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August 22, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

Re: Maria Povacz v. PECO Energy Company
PUC Docket No. C-2012-2317176

Dear Ms. Chiavetta:

Enclosed for filing with the Commission are the following documents and copies in the matter referenced above.

—	Answer (1 original)
—	Answer & New Matter (1 original)
—	Motion to Dismiss (original)
—	Motion for Judgment on the Pleadings (1 original)
<u>X</u>	Preliminary Objection (1 original)
—	Exceptions (1 original)
—	Reply Exceptions (1 original)
—	Main Brief (1 original)
—	Reply Petition (1 original)

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Thank you for your time and attention on this matter.

Very truly yours,



Shawane Lee
Counsel for PECO Energy Company

SL/lo

Enc.

Scheduling Recommendation: Call of the docket ___ Non Call of the docket _

PENNSYLVANIA PUBLIC UTILITY COMMISSION

MARIA POVACZ :
 Complainant :
 v. : **DOCKET NO. C-2012-2317176**
 : :
PECO ENERGY COMPANY :
 Respondent :
 : :
 : :

NOTICE TO PLEAD

Pursuant to 52 Pa. Code §§ 5.101 and 5.62(c), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of PECO Energy Company within 20 days from service of this notice, a decision may be rendered against you. All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for PECO Energy Company, Shawane L. Lee, and where applicable, the Administrative Law Judge presiding over the issue.

File with:
Rosemarie Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

With a copy to:
Shawane L. Lee, Esq.
PECO Energy Company
2301 Market Street, S-23
Philadelphia, PA 19103

Dated at Philadelphia, PA, August 22, 2012



Shawane L. Lee
Counsel for PECO Energy Company
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215-841-6863
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARIA POVACZ	:	
Complainant	:	
v.	:	DOCKET NO. C-2012-2317176
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

**PRELIMINARY OBJECTION OF RESPONDENT,
PECO ENERGY COMPANY**

Respondent, PECO Energy Company (“PECO Energy”), pursuant to 52 Pa. Code § 5.101(a)(4) respectfully petitions this Honorable Commission to dismiss the instant Complaint as legally insufficient.

1. On August 2, 2012, PECO Energy was served with a formal complaint filed by Maria Povacz (hereafter “Complainant”). A copy of the Complaint is attached hereto as Exhibit “1”.

2. In her Complaint, the Complainant alleges the following:

On June 15, 2012, I received a notice from PECO advising of the installation of a smart meter in my area. 2 days later, I contacted PECO via phone and ask (sic) the customer service representative to make a notation in my account that I do not give my permission for the meter install (sic). I was advised that this is mandatory in PA and failure to do so will result in my acct. being terminate (sic). I proceeded to state that failure to refuse meter install (sic) should not constitute loss of acct. termination as I have never been late in paying my bill. **I want to opt out of the smart meter installation** for reasons specified in my letter (copy attached) date June 18th. These are of course not off (sic) course the only reasons. PECO is the only electrical company so the customers should have a choice in the matter especially, because as per Act 129 we will be required to pay for such a terrible device.

See Exhibit “1”.

3. In her request for relief, the Complainant states “since changing electrical co (sic) is not an option, **I want to be given the option to opt out**” of smart meter installation.

Complainant additionally requests that PECO Energy leave her analog meter untouched and functional for as long as she resides at her address. See Exhibit “1”.

4. PECO Energy simultaneously filed an Answer and the instant Preliminary Objection.

5. Pursuant to 52 Pa. Code § 5.101, preliminary objections may be filed against a complaint and dismissed for legal insufficiency. 52 Pa. Code § 5.101(a)(4).

6. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil procedure. Equitable Small Transportation Intervenors. v. Equitable Gas Co., 1994 Pa.PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

7. In deciding preliminary objections, the Public Utility Commission must determine, based on the factual pleadings of the petitioner, if relief or recovery is possible. Roc v. Flaherty, 527 A.2d 211 (Pa. Cmwlth 1985).

