

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Lydia Rieger and Alan Rieger	:	
	:	C-2018-3005877
v.	:	C-2018-3005887
	:	C-2018-3005889
Metropolitan Edison Company	:	

INITIAL DECISION

Before
Jeffrey A. Watson
Administrative Law Judge

INTRODUCTION

This decision dismisses the Complaints filed in these matters due to Complainants' failure to appear for the hearing and prosecute the Complaints.

HISTORY OF THE PROCEEDING

On October 30, 2018, Lydia Rieger and Alan Rieger (Complainants) filed three separate Complaints with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company (Respondent). In the Complaint docketed at C-2018-3005887, Complainants averred they wanted to opt out of smart meter installation at their residence at 211 Ben Franklin Hwy. W., Birdsboro, PA, 19508 (service location 1). In the Complaint docketed at C-2018-3005889, Complainants averred they wanted to opt out of smart meter installation at 202 Cinder St., Birdsboro, PA, 19508 (service location 2). In the Complaint docketed at C-2018-3005877, Complainants averred they wanted to opt out of smart meter installation at 553 Rock Hollow Rd., Birdsboro, PA, 19508 (service location 3). In their Complaints, Complainants averred they wanted to opt out of smart meter installation at the service locations due to health,

safety, and constitutional reasons. As relief, Complainants requested they be allowed to opt out of smart meter installation at the service locations.

On November 28, 2018, Respondent filed an Answer and New Matter in response to each of the three Complaints admitting it provides residential electric service to Complainants at the service locations. Respondent averred installation of the smart meters is required by Act 129 of 2008¹ (Act 129) and Respondent's Commission-approved Smart Meter Deployment Plan (SMP), and neither Act 129 nor Respondent's SMP permit Complainants to opt-out of the installation of a smart meter at the service locations. Respondent essentially denied the remaining material averments set forth in the Complaints.

In its New Matters, Respondent argued the Complaints should be dismissed for legal insufficiency, because it is required by Act 129 and its SMP to install smart meters at the service locations and the Commission is unable to grant the relief requested by Complainants.

On November 28, 2018, Respondent filed Preliminary Objections in response to each of the three Complaints averring the requested relief – an exemption from the installation of a smart meter - is not legally recoverable and Complainants failed to allege that Respondent violated any Commission statute, regulation, order, or tariff provision. Respondent further averred it is required by Act 129 and its SMP to install a smart meter at the service locations, and the Complaints are legally insufficient because they fail to state a claim upon which the Commission can grant relief. Finally, Respondent argued a hearing was not in the public interest.

On November 28, 2018, Respondent filed a motion to consolidate all three Complaints.

On December 14, 2018, Complainants filed responses to the Preliminary Objections.

¹ 66 Pa.C.S. § 2806.1 *et seq.*

On December 17, 2018, Complainants filed responses to the New Matters.

On December 19, 2018, the Commission issued a Motion Judge Assignment Notice, assigning these matters to me.

On January 10, 2019, I issued Interim Orders consolidating the three Complaints at Docket Number C-2018-3005877, denying Respondent's Preliminary Objections, and establishing an initial litigation schedule. The Interim Order regarding the initial litigation schedule ordered the parties to, *inter alia*, provide the names, addresses, and written summaries (witness information) of fact and expert witnesses by March 15, 2019; conclude discovery by April 30, 2019; and file a status report by May 15, 2019.

On January 14, 2019, the Commission issued a Call-in Telephonic Prehearing Conference Notice, scheduling a prehearing conference for February 1, 2019, at 9:00 a.m.

On January 16, 2019, I issued an Interim Order, directing the parties to, *inter alia*, appear at the prehearing conference.

On January 22, 2019, Respondent filed a certificate of service regarding its service of Interrogatories and Requests for Production of Documents upon Complainants (discovery requests). Objections were due by February 1, 2019, and responses were due by February 11, 2019.

On January 28, 2019, Complainants filed correspondence requesting an in-person hearing and objecting to Respondent's discovery requests as irrelevant and invasive. Complainants also explained they did not have enough time to respond to the discovery requests by the deadline and it would be difficult for them to meet the deadlines of the initial litigation schedule.

