

John L. Munsch  
Attorney

724-838-6210  
Fax: 234-678-2370

April 22, 2014

**VIA EFILE**


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

**Re: William Efaw v. West Penn Power Company**  
**Complaint Docket No. C-2014-2413744**

Dear Secretary Chiavetta:

Enclosed are the **Preliminary Objections** of West Penn Power Company to the above-captioned Formal Complaint, with certificate of service attached. The Preliminary Objections are filed via Efile and deemed filed today.

Very truly yours,

  
John L. Munsch  
Attorney

JLM:jss

Enclosures

cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

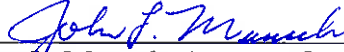
<b>WILLIAM EFAW</b>	:	
	:	
v.	:	<b>Docket No. C-2014-2413744</b>
	:	
<b>WEST PENN POWER COMPANY</b>	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served by first-class mail, postage prepaid, the foregoing  
**Preliminary Objections** addressed as follows:

William Efaw  
189 Homeville Road  
Waynesburg, PA 15370

Date: April 22, 2014

  
\_\_\_\_\_  
John L. Munsch, Attorney for  
WEST PENN POWER COMPANY  
800 Cabin Hill Drive  
Greensburg, PA 15601  
(724) 838-6210



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>WILLIAM EFAW</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. C-2014-2413744</b>
	:	
<b>WEST PENN POWER COMPANY</b>	:	

---

**WEST PENN POWER COMPANY'S  
PRELIMINARY OBJECTIONS TO THE COMPLAINT  
OF WILLIAM EFAW**

---

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

West Penn Power Company (“West Penn” or “Company”) by and through its counsel John L. Munsch, pursuant to Section 5.101 of this Commission’s regulations, 52 Pa. Code §5.101, requests that the Commission dismiss the Complaint of William Efaw, and in support of its Preliminary Objections states as follows:

**I.     Introduction**

1.     West Penn requests the dismissal of the Complaint of William Efaw (“Complainant”) because the Formal Complaint is legally insufficient, as a matter of law, and because Complainant does not claim – as required by Section 701 of the Public Utility Code 66 Pa. C.S. §701 – that the Company has taken any action or failed to take an action in violation of any law or regulation that it is required to follow.

**II.    Factual Background**

2.     The Complainant is a residential customer receiving electric service from the Company at 189 Homeville Road, Waynesburg, Pennsylvania 15370.

3. The Complainant filed a formal complaint with the Pennsylvania Public Utility Commission (“Commission”) at Docket No. C-2013-2356669 alleging concerns about the installation of Smart Meters.<sup>1</sup> The Complaint contends that West Penn is charging customers for a service they have not received.

4. In an Answer and New Matter being served contemporaneously with this Motion, West Penn has denied the material allegations in the Formal Complaint and requested that it be dismissed.

### **III. The Complaint is Insufficient as a Matter of Law**

5. In accordance with Section 5.101 of the Commission’s regulations, preliminary objections may be filed where the complaint is legally insufficient. 52 Pa. Code §5.101(4).

6. The Public Utility Code requires that “...any person...may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or any regulation or order of the Commission.” 66 Pa. C.S. §701.

7. On October 15, 2008, Governor Edward G. Rendell signed Act 129 of 2008 (“Act 129”) into law. The Act took effect thirty days thereafter on November 12, 2008.

8. Among other things, Act 129 specifically directed that electric distribution companies (“EDCs”) with at least 100,000 customers file, with the Commission for approval, a smart meter technology procurement and installation plan (“Plan”). 66 Pa.

---

<sup>1</sup> In accordance with 66 Pa. C.S. §2807(g) smart meter technology means “...technology, including metering technology and network communications technology capable of bidirectional communication, that records electricity on at least an hourly basis, including related electric distribution system upgrades to enable the technology. 66 Pa. C.S. §2807(g).

C.S. §§2807(f)(1) and (2). Act 129 also established cost recovery methods. 66 Pa. C.S. §2807(f)(7). Pursuant to Act 129, each Plan was required to describe the smart meter technologies proposed to be installed in new construction and in accordance with a depreciation schedule not to exceed 15 years. 66 Pa. C.S. §§2807(f)(1) ad (2).

9. On June 24, 2009, the Commission outlined the standards each Plan must meet, and provided guidance on the procedures to be followed for submittal, review and approval of all aspects of each Plan. *Smart Meter Procurement and Installation, Docket No. M-2009-209265 (Implementation Order*)”).