8. A complaint must be able to recover under the law to survive a preliminary objection. Milliner v. Enck, 709 A.2d 417, 418 (Pa. Super. Ct. 1998) (“preliminary objection should be sustained only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover”).

9. All of the non-moving party’s averments must be taken as true for the sake of deciding the preliminary objection. County of Allegheny v. Commw. of Pa., 490 A.2d 402 (Pa. 1985).

10. The court does not, however, need to accept, “unwarranted inferences from facts, argumentative allegations, or expressions of opinions.” Feingold v. McNulty, 2009 Phila. Ct. Com. Pl LEXIS 167, *3.

11. Section 703 of the Public Utility Code, 66 Pa. C.S.A. § 703(b) provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary to the public interest.

12. A hearing is required only when there is a disputed question of fact, and is not required to resolve questions of law. Dee-Dee Cab, Inc. v. Pa.Pub. Util. Comm’n, 817 A.2nd 593 (Pa.Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003).

13. Here, there are no genuine issues of fact and PECO Energy is entitled to judgment as a matter of law with respect to all of the allegations in the Complaint.

I. Legal Insufficiency – Prior Commission Approval of Smart Meter Installation

14. The Complainant has requested that she be permitted to “opt out” of the smart meter installation at her residence. PECO Energy’s Smart Meter installation plan was approved by the Pennsylvania Utility Commission on May 6, 2010, as a part of the Smart Meter Technology Procurement and Installation Plan, (“Smart Meter/Smart Grid Plan”) at docket number M-2009-2123944.

15. By way of background, Governor Edward Rendell signed Act 129 of 2008 into law on October 15, 2008. The Act took effect 30 days thereafter on November 14, 2008, and amended Section 2807 of the Public Utility Code. Among other things, the Act specifically directed that electric distribution companies (such as PECO Energy) with more than 100,000

customers file smart meter technology procurement and installation plans with the Commission for approval. See 66 Pa. C.S. § 2807(f). The statute does not provide customers with an option to “opt out” of smart meter installation.

16. On June 18, 2009, the Commission adopted a Smart Meter Procurement and Installation Implementation Order (“Implementation Order”) to establish the standards each plan must meet and to provide guidance on the procedures to be followed for submittal, review and approval of all aspects of each smart meter plan. See Smart Meter Procurement and Installation Implementation Order, entered on June 24, 2009, at Docket No. M-2009-2092655.

17. Specifically, the Commission’s Implementation Order states:

Act 129 requires EDCs to furnish smart meter technology (1) upon request from a customer that agrees to pay the cost of the smart meter at the time of the request, (2) in new building construction, and (3) in accordance with a depreciation schedule not to exceed 15 years. 66 Pa.C.S. § 2807(f)(2).

The Commission believes that it was the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide when it included a requirement for smart meter deployment “in accordance with a depreciation schedule not to exceed 15 years.”

**THEREFORE,
IT IS ORDERED:**

1. That the Commission establishes specific smart meter technology minimum capabilities and procedures for submittal, review and approval of all aspects of each smart meter plan to include cost recovery.
2. That electric distribution companies with greater than 100,000 customers adhere to the guidelines for smart meter technology procurement and installation identified in this Implementation Order.

3. That the Director of Operations convene a stakeholder meeting no later than July 17, 2009, to discuss issues related to the costs and benefits associated with the Commission imposed smart meter capability requirements.

4. That all electric distribution companies that are required to file a smart meter technology procurement and installation plan file such a plan consistent with the directives contained in this order by August 14, 2009.

See id.

18. The Commission's Order does not have a provision for customers to "opt out" of the smart meter installation.

19. Through its Implementation Order and policies, the Commission has approved the smart meter implementation process required by Act 129.

20. Indeed, Pennsylvania PUC Chairman, Robert F. Powelson stated:

Act 129 of 2008 has really paved the way for the rollout of smart meters, also referred to as Advanced Metering Infrastructure (AMI), and the implementation of Act 129 continues to benefit Pennsylvania customers. As I see it, smart meter technology is a "win-win" situation for the Commonwealth – both electricity customers and electricity providers alike reap the benefits of advanced meters.

