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February 26, 2014

**VIA UPS OVERNIGHT DELIVERY**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

Re: Utility Workers Union of America System Local 102 and Robert T. Whalen v.  
West Penn Power Company  
Docket No. C-2014-2404308

Dear Secretary Chiavetta:

On behalf of West Penn Power Company, I have enclosed for filing the Preliminary Objections of West Penn Power Company to the Formal Complaint of Utility Workers Union of America and Robert T. Whalen in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,

  
Brian C. Wauhop

BCW/tlg  
Enclosure  
cc: Certificate of Service

**RECEIVED**

FEB 26 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**UTILITY WORKERS UNION OF  
AMERICA SYSTEM LOCAL 102 AND  
ROBERT T. WHALEN** :

**Docket No. C-2014-2404308**

v. :

**WEST PENN POWER COMPANY** :

**RECEIVED**

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**NOTICE TO PLEAD**

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**FEB 26 2014**

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

TO: Scott J. Rubin  
333 Oak Lane  
Bloomsburg, PA 17815-2036

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of West Penn Power Company to the Formal Complaint of Utility Workers Union of America and Robert T. Whalen within **ten (10) days** from service of this Notice, the facts set forth by West Penn Power Company in the Preliminary Objections may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for West Penn Power Company, and where applicable, the Administrative Law Judge presiding over the case.

**File with:**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**With a copy to:**

Brian C. Wauhop  
Buchanan Ingersoll & Rooney, PC  
409 North Second Street  
Suite 500  
Harrisburg, PA 17101

Dated: February 26, 2014

  
\_\_\_\_\_  
Brian C. Wauhop, Esq.

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

FEB 26 2014

UTILITY WORKERS UNION OF  
AMERICA SYSTEM LOCAL 102,  
AND  
ROBERT T. WHALEN

v.

WEST PENN POWER COMPANY

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PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Docket No. C-2014-2404308

**PRELIMINARY OBJECTIONS TO THE COMPLAINT OF UTILITY WORKERS  
UNION OF AMERICA SYSTEM LOCAL 102 AND ROBERT T. WHALEN**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

West Penn Power Company (“West Penn” or the “Company”) by and through its attorneys John F. Povilaitis, Alan Michael Seltzer, Brian C. Wauhopp, and Buchanan Ingersoll & Rooney PC, files these Preliminary Objections pursuant to Section 5.101(a) of the Pennsylvania Public Utility Commission (“Commission”) regulations at 52 Pa. Code §§ 5.101(a)(1), (4) and (7), and in support thereof, avers as follows:

**I. Introduction**

1. On February 6, 2014, West Penn was served via electronic mail with the formal complaint of the Utility Workers Union of America System Local 102 (“UWUA”), Robert T. Whalen (“Whalen”) (collectively, UWUA and Whalen, “Complainants”) at Commission Docket No. C-2014-2404308 (“Formal Complaint”).

2. As explained in greater detail below, the Formal Complaint must be dismissed on several bases. First, Whalen lacks standing to assert the claims made in the Formal Complaint as an individual. Second, the UWUA lacks standing to assert claims in a representational capacity. Third, to the extent the Formal Complaint requests that the Commission direct West Penn to hire

meter readers to enable compliance with its meter reading regulations, the Commission lacks jurisdiction to direct West Penn to make such hires.

3. For the reasons specified more fully below, the Company requests that these Preliminary Objections be granted and that the Commission dismiss the Formal Complaint with prejudice.

## **II. Background**

4. West Penn is an electric distribution company that is certificated as a public utility in Pennsylvania.

5. In the Formal Complaint, Whalen asserts he is an individual and residential customer of West Penn (Formal Complaint ¶ 3), while the UWUA alleges it is the authorized collective bargaining representative for certain West Penn employees (Formal Complaint ¶ 1).