10. The Commission interpreted Act 129 to require all covered EDCs to deploy smart meters system-wide within 15 years, i.e., by April 2025, when it included a requirement that smart meter deployment be “in accordance with a depreciation schedule not to exceed 15 years.” Implementation Order.

11. On August 14, 2009, West Penn filed with the Commission a Petition for Approval of its Smart Meter Technology Procurement and Installation Plan (“WP Original SMIP”). The WP Original SMIP proposed that smart meters be installed and the costs associated with the plan be recovered through a reconcilable adjustment clause called the SMT Surcharge

12. The WP Original SMIP was the subject of a public proceeding where many parties with varying interests evaluated and discussed issues raised by the installation and recovery of costs for smart meters, including privacy issues and third party access. The Complainant did not avail the opportunity to voice concerns in this proceeding.

13. On March 9, 2011, West Penn filed an Amended Joint Petition for Settlement at Docket No. M-2009-2123951. The Commission approved the Amended Joint Petition for Settlement by Order entered June 30, 2011. On August 22, 2011, the Company submitted its compliance filing for the SMT Surcharge tariff, with a surcharge effective date of September 1, 2011 through December 31, 2011. On December 21, 2011, the Company submitted its annual rate change to the SMT Surcharge for the period of January 1, 2012 through December 31, 2012, Supplement No. 211 to Electric – Pa. P.U.C. No. 39, in accordance with the surcharge rates specified in the Amended Joint Petition for Settlement. On August 1, 2012, as amended on August 27, 2012, the Company submitted its annual rate change to the SMT Surcharge for the period of January 1, 2013 through December 31, 2013. The Commission accepted the filing by Secretarial Letter dated December 14, 2012, and directed the Company to file a tariff compliance filing for SMT Surcharge rates effective January 1, 2013. On August 1, 2013, the Company submitted its annual rate change to the SMT Surcharge for the period January 1, 2014 through December 31, 2014. The Commission approved West Penn’s SMT surcharge by Secretarial Letter dated December 26, 2013, at Docket No. M-2009-2123951. The Company filed a tariff compliance as Supplement No. 233 to Electric – Pa.P.U.C. No. 39, with rates effective January 1, 2014. A copy of the Company’s Supplement No. 233 is attached as **Exhibit A**.

On March 6, 2014, the Commission approved West Penn Power’s SMIP at Docket No. M-2013-2341994, establishing the process for deployment of smart meters in West Penn Power territory. Pursuant to the Order, the Company would begin installation of smart meters to over 98 percent of its customers, to be completed by the end of 2019.

14. The Commission's approval of the implementation and cost recovery of the Plan are in accordance with 66 Pa. C.S. 2807(f).

15. West Penn is required by statute, its duly filed and Commission-approved tariff and Commission order to implement a Smart Meter program, install Smart meters throughout its certificated territory, and charge a SMT Surcharge to all of its metered customers pursuant to approved tariff provision.

16. As confirmed by the Initial Decision in *Richard Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305, entered December 15, 2010, there is no "opt-out" provision in Act 129, the Commission's regulations, the Implementation Order, the Joint Petition, the Commission's June 9, 2010 Order or the Commission-approved tariff. See also *Lutherschmidt v. MetEd*, C-2010-2200353. Copies of said decisions are attached hereto as **Exhibit B**.

17. In its Final Order concerning smart meter implementation, entered December 6, 2012, at Docket No. M-2009-2092655, the Commission addressed the issue of smart meters and customer privacy. The Commission recognized that smart meter technology provides more information about customers' electricity use than previously available, yet also recognized that the Commission has promulgated regulations, such as 52 Pa. Code §54.8, that restrict access to customer information. Furthermore, electric generation suppliers are required to maintain the confidentiality of customers' personal information. 52 Pa. Code §54.43(d). The Complainant did not avail the opportunity to submit written comments in the proceeding at Docket No. M-2009-2205305. The proceeding was noticed for public comments and reply comments by publication in the Pennsylvania Bulletin on July 23, 2011 at 41 Pa. Bull. 4066.

18. In a proceeding similar to the present proceeding the Commission affirmed the Initial Decision of Administrative Law Judge David A. Salapa in which the ALJ sustained the Preliminary Objections of Pennsylvania Power Company to a Complaint alleging that smart meters constitute an invasion of privacy. *Gloria Corbett v. Pennsylvania Power Company*, Docket No. C-2011-2219898, Final Order entered May 27, 2011, Initial Decision dated February 23, 2011 (2011 Pa. PUC LEXIS 820). The ALJ reasoned that “[b]ecause Act 129 of 2008 and the Commission’s [Implementation] order authorizes the Respondent to develop and implement a smart meter procurement and installation plan, leading to the installation of smart meters ... the Complainant has not set forth in her complaint any act done by the Respondent that violates a Commission regulation, statute or order.” A copy of the Initial Decision and the Commission’s Final Order affirming the Initial Decision is attached as **Exhibit C**.

