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March 25, 2014

VIA UPS OVERNIGHT DELIVERY

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

RECEIVED

MAR 25 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

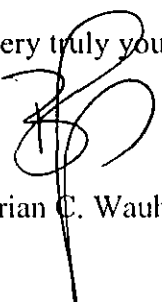
Re: John Lavelly v. West Penn Power Company
Docket No. C-2014-2408502

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 Richard S. Bell 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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JOHN LAVELY

v.

WEST PENN POWER COMPANY

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Docket No. C-2014-2408502

NOTICE TO PLEAD

RECEIVED

MAR 25 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

TO: John Lavelly
131 Smith Road
New Bethlehem, PA 16242

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 John Lavelly 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: March 25, 2014



Brian C. Wauhop, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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JOHN LAVELY

v.

WEST PENN POWER COMPANY

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Docket No. C-2014-2408502

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**PRELIMINARY OBJECTION OF WEST PENN POWER COMPANY
TO THE COMPLAINT OF JOHN LAVELY**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, West Penn Power Company ("West Penn" or the "Company"), by and through its counsel, Brian C. Wauhop, Alan Michael Seltzer, and Buchanan Ingersoll & Rooney PC, files these Preliminary Objections pursuant to Sections 5.101(a)(2)(4), and (7) of the Pennsylvania Public Utility Commission ("Commission") regulations at 52 Pa. Code § 5.101(a), and in support thereof, avers as follows:

I. Introduction

1. In his recently filed Formal Complaint, John Lavelly ("Complainant") alleges he sustained damage to his properties located at 2218 Madison Road, New Bethlehem, Pennsylvania, 16242 and 2219 Madison Road, Distant, Pennsylvania, 16242 ("Madison Road Locations").¹ (Compl. ¶ 4(B)(1).) The Complainant demands West Penn compensate him for the value of property allegedly destroyed due to "frozen water lines" that resulted from a weather-related electric power outage. (*Id.* ¶ 5.)

2. As explained in greater detail below, the Complainant is not the customer of record at the Madison Road Locations, the places he claims he sustained damage. As a result, the Complainant has no standing to assert claims related to the electric service the Company

¹ As explained in the Company's Answer with New Matter filed March 25, 2014, the Formal Complaint alternatively alleges that the Madison Road Locations are located in New Bethlehem, Pennsylvania (*see* Compl. ¶ 1), and Distant, Pennsylvania (*see* Compl. ¶ 4(B)). The Company's records confirm that 2218 Madison Road is located in New Bethlehem, Pennsylvania and 2219 Madison Road is located in Distant, Pennsylvania.

provides to the customers of record at the Madison Road Locations. In addition, the Commission does not have the power and legal authority to award money damages. As such, the Formal Complaint does not state a claim upon which the Commission may grant relief. Moreover, the Complainant does not allege that the Company failed to provide reasonable, adequate, safe and reliable service to him. As a result, the Company requests that this Preliminary Objection be granted and that the Commission (i) strike all allegations in the Formal Complaint regarding money damages; (ii) dismiss the Formal Complaint for failure to state a claim upon which the Commission may grant relief; and (iii) grant the Company any other relief as may be just and reasonable under the circumstances.

II. Background

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

4. On or about March 3, 2014, the Complainant filed a Formal Complaint with the Commission against West Penn at the above-captioned docket requesting that West Penn compensate him for the cost of new water lines and carpet the Complainant alleges were damaged because pipes carrying water to the Madison Road Locations froze. (Compl. ¶ 4.)

5. In Paragraph 1 of the Formal Complaint indicates that this dispute involves utility service provided to “Laurie Russo” and/or “Mr. and Mrs. James Leisure” at 2218 and 2219 Madison Road, New Bethlehem, Pennsylvania, 16242.

6. On or about March 3, 2014, the Formal Complaint was served on West Penn via electronic mail.

7. West Penn is timely filing its Answer and New Matter contemporaneously with this Preliminary Objection.

III. Argument

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

9. The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa. Code §5.101(a) as follows:

- (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.

10. 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).

11. 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).

12. 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).

13. 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).

14. 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).

15. 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)).

16. While the Commission generally refrains from dismissing complaints filed by *pro se* complainants without allowing them an opportunity to develop an evidentiary record, an administrative law judge has the discretion to dismiss a complaint on preliminary motion if that dismissal is neither arbitrary nor capricious, and is otherwise in accordance with the law. *Guesman v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2012-2326301 (Final Order entered January 4, 2013) (citing *Graham v. Philadelphia Suburban Water Company and Bell-Atlantic Pennsylvania, Inc.*, Docket No. C-00957557 (Order entered June 12, 1996)).

A. Preliminary Objection Regarding Standing Pursuant to 52 Pa. Code § 5.101(a)(7).

17. The Company incorporates the preceding paragraphs as if fully set forth herein.

18. In Paragraph 1 of the Formal Complaint, the Complainant alleges that this dispute involves utility service provided to “Laurie Russo” and/or “Mr. and Mrs. James Leisure” at the Madison Road Locations.²

19. In Paragraph 1 of the Formal Complaint, the Complainant avers his mailing address is 131 Smith Road, New Bethlehem, Pennsylvania 16242 and he receives residential retail electric service from the Company there under Account No. 100090272137 (“Account”).