See PaPUC Chairman Powelson on Smart Meters and Pennsylvania's Energy Future at <http://www.smartgridlegalnews.com/interviews/papuc-chairman-powelson-on-smart-meters-and-pennsylvanias-energy-future/>

21. On August 14, 2009, PECO Energy filed with the Commission its Petition of PECO Energy Company for Approval of its Smart Meter/Smart Grid Plan.

22. Amongst other things, PECO Energy's Petition requested that the Commission approve the deployment of up to 600,000 smart meters. See PECO Energy's Smart Meter/Smart Grid Petition.

23. As a part of PECO Energy's meter deployment plan, the company committed to deploy 600,000 meters by March 2013, upon receiving American Recovery and Reinvestment Act funding from the Department of Energy. See id.

24. PECO Energy's Implementation plan does not give customers the option to "opt out" of smart meter installation.

25. By Order entered May 6, 2010 at Docket No. M-2009-2123944, the Commission approved PECO Energy's Smart Meter/Smart Grid Plan.

26. The Commission's Order approving PECO Energy's plan does not provide an "opt out" provision.

27. In conjunction with the Commission's Implementation Order; the Commission-approved Smart Meter/Smart Grid Plan and continuing compliance with Act 129, PECO Energy has deployed over 194,000 Advanced Metering Infrastructure ("AMI") meters in customer's homes and businesses.

28. Act 129, the Commission's Implementation Order; and PECO Energy's Commission-approved Smart Meter/Grid Plan do not provide customers the ability to "opt out" of having a smart meter installed in their homes or businesses. See 66 Pa. C.S. § 2807(f). See also Smart Meter Procurement and Installation Implementation Order, at Docket No. M-2009-2092655. See PECO Energy's Smart Meter/Smart Grid Plan at docket number M-2009-2123944.

29. The absence of an "opt out" provision in the existing statute; Implementation Order; and Smart Meter/Smart Grid Plan is underscored by a recent bill introduced at the General Assembly.

30. House Bill 2188, which was introduced on February 8, 2012, seeks to change the existing law by adding a “opt out” provision. Specifically, House Bill 2188 reads as follows:

Section 2807(f) of Title 66 of the Pennsylvania Consolidated Statutes is amended by adding a clause to read:

§ 2807. Duties of electric distribution companies.

** * **

(2) Electric distribution companies shall furnish smart meter technology as follows:

(iii) In accordance with a depreciation schedule not to exceed 15 years.

(iv) Customers may request to opt out of receiving smart meter technology under subparagraph (iii) by notifying, in writing, the electric distribution company. Meters for customers who opt out will be replaced according to a useful life depreciation schedule.

31. House Bill 2188 attempts to address individual customer concerns about the smart meter (such as the Complainant’s concerns) by allowing individual customers to “opt out” of receiving smart meter technology on the mandatory schedule established by Act 129.

32. The “opt out” provision; however, has not been scheduled for a vote by the General Assembly, and the ability to opt out of smart meter installation is not currently permissible under the law.

33. Accordingly, the Complainant’s formal complaint, requesting the ability to “opt out” of smart meter installation should be dismissed as a matter of law.

34. The Commission has reached a similar conclusion with cases concerning PECO Energy’s elimination of the Residential Heating rate, which was required by the Electricity Generation Customer Choice and Competition Act of 1996, 66 Pa.C.S. §§ 2801-15.

35. There have been multiple formal complaints filed by individual customers in opposition to phasing out the Residential Heating Rate.

36. The PUC precedent for formal complaints filed against PECO Energy and other utility companies in opposition of the elimination of the Residential Heating rate is clear and

unambiguous. These complaints are dismissed as a matter of law pursuant to 66 Pa.C.S. §§ 2801-15. See e.g. Tshudy v. PPL Electric Utilities Corp., Docket No. C-2009-2092230 (Order entered August 21, 2009); Dunham v. PPL Electric Utilities Corporation, Docket No. C-2010-2155056; Kupchinskis v. PECO Energy Company, Docket No. C-2011-2253896; Brickner v. PPL Electric Utilities Corporation, Docket No. C-2009-2105583.