A similar result was obtained by West Penn in the case *Richard Secrest v. West Penn Power Company*, Docket No. C-2013-2356669, attached as **Exhibit D**.

19. Because the Complainant fails to claim that the Company has committed or omitted an act in violation of any Commission statutes, regulations, orders or its tariff, as required by Section 701 of the Public Utility Code, 66 Pa. C.S. §701, Complainant has failed to state a claim upon which relief can be granted, and the Formal Complaint should be dismissed as legally insufficient. 52 Pa. Code §5.101(4).

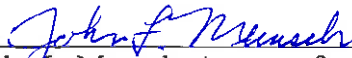
**IV. Conclusion**

WHEREFORE, West Penn Power Company requests that the Commission dismiss the Formal Complaint of William Efaw with prejudice because the Formal Complaint is legally insufficient as a matter of law.

Respectfully submitted,

Date: April 22, 2014

By:

  
\_\_\_\_\_  
John L. Munsch, Attorney for  
WEST PENN POWER COMPANY  
800 Cabin Hill Drive  
Greensburg, PA 15601  
(724) 838-6210  
Pa. I.D. No. 31489

# **EXHIBIT A**

---

**SMART METER TECHNOLOGIES SURCHARGE**

A Smart Meter Technologies ("SMT") Surcharge shall be applied during each billing month to metered Customers served under this Tariff. For the Residential Customer Class, the SMT Surcharge shall be determined to the nearest one-thousandth of a cent per kWh. For the Commercial and Industrial Customer Classes, the SMT Surcharge shall be determined to the nearest cent. The SMT Surcharge rates shall be calculated separately for each Customer Class according to the provisions of this Surcharge Tariff.

For service rendered January 1, 2014 through December 31, 2014 the SMT Surcharge rates billed by Customer Class are as follows:

Residential Customer Class (Rate Schedule 10)

\$0.00303 per kWh

Commercial Customer Class (Rate Schedules 20, 22, 23 and 24)

\$2.89 per month

Industrial Customer Class (Rate Schedules 30, 40, 41, 44, 46, 86 and Tariff No. 37)

\$2.48 per month

The SMT Surcharge rates by Customer Class shall be calculated in accordance with the formula set forth below:

$$SMT = [ ((SMT_C - E) / CCB D) / 12 ] X [ 1 / (1 - T) ]$$

$$SMT_C = SMT_{Exp1} + SMT_{Exp2}$$

Where:

SMT = The monthly surcharge by Customer Class as defined by this Surcharge Tariff applied to each Customer billed under the Rate Schedules and Tariff identified in this Surcharge Tariff.

SMT<sub>C</sub> = The Smart Meter Technologies costs by Customer Class projected to be incurred by the Company for the SMT Computational Year calculated in accordance with the formula shown above.

SMT<sub>Exp1</sub> = A projection of costs to be incurred associated with the Customer Class specific Smart Meter Technology Procurement and Installation Plan ("Plan") as approved by the Commission for the SMT Computation Year by Customer Class including carrying charges on capital costs, depreciation expense, accumulated deferred income taxes, allowance for funds used during construction, and operational and maintenance expenses. These costs would also include an allocated portion of any projected indirect costs to be incurred benefiting all Customer Classes of the Company's Plan for the SMT Computational Year. Any reduction in operating expenses or avoided capital expenditures due to the Smart Metering Program will be deducted from the incremental costs of the Smart Meter Program to derive the net incremental cost of the Program that is recoverable. Such reductions shall include any reductions in the Company's current meter and meter reading costs.