On January 28, 2019, I issued an Interim Order in response to Complainants'

January 28, 2019, correspondence and advised the parties that the February 1, 2019, prehearing conference would convene as scheduled. I also advised that the Complainants' concerns regarding the scheduling of an in-person hearing, as well as revisions to the initial litigation, would be addressed at the conference.

On February 1, 2019, I convened a prehearing conference. Complainants appeared *pro se*, and Tori Giesler, Esq., and Lauren Lepkoski, Esq., appeared on behalf of Respondent. The parties discussed the litigation schedule, as well as the submission of written testimony. Additionally, Complainants requested an extension of the deadlines to file objections and responses to the discovery requests. Respondent agreed to extend the deadline for objections to February 11, 2019, and the deadline for responses to February 25, 2019.

On February 13, 2019, Complainants filed a certificate of service regarding their service of objections and responses to the discovery requests upon Respondent.

On February 14, 2019, I issued an Interim Order revising the litigation schedule. I ordered the parties to, *inter alia*, exchange witness information by March 15, 2019; conclude discovery by April 30, 2019; and file a status report by May 15, 2019. I also ordered Complainants to submit written direct testimony by May 31, 2019, and Respondent to submit written rebuttal testimony by June 28, 2019.

On February 26, 2019, Complainants filed a certificate of service regarding their service of Interrogatories and Requests for Production of Documents (discovery requests) upon Respondent.

On March 19, 2019, Respondent filed a certificate of service regarding its service of discovery responses upon Complainants.

On March 18, 2019, Complainants filed a certificate of service regarding their service of their witness information upon Respondent.

On March 18, 2019, Complainants filed a Motion to Compel Metropolitan Edison Company to Answer the Interrogatories and Requests for Production of Documents of Lydia and Alan Rieger (Complainants' Motion to Compel), averring, *inter alia*, they had not received any response to the discovery requests propounded upon Respondent.

On March 20, 2019, Respondent filed a response to Complainants' Motion to Compel, averring, *inter alia*, the statutory deadline for Respondent to submit responses, accounting for the "mailbox rule," was March 20, 2019, which had not yet passed by the time Complainants filed their Motion to Compel on March 18, 2019. Respondent also argued Complainants' Motion to Dismiss was moot, since it served its responses upon Complainants on March 19, 2019.

On March 26, 2019, I issued an Interim Order, directing the parties to submit a status report by May 15, 2019. I ordered the parties to, *inter alia*, identify available dates for the scheduling of an evidentiary hearing and confer and determine whether the hearing should be scheduled as an in-person or telephonic hearing.

On March 26, 2019, I issued an Interim Order, denying Complainants' Motion to Compel as being premature and moot.²

On May 20, 2019, Respondent filed a status report dated May 15, 2019. Respondent advised, *inter alia*, the parties had completed discovery and exchanged witness information, however, Complainants had reserved notification of any expert witnesses.

On August 21, 2019, Complainants filed a status report dated August 20, 2019, advising, *inter alia*, they no longer owned the properties located at service locations 2 and 3. They also detailed various arguments related to their claims and argued, "[W]e have no reason to believe that a PUC appointed ALJ would be empowered to correct the overreach of the PA PUC.

² The March 26, 2019 Interim Order was inadvertently titled "Interim Order Granting Motion of Metropolitan Edison Company to Compel Responses to Interrogatories and Document Requests." On May 20, 2019, an Interim Order was issued correcting the title of the March 26, 2019 Interim Order to read "Interim Order Denying Complainants' Motion to Compel Discovery Responses."

It is clear that this Formal Complaint process cannot resolve the primary issues here.” (emphasis omitted). Complainants also advised they had the meter socket for service location 1 relocated away from their residence. Complainants wrote, “[W]e intend to withdraw our formal Complaint without satisfaction. We choose this not because we agree that the PUC could or should force PA customers to use the advanced metering technology. It is our best use of our resources to reduce the potential impact of the device, we cannot turn off which is designed to do far more than just measure our electricity use.... Our dispute is with the way the PA PUC has ignored the need for accommodation, ignored the individual natural rights of consumers and inappropriately imposed mandate, which was not intended by the legislature.”