6. Both Whalen and the UWUA are represented by a single attorney (Formal Complaint ¶ 4).

7. In essence, the Formal Complaint claims that West Penn has repeatedly and willfully violated the Commission's regulations at 52 Pa. Code § 56.262 ("Meter Reading Regulations"),<sup>1</sup> which generally require a public utility that bills customers monthly to read residential meters at least once every two months, with certain exceptions. (Formal Complaint ¶¶ 11, 13, and 14).

8. For relief, the Formal Complaint asks, among other things, that the Commission: (i) impose a civil penalty against West Penn in the amount of \$1,000 for each alleged violation of the Meter Reading Regulations and (ii) order West Penn to "hire a sufficient number of meter

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<sup>1</sup> As explained in the Company's Answer with New Matter, the Formal Complaint erroneously cites 52 Pa. Code § 56.262 as the Commission regulation that governs the Company's meter reading activities. The correct regulation that governs West Penn's meter reading policy is 52 Pa. Code § 56.12.

readers in each portion of its service area to enable West Penn to comply with the meter reading requirements contained in 52 Pa. Code § 56.262.” (Formal Complaint, ¶¶ A and B).

9. West Penn is timely filing its Answer and New Matter contemporaneously with these Preliminary Objections, which Answer and New Matter are incorporated into these Preliminary Objections as if fully set forth herein.

### **III. Legal Standards Applicable to Preliminary Objections**

10. The Commission’s Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101; see also *Equitable Small Transportation Interveners v. Equitable Gas Company*, Docket No. C-00935435 (Final Order entered July 18, 1994).

11. The grounds for preliminary objections are set forth in 52 Pa Code § 5.101(a):

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

12. The Commission recently added § 5.101(a)(7) to its regulations allowing an objection to a party’s standing to participate in proceedings before the Commission to be raised via preliminary objections. *See Amendment of Public Utility Commission Rules of Practice and*

*Procedure; 52 Pa. Code Chapters 1, 3 and 5, Docket No. L-2012-2296005 (Final Rulemaking Order entered June 13, 2013).*

13. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners*, Docket No. C-00935435 (July 18, 1994).

14. Administrative motions practice before the Commission contemplates the filing of a preliminary objection to the legal insufficiency of a complaint. *See* 52 Pa. Code § 5.101(a)(4).

15. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission has adopted this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

16. Thus, in resolving a preliminary objection, the Commission must assume that:

[a]ll material facts set forth in the complaint as well as all inferences reasonably deductible therefrom are admitted as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

*McMahon v. Shea*, 688 A.2d 1179, 1181 (Pa. 1997).

17. The Commission may dismiss a complaint without hearing if, in its opinion, a hearing is not necessary in the public interest. 52 Pa. Code § 5.21(d); *see also Lydine Dutton v. Cordia Communications Corporation*, Docket No. F-2010-2201413 (Initial Decision entered March 10, 2011; Order entered September 22, 2011) (citing 66 Pa.C.S. § 703(b)).

#### IV. Argument

##### A. **Preliminary Objection Regarding Lack of Individual Standing Pursuant to 52 Pa. Code § 5.101(a)(7).**

18. While Whalen avers in the Formal Complaint he received estimated meter readings from the Company in violation of the Meter Reading Regulations, he fails to allege any of the following, all of which are essential to establishing legal standing to prosecute the Formal Complaint against West Penn:

- (i) that he suffered any harm as a result of the estimated meter readings;
- (ii) that the Company has done anything to cause him any injury or harm; and
- (iii) that he has any interest in the Company's meter reading practices.

19. Consequently, Whalen does not have standing to prosecute the claims raised in the Formal Complaint because he has not pled an interest in the Company's meter reading practices and has not averred that the Company's conduct has caused him any harm.

20. In order to bring a complaint before a tribunal like the Commission, a complainant must first demonstrate that she/he has standing to maintain the action. *Nye v. Erie Insurance Exchange*, 470 A.2d 98, 100 (Pa. 1983). Standing requires that a party have an interest in the matter that is *substantial, direct and immediate*. *William Penn Parking Garage, Inc. et al. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). These criteria are defined as follows:

A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A 'direct' interest requires a showing that the matter complained of caused harm to the party's interest. An 'immediate' interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or the constitutional guarantee in question.