20. The Complainant does not aver that he resides at or receives electric service from the Company at the Madison Road Locations.

21. In fact, the Complainant is not the ratepayer of record at either of the Madison Road Locations: the ratepayers of record there are Joshua Russo and James Leisure, and each has an individual residential account number for the electric service they receive from the Company there.

22. As such, the Complainant does not have standing to raise claims before this Commission regarding the electric service provided by the Company to other ratepayers under different account numbers.

23. 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:

² By way of background, the Company’s Answer with New Matter correctly identified Joshua Russo as the ratepayer of record for 2219 Madison Road, Distant, Pennsylvania.

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).

24. 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).

25. The Commission has repeatedly held that a complainant must be a customer of a utility in order to have standing to file a complaint about that utility's service. *Coggins v. PPL Electric Utilities Corp.*, Docket No. C-2012-2312785 (Final Order entered July 18, 2013 affirming dismissal of complaint on the basis that the complainant was not a customer of the utility, and therefore did not have standing to complaint about the utility's service); see also *Re: Pennsylvania American Water Company*, Docket Nos. A-212285F019, A-212285F020, A-212285F021 (Final Order entered October 26, 1995, dismissing protests for lack of standing as protestors were not customers of the utility); and *Pa. P.U.C. v. Marietta Gravity Water Company*, Docket Nos. R-00973991, R-00973991C0001-C0003 (Final Order entered November 21, 1997 dismissing complaints against utility filed by non-customers for lack of standing).

26. The Complainant has the burden of establishing its standing to participate in this proceeding, and has failed to meet that burden with appropriate factual averments. *Nye*, 470 A.2d at 100. The Complainant does not allege that he is a customer of record at the Madison Road Locations. In fact, he affirmatively alleges that he receives electric service from the Company at 131 Smith Road in New Bethlehem under the Account, and that other individuals receive utility service from the Company at the Madison Road Locations. (Compl. ¶ 1.)

27. Because the Complainant has not demonstrated that he has any interest in the electric service provided by the Company to the Madison Road Locations (and in fact, he has affirmatively pleaded that other individuals receive service from the Company there), he failed to demonstrate that he has standing necessary to bring a complaint disputing West Penn's electric service before this Commission. *William Penn Parking Garage, Inc. et al. v. City of Pittsburgh*; *Courier Express, Inc. v. F.L. Shaffer Company Inc.*; *Coggins v. PPL Electric Utilities Corp.*; *Re: Pennsylvania American Water Company*; *Pa. P.U.C. v. Marietta Gravity Water Company*. Accordingly, the Formal Complaint must be dismissed.

B. Preliminary Objection Regarding Impertinent Matter Pursuant to 52 Pa. Code § 5.101(a)(2).

28. The Company incorporates the preceding paragraphs as if fully set forth herein.

29. The Commission's procedural regulations allow a party to object to pleadings that fail to comply with its rules of administrative practice or that include scandalous or impertinent matters. *See* 52 Pa. Code § 5.102(a)(2).

30. In paragraph 5 of the Formal Complaint, the Complainant demands the following: "I would like re-Imbursed for cost of repairs." (Compl. ¶ 5.) Clearly, the Formal Complaint is seeking monetary damages from the Company for the value of property the Complainant alleges was damaged at the Service Locations.

31. It is well-established under Pennsylvania law that the Commission's enforcement powers do not include the power to award money damages. *Elkin v. Bell Tel. Co. of PA.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978); *see Nagy v. Bell Tel. Co. of PA.*, 436 A.2d 701 (Pa. Super. 1981).

32. In *Feingold*, the Pennsylvania Supreme Court explained:

. . . the statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility. Nor can we find an

express grant of power from which the power to award such damages can be fairly implied. Thus, it can be concluded that the Legislature did not intend for the PUC to have such a power.

Feingold, 383 A.2d at 794.

33. A prayer for damages which are not legally recoverable in the cause of action is “impertinent matter” in the sense that it is irrelevant to that cause of action, and is correctly challenged through a motion to strike the requested relief as impertinent matter. *Third Avenue Realty Limited Partners v. Pennsylvania-American Water Co.*, Docket No. C-2010-2167286 (Final Order entered September 30, 2010) (citing *Hudock v. Donegal Mut. Ins. Co.*, 264 A.2d 668 (Pa. 1970)).

34. Therefore, in accordance with Pennsylvania law, this Commission does not have the power to award monetary damages, and the Complainant’s request for money damages is an impertinent matter that must be stricken.

C. Preliminary Objection for Legal Insufficiency of the Complaint Pursuant to 52 Pa. Code § 5.101(a)(4).

35. The Company incorporates the preceding paragraphs as if fully set forth herein.

36. The Commission’s procedural regulations allow a party to object to pleadings that are legally insufficient. *See 52 Pa. Code § 5.102(a)(4)*.