37. Like the complaints filed in opposition to the elimination of the Residential Heating rate, this Complaint objecting to the installation of the smart meter, and requesting an “opt out” should be dismissed.

38. The Complainant’s Complaint does not allege that PECO Energy improperly installed the meter in any way contrary or inconsistent with the Commission-approved Smart Meter/Smart Grid Plan.

39. The Complainant simply alleges that she wants to “opt out” of smart meter installation.

40. Assuming that everything the Complainant alleges in her Complaint is true, PECO Energy is operating under the basis of Act 129 and the specific direction given to the company by the legislature and the Commission through the Commission’s Implementation Order.

41. The Complainant’s Complaint, objecting to the installation of a smart meter at her residence, does not allege a violation of any order, law or tariff that can be the basis of any finding against PECO Energy.

42. Further, as the law currently stands, pursuant to Act 129 and the Commission’s Implementation Order, customers do not have the ability to “opt out” of smart meter installation.

43. Because PECO Energy's smart meters are being deployed in compliance with the Commission-approved Smart Meter/Smart Grid Plan, and the law does not provide for the Complainant to "opt out" of smart meter installation, there is no legal basis for the Complainant's Complaint.

44. Therefore, the Complainant is not entitled to relief under the law.

45. For the reasons set forth above, the Complainant's Complaint should be dismissed as a matter of law.

REQUEST FOR RELIEF

WHEREFORE, for the reasons set forth above, PECO Energy Company respectfully requests that your Honorable Commission summarily dismiss the Complainant's formal complaint, and all issues which were raised in the Complaint.

Respectfully submitted,



Shawane L. Lee
Counsel for PECO Energy Company
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P.O. Box 8699
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(215) 841-6841
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARIA POVACZ	:	
Complainant	:	
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	:	
PECO ENERGY COMPANY	:	
Respondent	:	

VERIFICATION

I, Shawane L. Lee, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.



Date: August 22, 2012

Shawane L. Lee

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARIA POVACZ	:	
Complainant	:	
v.	:	DOCKET NO. C-2012-2317176
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

CERTIFICATE OF SERVICE

I, Shawane L. Lee, hereby certify that I have this day served a copy of PECO Energy Company's Answer in the above matter upon all interested parties by mailing a copy, properly addressed and postage prepaid to:

Maria Povacz
533 Tori Court
New Hope, PA 18938

Dated at Philadelphia, Pennsylvania, August 22, 2012



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August 22, 2012

**Maria Povacz
553 Tori Court
New Hope, PA 18938**

**Re: Maria Povacz v. PECO Energy Company
PUC Docket No. : C-2012-2317176**

Dear Ms. Povacz:

Enclosed is a copy of PECO Energy Company's response to the formal complaint filed in the above-referenced docket. The law requires PECO Energy to file an answer to your Public Utility Commission complaint. Keep these papers for your records. This is not a decision on your complaint. PECO's response may include a New Matter, Motion or Preliminary Objection. Please note that if you do not respond to a New Matter, Motion, or Preliminary Objection an unfavorable decision may be rendered against you. Responses to New Matters and Motions must be filed within 20 days. Responses to Preliminary Objections must be filed within 10 days. If there is no New Matter, Motion or Preliminary Objection included, no response is required.

Soon, the Public Utility Commission will schedule either a settlement conference or a hearing on your complaint. The Commission will let you know by mail whether there will be a conference or a hearing and will include instructions on what to do next. If the matter is set for hearing, the notice will provide you with information about the date, time and place of the hearing. If we are unable to resolve your complaint and have to proceed with a hearing, a judge will be at the hearing and will decide your complaint. You must call the Public Utility Commission if you have any questions about the hearing or if you cannot attend the hearing.

Thank you for your time and attention on this matter.

Very truly yours,



Shawane Lee
Counsel for PECO Energy Company
Enc.
SL/lo