*George v. Pennsylvania PUC*, 735 A.2d 1282, 1286 (Pa. Cmwlth. 1999).

21. The standard set by *William Penn Parking Garage* is applicable to Commission cases. *Courier Express, Inc. v. F.L. Shaffer Company, Inc.*, Docket No. C-892462 (Order entered August 30, 1990, petition for reconsideration denied December 3, 1990).

22. Whalen has the burden of establishing his standing to participate in this proceeding and has failed to meet that burden by not asserting appropriate factual averments. *Nye*, 470 A.2d at 100.

23. As noted above, Whalen did not allege in the Formal Complaint that he suffered any harm as a result of West Penn's conduct. *George v. Pennsylvania PUC*, 735 A.2d at 1286. In fact, he failed to identify any interest whatsoever in the Company's meter reading practices that would surpass the common interest of the public in procuring obedience to the law, which is the required showing for standing under Pennsylvania law. *Id.*

24. What Whalen has alleged, however, is a technical violation of the Meter Reading Regulations. However, the Commission has held that a "technical violation" of a Commission regulation is not a *per se* violation of Section 1501 of the Public Utility Code ("Code"), 66 Pa.C.S. § 1501. *Montgomery v. T-Netix, Inc., et. al*, Docket No. C-20031203 (Final Order entered September 29, 2008). If a public utility's alleged violation of a Commission regulation "does not result in inconvenience, interruptions in service or expense to the customer or have safety implications," then the technical regulatory violation may not be considered unreasonable or inadequate service pursuant to Section 1501. *Id.*

25. Whalen has not pleaded any facts addressing such inconvenience, service interruptions or customer expense and, therefore, all that remains is a technical violation that cannot support any violation of the Code.

26. As a result, Whalen's allegation of a technical violation of a regulation does not create standing for him in this proceeding. *William Penn Parking Garage, Inc. et al. v. City of Pittsburgh*; *Courier Express, Inc. v. F.L. Shaffer Company Inc.*; *George v. Pennsylvania PUC*; *Montgomery v. T-Netix, Inc., et al.*

**B. Preliminary Objection Regarding UWUA Lack of Representational Standing Pursuant to 52 Pa. Code § 5.101(a)(7).**

27. West Penn incorporates paragraphs 1-26 as if set forth fully herein.

28. UWUA avers it is the "authorized collective bargaining representative for certain employees of West Penn Power Company" (Complaint ¶ 1), and that it "brings this complaint in its representative capacity on behalf of hundreds of members of UWUA . . . [and] . . . as the representative of meter readers and other West Penn employees." (Complaint ¶¶ 7-8).

29. The Formal Complaint fails to aver sufficient facts to establish that UWUA has representational standing to bring the Formal Complaint on behalf its members because UWUA has failed to plead – let alone demonstrate – that any of its members have a direct, immediate and substantial interest in the subject matter of this proceeding.

30. The Commission recognizes that an organization may have representational standing if any of its individual members would have standing to maintain the complaint. *Utility Workers Union of America System Local 537 v. Pennsylvania-American Water Company*, Docket No. C-2012-2287204 (Final Order entered June 21, 2012) (citing *PPL Electric Utilities Corporation Universal Service and Energy Conservation Plan for 2011 through 2013*, Docket No. M-2010-2179796 (Order entered May 5, 2011)). If the organization's members do not have standing to prosecute a claim because they have not suffered a direct, immediate and substantial harm, the organization does not have representational standing to maintain an action on behalf of its members. *Utility Workers Union*

*of America System Local 537 v. Pennsylvania-American Water Company*, Docket No. C-2012-2287204 (Final Order entered June 21, 2012).