37. In paragraph 4 of the Formal Complaint, the Complainant makes the following statement: “We incurred two houses with frozen water lines.” This allegation implicates water utility service, not electric utility service. The Company does not provide water utility service, and any issues related to water utility service are beyond the Company’s ability to control.

38. The Formal Complaint contains no allegations whatsoever about any conduct of the Company, let alone conduct that would constitute a violation of the Pennsylvania Public Utility Code, Commission order or regulation.

39. The only relief sought in this proceeding by the Complainant is his request that the Commission direct the Company to pay him money damages he alleges were caused by frozen water lines that were beyond the Company's ability to control.

40. When attacking the legal sufficiency of a pleading, the moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985). Therefore, in ruling on a preliminary objection, the Commission must assume, for decisional purposes only, that the factual allegations of the Formal Complaint are true. *Id.*

41. A preliminary objection may be granted only if the moving party prevails as a matter of law. *Roc v. Flaherty*, 527 A.2d 211 (Pa. Cmwlt. 1985). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dept. of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlt. 2003) citing, *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlt. 2002).

42. Applied here, the Company is not responsible for losses that occur due to storm or circumstances beyond its control:

The Company does not guarantee but will endeavor to furnish a continuous supply of electric energy and to maintain voltage and frequency within reasonable limits. The Company shall not be liable for damages or losses which the Customer may sustain caused by or resulting from interruptions in service, variations in service characteristics (including but not limited to high or low voltage, operation of protection or control devices, the single phasing of three-phase service, and phase reversals) or neutral to ground voltage, except such damages and losses which are solely caused by or due to the negligence or willful and wanton misconduct of the Company. *Any of the aforementioned conditions occurring as a result of conditions or occurrences beyond the Company's reasonable control or as a result of electric system design common to the electric utility industry or electric system operation practices or conditions common to the electric*

utility industry shall be conclusively deemed not to result from the negligence or willful and wanton misconduct of the Company.

West Penn Power Company Tariff for Electric Service, Electric Pa. P.U.C. No. 39, Original Page 4-5 (Effective: January 1, 1999) (emphasis added). “A public utility is required to adhere to its duly filed and Commission-approved tariff. Such tariff has the force and effect of law in Pennsylvania, and is legally binding upon the utility, its customers and the public.” *McCloughan v. Metropolitan Edison Co.*, Docket No. C-2010 (Final Order entered March 3, 2011) (citing 66 Pa. C.S. § 1303; *DiSanto v. Dauphin County Water Supply Company*, 436 A.2d 197 (Pa. Super. 1981); *Brockway Glass Co. v. Pennsylvania Public Utility Commission*, 437 A.2d 1067 (Pa. Cmwlth. 1981)).

43. Because the Commission cannot order the Company to award money damages to the Complainant, and the Company is not liable for any damages due to frozen water lines—clearly an event beyond the Company’s ability to control—the Complaint is legally insufficient.

44. Here, even if all of the facts averred in the Formal Complaint are accepted as true, which they must be for the purposes of a preliminary objection, the Complainant has not stated a claim upon which relief may be granted. The Company’s Commission-approved tariff, which has the force of law, explicitly states that the Company is not responsible for damages caused by circumstances beyond the Company’s control. *West Penn Power Company Tariff for Electric Service*, Electric Pa. P.U.C. No. 39, Original Page 4-5; 66 Pa. C.S. § 1303; *McCloughan, DiSanto; Brockway Glass Co., supra*. The Complainant makes no other allegations about the Company’s conduct that implicate the Commission’s regulatory enforcement powers. Therefore, the Formal Complaint should be dismissed for legal insufficiency.

45. Moreover, allowing the Complainant an opportunity to be heard in this matter does nothing to advance the public interest. The Complainant clearly alleges that frozen water lines caused the alleged harms. Even if a record is developed in this matter, the facts giving rise

to the claim presented in the Formal Complaint would not entitle the Complainant to the relief he seeks, or any relief within the power of the Commission to award. As a result, the Commission should dismiss this Complaint without further proceedings. *See* 66 Pa.C.S. § 703(b); 25 Pa. Code § 5.21(d); *Guesman, supra*.

IV. Conclusion

WHEREFORE, for the foregoing reasons, West Penn Power Company respectfully requests that the Commission: (1) grant its Preliminary Objection and strike the Complainant's request for money damages; (2) dismiss the Formal Complaint with prejudice; and (3) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,



Dated: March 25, 2014

Brian C. Wauhop, Esquire
Alan Michael Seltzer, Esquire
Buchanan Ingersoll & Rooney P.C.
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
(717) 237-4975

Attorneys for
West Penn Power Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JOHN LAVELY

v.

WEST PENN POWER COMPANY

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Docket No. C-2014-2408502

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).

First Class Mail


John Lavelly
131 Smith Road
New Bethlehem, PA 16242

Dated this 25th day of March, 2014.

RECEIVED

MAR 25 2014

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU



Brian C. Wadhop, Esq.