaint because she cannot find an attorney to represent her.

23. On May 24, 2019, an interim order was entered requiring that the Parties participate in a prehearing conference on Tuesday, June 4, 2019, at 10:30 a.m. The Interim

Order reminded the Parties that a complaint may only be withdrawn upon the entry of an initial decision of the administrative law judge approving the request, which has not occurred. The Parties were further advised that the request of the Complainant to withdraw her Amended Complaint would be addressed at the prehearing conference on June 4, 2019. The Parties were also advised that they were expected to be prepared to fully address the litigation schedule in this matter and to address all concerns identified by Complainant in her correspondence dated February 13, 2019, April 12, 2019, and May 14, 2019, Complainant's request for an extension and statements about obtaining counsel, and any outstanding issues in this case. In addition, the Interim Order discussed the withdrawal of a complaint with prejudice, and explained this means, in part, that Complainant will not be able to file another complaint raising the issues in dispute in this case.

24. Complainant and Lauren Lepkoski, Esquire, counsel for Respondent, attended the prehearing conference. Complainant stated that it was her desire to withdraw her Amended Complaint but to refile the Complaint if she would obtain legal counsel. Counsel for Respondent stated that Respondent did not object to the withdrawal of the Amended Complaint with prejudice but objected to the withdrawal of the Amended Complaint without prejudice. Counsel argued that permitting Complainant to withdraw an Amended Complaint that has been the subject of litigation since July 30, 2018 and to permit Complainant to refile the Amended Complaint was not in the public interest and would result in a further expenditure of Company and Commission resources which would unnecessarily be borne by ratepayers.

25. Complainant requested a delay in the proceeding for a period of two years in order to obtain legal counsel and indicated that it is difficult to locate an attorney in Pennsylvania. Under the circumstances, the Parties were advised that this proceeding would be stayed until August 30, 2019, to permit Complainant time to secure counsel and have counsel file and serve his or her entry of appearance.

26. On September 9, 2019, I received correspondence from Complainant dated September 6, 2019, requesting to withdraw her Amended Complaint without prejudice. Complainant indicated, among other things, that she was not able to obtain legal counsel. The

letter was treated as Complainant's petition to withdraw the Amended Complaint without prejudice.

27. On September 9, 2019, an interim order was entered permitting Respondent to file a response to the Petition to Withdraw the Amended Complaint without prejudice, by September 20, 2019.

28. On September 20, 2019, Respondent filed a letter with the Commission objecting to the Withdrawal of the Amended Complaint without prejudice, under the circumstances, and renewed its Motion to Dismiss the Amended Complaint filed by Complainant with prejudice.

29. On October 11, 2019, an interim order was entered extending Complainant's deadline to file a response to the Motion to Dismiss the Amended Complaint with prejudice, filed by Respondent on May 9, 2019 and the letter from Respondent dated September 20, 2019, renewing the Motion to Dismiss with prejudice, until October 30, 2019.

30. Complainant did not file a response to the averments set forth in the Motion to Dismiss, but filed a letter dated October 30, 2019 stating, "Again, I wish to withdraw my complaint Without Prejudice."

31. Complainant has not filed a certificate of service regarding her service of witness information or discovery responses 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 her witness information and failure to respond to Respondent's discovery requests, in violation of the December 27, 2018 interim order. Respondent argues Complainant's actions demonstrate her lack of cooperation and willingness to participate in the proceeding as required by 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 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 February 4, 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, objections, if any, to the discovery requests were due by February 14, 2019, and her responses were due by February 25, 2019.

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

Furthermore, on December 27, 2018, an interim order was entered establishing an initial litigation schedule setting forth deadlines for witness information no later than February 22, 2019 and to conclude discovery by April 26, 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 violated interim orders issued in this case. As of the date of this Initial Decision, Complainant has not filed a certificate of service showing her service of witness information or her full and complete responses to the discovery requests upon Respondent.

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 unanimously 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 engage by failing to respond to discovery, Complainant has denied Respondent the opportunity to prepare a defense to her claims. To proceed to a hearing 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. A prehearing conference was held on June 4, 2019 to address Complainant's questions and concerns regarding the hearing procedure and compliance with the December 27, 2018 Interim Order, among other matters. Deadlines for compliance were extended and Complainant's request for additional time to obtain legal counsel was granted. Complainant did not respond to the Motion to Dismiss, serve a witness list or respond to discovery requests. Complainant's desire to withdraw the Amended Complainant and perhaps refile it at a later date does not excuse her failure to comply with interim orders in this proceeding. Accordingly, the Amended Complaint will be dismissed with prejudice. The dismissal of the Amended Complaint with prejudice is consistent with recent Commission precedent. Permitting Complainant to

withdraw her complaint and perhaps file a new complaint to start the process over would not be fair to the Respondent.

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 § 5.372 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.
4. 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).
5. 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 Metropolitan Edison Company to Dismiss the Amended Complaint of Barbara McDonald filed at Docket No. C-2018-3003758 is granted.

2. That the Amended Complaint filed by Barbara McDonald against Metropolitan Edison Company at Docket No. C-2018-3003758 is hereby dismissed with prejudice.

3. That the Secretary's Bureau shall mark Docket No. C-2018-3003758 as closed.

Date: April 20, 2020

/s/
Jeffrey A. Watson
Administrative Law Judge