30. As explained above, Whalen has not established his individual standing to prosecute the Formal Complaint.<sup>2</sup> Nor does the Formal Complaint plead facts establishing that any of the “hundreds of members of UWUA” or “meter readers and other West Penn employees” have a direct, immediate and substantial interest in the subject matter of this litigation which, as noted above, constitute the threshold test for establishing standing. Indeed, the Formal Complaint does not identify any harm whatsoever that the “hundreds of members of UWUA” or “meter readers and other West Penn employees” have allegedly suffered as a result of West Penn’s actions.

31. Therefore, the UWUA does not have representational standing to participate in this proceeding because it has not pled facts sufficient to establish that any of its members (including Whalen to the extent he is alleged to be a member of the UWUA) have a direct, immediate and substantial interest in this matter to have standing to participate. *Utility Workers Union of America System Local 537 v. Pennsylvania-American Water Company*, Docket No. C-2012-2287204 (Final Order entered June 21, 2012) (citing *PPL Electric Utilities Corporation Universal Service and Energy Conservation Plan for 2011 through 2013*, Docket No. M-2010-2179796 (Order entered May 5, 2011)).

33. Moreover, to the degree that Whalen and UWUA purport to bring claims on behalf of other West Penn customers, those claims are also barred.

34. In Paragraph 14 of the Formal Complaint, Whalen and UWUA allege that West Penn estimates bills for “thousands of residential customers.”

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<sup>2</sup> In fact, the Formal Complaint fails to plead facts establishing that Whalen is even a member of the UWUA.

35. In Paragraph A of the Formal Complaint, Whalen and UWUA request that the Commission levy a fine against the Company “for each violation of 52 Pa. Code § 56.262 that occurred in the three years prior to the date of this Complaint.”

36. As such, Whalen and UWUA are purporting to assert claims and seek civil penalties against the Company on behalf of West Penn customers other than those that are UWUA members. Neither Whalen nor UWUA provide any legal basis supporting their assertion of claims on behalf of these non-UWUA customers.

37. There is no Code provision authorizing Whalen or UWUA to assert claims on behalf of other customers and seek penalties for service the Company provides to other non-UWUA customers.

38. On the contrary, to the degree that Whalen and UWUA are purporting to assert claims on behalf of a class of West Penn customers, the Commission has specifically held that those types of claims are barred. *See Pettko v. Pennsylvania American Water Co.*, Docket No. C-2011-2226096 (October 5, 2011 Order Granting in Part Motion for Judgment on the Pleadings; Final Order entered February 28, 2013).

39. In *Pettko*, the complainant asserted numerous allegations against a public utility and sought the formation of a “class” of similarly situated customers. *Pettko* at 1-2. The utility filed a motion for judgment on the pleadings arguing, among other things, that the Commission is not the proper forum to assert a class action. *Id.* at 2.

40. In the order granting partial judgment on the pleadings, ALJ Joel Cheskis analyzed the complainant’s attempt to assert claims on behalf of other customers:

PAWC is correct in its Answer to the Complaint that class actions are not permitted under the Public Utility Code and, therefore, the Complainant cannot represent the interests of any other customer. The Complaint cannot be brought on behalf of “all others similarly situated,” as is possible in proceedings brought

before a Court of Common Pleas. Section 701 of the Public Utility Code provides that any person may complain in writing to the Commission regarding the acts or omissions of a public utility. 66 Pa. C.S. § 701. Nothing in that Section 701 or any other section of the Public Utility Code, however, allows for the filing of class action complaints. In the absence of statutory authority, the Commission cannot entertain class action complaints.

*Id.* at 6.

41. The same outcome is warranted here. Like ALJ Cheskis correctly held in *Pettko*, Whalen and UWUA cannot bring claims before the Commission on behalf other non-UWUA West Penn customers.