(C) Indicates Change  
(I) Indicates Increase

(C)

**SMART METER TECHNOLOGIES SURCHARGE (Continued)**

- SMT<sub>Exp2</sub> =** A Customer Class allocated portion of \$40 million of expenditures between 2009 and 2010 in support of the development of a smart meter deployment plan. The \$40 million will be recovered via a levelized basis over a 5.5-year period beginning with the SMT Surcharge start date, and will not include interest on over-collections or under-collections. A Customer Class allocation of \$5.712 million of interest charges will be added, and will be amortized for recovery over a 5.5-year period coincident with the recovery of the \$40 million.
- E =** The over or under-collection of SMT costs by Customer Class that results from the billing of the SMT Surcharge rates during the SMT Reconciliation Year (an over-collection is denoted by a positive E and an under-collection by a negative E), including applicable interest for SMT<sub>Exp1</sub> costs. Interest shall be computed monthly at the legal rate determined pursuant to 41 P.S. § 202, from the month the over or under-collection occurs to the month that the over-collection is refunded or the under-collection is recovered from Customers in the specific Customer Class. Any reduction in operating expenses or avoided capital expenditures due to the Smart Metering Program will be deducted from the incremental costs of the Smart Meter Program to derive the net incremental cost of the Program that is reconciled to the billed SMT Surcharge rates during the SMT Reconciliation Year. Such reductions shall include any reductions in the Company's current meter and meter reading costs.
- CCBD =** The Company's projected Customer Class Billing Determinants for the specific Customer Class for the SMT Computational Year. Billing Determinants shall be kWh for the Residential Customer Class, and shall be the average Customer Class count for the Commercial and Industrial Classes.
- T =** The Pennsylvania gross receipts tax rate in effect during the billing month expressed in decimal form as reflected in the Company's base rates.

All capitalized terms not otherwise defined in this Surcharge Tariff shall have the definitions specified in the Definitions section of this Tariff. For the purpose of this Surcharge Tariff, the following additional definitions shall apply:

1. **SMT Computational Year** – The 12-month period from January 1 through the following December 31 with the exception of the initial SMT Computational Year that will be the 4-month period from September 1, 2011 through December 31, 2011.
2. **SMT Reconciliation Year** – The 12-month period ending June 30 immediately preceding the SMT Computational Year.

(C) Indicates Change

(C)

**SMART METER TECHNOLOGIES SURCHARGE (Concluded)**

The initial SMT Surcharge rates pursuant to this Surcharge Tariff shall be effective September 1, 2011 through December 31, 2011. Subsequent SMT Surcharge rates shall be filed with the Commission by August 1 of each year beginning August 1, 2012, and the SMT Surcharge rates shall become effective the following January 1, unless otherwise ordered by the Commission, and shall remain in effect for a period of one year, unless revised on an interim basis subject to the approval of the Commission. Upon determination that the SMT Surcharge rates, if left unchanged, would result in material over or under-collection of all recoverable costs incurred or expected to be incurred during the then-current SMT Computational Year, the Company may request that the Commission approve one or more interim revisions to the SMT Surcharge rates to become effective thirty (30) days from the date of filing, unless otherwise ordered by the Commission.

The Company shall file an annual report of collections under this Surcharge Tariff within thirty (30) days following the conclusion of each SMT Reconciliation Year.

At the conclusion of the duration of this reconciliation Surcharge Tariff, the Company is authorized to recover or refund any remaining amounts not reconciled at that time under such mechanism as approved by the Commission.

Application of the SMT Surcharge rates shall be subject to annual review and audit by the Commission.

(C) Indicates Change

**ENERGY EFFICIENCY AND CONSERVATION ("EE&C") SURCHARGE**

In addition to the charges provided in this Tariff and in accordance with 66 Pa. C.S. §2806.1, there shall be a surcharge as set forth below to recover the costs associated with Company-sponsored programs for energy efficiency and conservation programs as approved by the Commission. This surcharge is applied to designated Rate Schedules to recover costs allocated to that Rate Schedule. This surcharge will be applied each month until changed by the Commission. The resulting surcharge is in addition to any minimum charge set out in the Rate Schedule and is added to the Customer's bill before any tax surcharge is levied against the Customer's total bill. Amounts billed hereunder shall be subject to late payment charges.

**CALCULATION OF SURCHARGE**

The EE&C Surcharge is calculated as a levelized surcharge through May 2013. The surcharge is calculated by separating the Program Costs allocated to each Rate Schedule into an energy-related portion and a demand-related portion, and dividing by forecasted distribution energy and distribution demand sales, respectively, for the same Rate Schedule. The calculation includes an Annual Reconciliation Factor adjustment and an adjustment for gross receipts tax. The Annual Reconciliation Factor adjustment will be filed by March 31 to become effective the forthcoming June 1. Upon determination that the surcharge, if left unchanged, would result in a material over/under-collection, the Company may file a proposed interim revision of the surcharge for Commission approval.

For Customers receiving service under Schedule 10, the EE&C Surcharge is added to the Distribution Charge for billing purposes. For all other Customers, the EE&C Surcharge shall be set out separately on the Customer's bill.