On August 27, 2019, Respondent filed a status report dated August 20, 2019, advising, *inter alia*, it had not been successful in reaching Complainants to discuss the evidentiary hearing, Complainants did not submit any written direct testimony, and it was available for a telephonic evidentiary hearing in the month of October 2019.

On December 19, 2019, I issued an Interim Order, directing the parties to file a joint letter or status report advising of mutually agreeable dates in February or March 2020 to schedule a hearing.

On January 6, 2020, Complainants filed a status report dated December 30, 2019, arguing, *inter alia*, Act 129 permitted them to opt out of smart meter installation, and, “[A]ll Administrative Law Judges have an inherent conflict of interest, requiring them to support the PUC or risk termination of employment.” They advised, “We will NOT be available to attend a hearing with the ALJ as no PA ALJ can provide an unbiased decision. Neither can the PUC be ‘Self Policing’ in good faith.” (emphasis in original).

On January 6, 2020, Respondent filed a status report dated December 30, 2019, requesting, *inter alia*, a telephone hearing be scheduled for dates in February or March 2020.

On January 8, 2020, the Commission issued a Call-out Telephone Notice, scheduling a hearing for March 4, 2020, at 10:00 a.m. The notice advised the parties that the

presiding officer would contact the parties on the day of the hearing and listed the phone numbers on file for the parties. The Notice cautioned, “*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*” (emphasis in original).

The January 24, 2020 Notice was sent by regular first-class mail to the address Complainants listed for themselves on the Complaints, and it was not returned as undeliverable.

I convened a telephonic hearing on March 4, 2020, at approximately 10:00 a.m. Respondent’s counsel and witnesses were available when I called them. There was no answer when I called the number listed for Complainants in the January 24, 2020 Notice.

Respondent did not offer any testimony or evidence, but rather made a Motion to Dismiss due to Complainants’ failure to appear at the hearing. I informed counsel that I would issue an Initial Decision granting the Motion to Dismiss. I adjourned the hearing, and the hearing record closed.

FINDINGS OF FACT

1. Complainants in this case are Lydia and Alan Rieger.
2. Respondent in this case is Metropolitan Edison Company, a jurisdictional public utility.
3. The service locations are: 211 Ben Franklin Hwy. W., Birdsboro, PA, 19508; 202 Cinder St., Birdsboro, PA, 19508; 553 Rock Hollow Rd., Birdsboro, PA, 19508.
4. On October 30, 2018, Complainants filed three Complaints with the Commission against Respondent.
5. On November 28, 2018, Respondent filed an Answer, New Matter, and Preliminary Objections in response to each of the three Complaints.

6. On December 14, 2018, Complainants filed responses to the Preliminary Objections.
7. On December 17, 2018, Complainants filed responses to the New Matters.
8. On January 10, 2019, I issued Interim Orders consolidating the three Complaints at Docket Number C-2018-3005877, denying Respondent's Preliminary Objections, and establishing an initial litigation schedule.
9. On February 1, 2019, a prehearing conference was convened. Complainants appeared *pro se*, and Respondent was represented by counsel.
10. On February 14, 2019, I issued an Interim Order, revising the initial litigation schedule.
11. On August 21, 2019, Complainants filed a status report dated August 20, 2019, advising, *inter alia*, they no longer owned the properties located at service locations 2 and 3, and the meter socket for service location 1 had been relocated away from the residence.
12. In their status report, Complainants wrote they "intend to withdraw our Formal Complaint without satisfaction."
13. Complainants' status report dated August 20, 2019, was not styled as a petition for leave to withdraw the Complaint(s).
14. Complainants' status report dated August 20, 2019, did not contain a notice to plead.
15. On August 27, 2019, Respondent filed a status report dated August 20, 2019.

16. Respondent's status report dated August 20, 2019 did not address or reference Complainants' stated intention to withdraw the Complaint(s).

17. On December 19, 2019, an Interim Order was issued, directing the parties to file a joint letter or status report advising of mutually agreeable dates in February or March 2020 to schedule a hearing.

18. On January 6, 2020, Complainants filed a status report dated December 30, 2019, advising, "We will NOT be available to attend a hearing with the ALJ as no PA ALJ can provide an unbiased decision." (emphasis in original).

19. Complainants' status report dated December 30, 2019, was not styled as a petition for leave to withdraw the Complaint(s).