42. The Formal Complaint must be dismissed because UWUA has no representational standing to participate in this proceeding and neither UWUA nor Whalen are able to assert claims on behalf of other non-UWUA West Penn customers before the Commission.<sup>3</sup>

**C. Preliminary Objection Regarding Lack of Commission Jurisdiction to Grant Requested Relief Pursuant to 52 Pa. Code § 5.101(a)(1) and (4).**

43. West Penn incorporates paragraphs 1-42 as if set forth fully herein.

44. The Formal Complaint requests that the Commission order West Penn to “hire a sufficient number of meter readers in each portion of its service territory” to enable the utility to comply with the Commission’s meter reading requirements. (Complaint ¶ B.)

45. The Commission has no jurisdiction or authority to direct West Penn to engage in a specific employee hiring program on two primary bases.

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<sup>3</sup> If the Commission does not dismiss UWUA’s participation in this proceeding for lack of representational standing, West Penn requests that the Commission grant West Penn additional time to develop the additional facts and information necessary to address UWUA’s lack of representational standing. While West Penn is required to assert any claims/defenses regarding lack of standing in preliminary objections under 52 Pa. Code § 5.101(a)(7), representational standing presents unique issues that are not capable of being resolved at this stage of the proceeding, *if the Commission does not to dismiss the UWUA’s participation now on the bases identified above*. This because certain critical facts solely within the UWUA’s possession and control must be developed through discovery before determining if the UWUA can lawfully represent its members and, if so, on what issues.

46. First, under Chapters 13 and 15 of the Code, the Commission has jurisdiction to adjudicate matters involving rates, services and facilities of public utilities.

47. To the extent the issue of a public utility's obligation to hire employees is addressed by the collective bargaining agreement, it is a labor dispute, and the Commission's jurisdiction does not encompass disputes between employee and employer. *Ciabattini v. Rounsville t/a Schuylkill Valley Airport Shuttle*, 2009 Pa. PUC LEXIS 259 (June 16, 2009)(Opinion by CALJ Smith on POs).

48. Therefore, the UWUA's request that the Commission direct West Penn to hire additional meter readers is not within the Commission's jurisdiction and authority and is barred.

49. Second, for the Commission to direct West Penn to hire a sufficient number of additional meter readers would violate existing and well-established law that the Commission is not a "super board of directors" that can order a public utility to manage its business in any particular way. *See Brian M. Rudnick v. Verizon Pennsylvania Inc.*, C-2009-2142052 (Final Order entered April 1, 2011) (quoting *Northern Pennsylvania Power Co. v. Pa. Publ. Util. Comm'n*, 5 A.2d 133, 134-35 (Pa. 1939): "The Public Utility Commission is not a super board of directors for the public utility companies of the state and it has no right of management of them. Its sole power is to see that in matters of rates, service and facilities, their treatment of the public is fair. . . . while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies and is not clothe[d] with the general power of management incident to ownership.").

50. Therefore, the Formal Complaint's request for relief that West Penn be directed to hire a sufficient number of additional meter readers (Formal Complaint, ¶ B) must be dismissed


because the Commission does not have jurisdiction to order the Company to hire more meter readers.

**V. CONCLUSION**

WHEREFORE, for the foregoing reasons, West Penn Power Company respectfully requests that the Commission grant its Preliminary Objections and dismiss the Formal Complaint for the reasons specified above, and grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: February 26, 2014

  
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John F. Povilaitis  
Alan Michael Seltzer  
Brian C. Wauhop  
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Attorneys for  
West Penn Power Company

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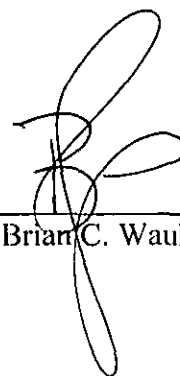
**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

**Via UPS Overnight Delivery**

Scott J. Rubin  
333 Oak Lane  
Bloomsburg, PA 17815-2036

Dated this 26<sup>th</sup> day of February, 2014.



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Brian C. Wauhop, Esq.

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