20. Complainants' status report dated December 30, 2019, did not contain a notice to plead.

21. On January 6, 2020, Respondent filed a status report dated December 30, 2019, requesting, *inter alia*, a telephone hearing be scheduled for dates in February or March 2020.

22. Respondent's status report dated December 30, 2019 did not address or reference Complainants' stated intention to withdraw the Complaint(s).

23. On January 8, 2020, the Commission issued a Call-out Telephone Notice, scheduling a hearing for March 4, 2020, at 10:00 a.m.

24. The January 8, 2020 Notice advised the parties that the presiding officer would contact the parties on the day of the hearing and listed the phone numbers on file for the parties.

25. The January 8, 2020 Notice cautioned, “*Attention: You may lose the case if you do not take part in this hearing and present facts on the issues raised.*” (emphasis in original).

26. The January 8, 2020 Notice was sent by regular first-class mail to the address Complainants listed for themselves on the Complaints, and it was not returned as undeliverable.

27. A telephonic hearing was convened on March 4, 2020, at approximately 10:00 a.m.

28. Complainants were not available when called by the ALJ for the hearing.

29. During the hearing, Respondent made an oral Motion to Dismiss the Complaints due to Complainants’ failure to appear and prosecute.

30. At no point during this preceding did the Commission or the ALJ advise Respondent that either or both of Complainants’ status reports dated August 20, 2019 and December 30, 2019, would be treated as a petition for leave to withdraw the Complaint(s).

31. Complainants did not contact the Office of the Administrative Law Judge (OALJ) to request a continuance.

32. Complainants did not settle these matters.

DISCUSSION

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm’n*, 479 A.2d 10 (Pa.Cmwlth. 1984). This due process requirement is satisfied, however, when the administrative agency provides the parties notice and the opportunity to be heard.

By Notice dated January 8, 2020, the Commission scheduled this matter for a hearing to be held on March 4, 2020 at 10:00 a.m. The Commission mailed a copy of the January 8, 2020 Notice by regular first-class mail to the address listed for Complainants in the Complaints.

Complainants' copy of the January 8, 2020 Notice was not returned as undeliverable. Since it was mailed in the ordinary course of business, there is a presumption that Complainants received it. *Berkowitz v. Mayflower Securities, Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa.Super. 1997); *Judge v. Celina Mutual Insurance Co.*, 449 A.2d 658 (Pa.Super. 1982).

The January 8, 2020 Notice advised the parties they must be available when called for the hearing and they may lose their case if they did not participate.

I called the parties at the scheduled date and time for the hearing. Respondent's counsel and witnesses were available when I called them. Complainants did not answer their phone when I called them.

Under these circumstances, Complainants had an opportunity to appear and be heard in this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of Complainants have been fully protected. *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161101 (Opinion and Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

Complainants filed status reports dated August 20, 2019, and December 30, 2019. In their August 20, 2019, status report, Complainants advised, *inter alia*, they no longer owned the properties located at service locations 2 and 3 and had the meter socket for service location 1 relocated away from the residence. Complainants wrote, "[W]e intend to withdraw our Formal Complaint without satisfaction." In their December 30, 2019, status report, Complainants advised, *inter alia*, "We will NOT be available to attend a hearing with the ALJ as no PA ALJ can provide an unbiased decision. Neither can the PUC be 'Self Policing' in good faith." (emphasis in original).

At its public meeting on March 12, 2020, the Commission considered a similar case, *Hubel v. Duquesne Light Company*, C-2018-3002620. In that case, the complainant filed a complaint to prevent the installation of a smart meter at her home, and during the litigation process, she filed correspondence indicating she wished to discontinue her case, as she did not wish to expend the resources which would be necessary to continue. The company subsequently filed a response, indicating that it had successfully installed a smart meter at the complainant's residence and had no objection to the withdrawal of the Complaint. Rather than act on the petition to withdraw, the presiding ALJ scheduled a prehearing conference. When the complainant failed to appear at the prehearing conference, the ALJ issued an Initial Decision dismissing the complaint due to the complainant's failure to prosecute.

Upon consideration of the Initial Decision, Vice Chairman David W. Sweet made a motion to vacate the ALJ's decision and grant the complainant's petition to withdraw, explaining that the complainant informed both the Commission and the company that she did not wish to pursue her complaint, and did so prior to the ALJ's decision to hold a prehearing conference. Vice Chairman Sweet also pointed out that there was no objection by the company to the withdrawal, a smart meter had already been installed, and there was no harm to the public interest by allowing the complainant to withdraw her complaint. The Commission unanimously adopted Vice Chairman Sweet's motion.

The instant case is distinguishable from *Hubel*. In this case, Complainants wrote of their "intention" to withdraw their "Formal Complaint." Indicating one's *intention* to withdraw is not necessarily the same thing as actually withdrawing. It is unclear whether Complainants intended their August 20, 2019, status report to be interpreted as a petition for leave to withdraw or whether they were simply putting the Commission and opposing counsel on notice of an action they may take in the future. Furthermore, Complainants referenced a single "complaint," when they had actually filed three separate Complaints. Even if Complainants intended their August 20, 2019, status report to be interpreted as a petition for leave to withdraw, their use of the word "complaint," did not adequately specify whether the petition pertained to

the withdrawal of all three Complaints or, if not, which of the three Complaints Complainants wanted to withdraw.

Additionally, in *Hubel*, the opposing party interpreted the complainant's filing as a petition for leave to withdraw the complaint and filed a response indicating it had no objection. In the instant matter, Respondent filed status reports dated August 20, 2019, and December 30, 2019. In neither of these filings did Respondent address its position regarding the withdrawal of any of the three Complaints.

Complainants' filings dated August 20, 2019, and December 30, 2019, were styled as "status reports," not "petitions for leave to withdraw a complaint," and did not contain notices to plead. Consequently, not only does the record not reflect Respondent's position on the withdrawal of any of the Complaints, it does not show that Respondent was even aware that Complainants' status reports could be interpreted as petitions for leave to withdraw. To now interpret Complainants' August 20, 2019 status report, their December 30, 2019 status report, or both, as petitions for leave to withdraw all or some of the Complaints, would violate Respondent's due process rights.

Section 5.94 of the Commission's rules provides that "a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties, setting forth the reasons for the withdrawal." 52 Pa.Code § 5.94. It further provides, "After considering the petition, and objection thereto, and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted." *Id.* Therefore, pursuant to the Commission's rules, although a party may request a withdrawal of a complaint, it is ultimately up to the presiding officer or the Commission to determine whether to permit the withdrawal. In this case, even if Complainants' status reports were intended to be petitions for leave to withdraw, I did not rule on them as such. Therefore, Complainants had an obligation to appear at the hearing on March 4, 2020.

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of any request for relief. As the party bringing these Complaints, Complainants bear the burden of proving by a preponderance of evidence that they are entitled to relief. By failing to appear and proffer any evidence to support the Complaints, Complainants have failed to meet this burden. Under these circumstances, the Complaints may be dismissed with prejudice. *Jefferson v. UGI Utilities, Inc.*, Docket No. Z-00269892 (Opinion and Order entered December 26, 1995); *El-Ayazra v. West Penn Power Company*, Docket No. F-2015-2509292 (Opinion and Order entered June 30, 2016); 52 Pa.Code § 5.245.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of this proceeding. 66 Pa.C.S. § 701.

2. The due process rights of Complainants have been fully protected in this proceeding. *Sentner v. Bell Telephone Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered October 25, 1993); 52 Pa.Code § 5.245(a).

3. By failing to appear for the hearing and proffer any evidence to support the Complaints, Complainants have failed to meet their burden of proving they are entitled to the relief they seek from the Commission. 66 Pa.C.S. § 332(a).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the motion of Metropolitan Edison Company to dismiss the Complaints of Lydia and Alan Rieger at Docket Nos. C-2018-3005887, C-2018-3005889, and C-2018-3005877, for failure to prosecute is granted.

2. That the Complaints of Lydia and Alan Rieger against Metropolitan Edison Company at Docket Nos. C-2018-3005887, C-2018-3005889, and C-2018-3005877 are dismissed with prejudice.

3. That the Secretary's Bureau shall mark Docket Nos. C-2018-3005887, C2018-3005889, and C-2018-3005877 as closed.

Date: April 6, 2020

/s/
Jeffrey A. Watson
Administrative Law Judge