Bills shall include an amount equal to the surcharge rate times the number of distribution energy and capacity sales as follows:

EE&C SURCHARGE				
Rate Schedule	Rate per kWh	Rate per kW	Rate per kW PLC	
10	-\$0.00101			(D)
20	-\$0.00319			(D)
22	-\$0.00319			(D)
30 (small)*	-\$0.00139	-\$0.43		(D)
30 (large)*			-\$0.08	(D)
40			-\$0.08	(D)
41			-\$0.08	(D)
44			-\$0.08	(D)
46			-\$0.08	(D)
51 thru 58, 71	\$0.00036			(I)

\*Rate Schedule 30 (small) defined as Customers receiving service under Rate Schedule 30 with a Kilowatt Demand less than 500 kilowatts, and Rate Schedule 30 (large) defined as Customers receiving service under Rate Schedule 30 with a Kilowatt Demand greater than or equal to 500 kilowatts. The Company will categorize Customers as those with Kilowatt Demands less than 500 kilowatts and those with a Kilowatt Demand greater than or equal to 500 kilowatts.

(D) Indicates Decrease  
 (I) Indicates Increase

# **EXHIBIT B**

*Negley v. Met-Ed; C-2010-2205305*

*Lutherschmidt v. Met-Ed; C-2010-2200353*

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265

Richard Negley :  
 :  
 v. : C-2010-2205305  
 :  
 Metropolitan Edison Company :

**FINAL ORDER**

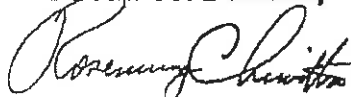
In accordance with the provisions of Section 332(h) of the Public Utility Code, 66 Pa. C.S. §332(h), the Initial Decision of Administrative Law Judge Susan D. Colwell dated December 15, 2010, has become final without further Commission action;

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by Metropolitan Edison Company in the case captioned Richard Negley v. Metropolitan Edison Company at Docket No. C-2010-2205305 are granted.
2. That the Complaint filed in the case captioned Richard Negley v. Metropolitan Edison Company at Docket No. C-2010-2205305 is dismissed.
3. That the Secretary mark this docket closed.

BY THE COMMISSION,



Rosemary Chiaveta  
Secretary

(SEAL)

ORDER ENTERED: March 3, 2011

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Richard Negley	:	
	:	
v.	:	C-2010-2205305
	:	
Metropolitan Edison Company	:	

**INITIAL DECISION**

Before  
Susan D. Colwell  
Administrative Law Judge

**HISTORY OF THE PROCEEDING**

On October 12, 2010, Richard Negley (Complainant) filed a formal Complaint against Metropolitan Edison Company (Met Ed or Respondent) asking that he be removed from the Respondent's Smart Meter program because it does not fit his lifestyle. If he cannot be removed due to legislative action and is forced to participate against his will, then the fee should be reflected on the electric bill as a tax and not as a usage fee.

On November 12, 2010, Met Ed filed its Answer with New Matter, and Preliminary Objections. The Answer denies that the Smart Meter Plan is a program in which a customer can participate and enroll. Rather, all customers on Rate Schedule RS are charged an extra charge on the monthly bill beginning August 2010, and the tariff does not provide for exceptions. The Answer describes the charge as a fixed monthly customer charge to recover the cost of the implementation of Met Ed's Smart Meter Plan. In New Matter, Respondent states that the charge is imposed pursuant to legislative mandate and according to the guidelines set forth by the Commission. Met Ed states that its actions are consistent with applicable regulations, statutes, and tariffs.

The Preliminary Objections ask for dismissal of the case because it is legally insufficient in that it does not claim that Respondent has committed or omitted an act in violation of Commission statutes, regulations, order, or Met Ed's own tariff. The Complaint has failed to state a claim upon which relief can be granted, and therefore, it should be dismissed in its entirety.

On December 2, 2010, a Motion Judge Assignment was issued which assigned this matter to Administrative Law Judge Herbert R. Smolen. On December 9, 2010, the case was reassigned to me.

The time for filing a response to both New Matter and to Preliminary Objections has expired, and no responses were filed. The Preliminary Objections are ready for decision.

#### FINDINGS OF FACT

1. Complainant is Richard Negley, 1927 Queenswood Drive, B-103, York PA 17403.
2. Respondent is Metropolitan Edison Company, a jurisdictional public utility providing residential electric service in the Commonwealth of Pennsylvania.
3. On October 12, 2010, Complainant filed his formal Complaint with the Commission against Respondent.
4. On November 12, 2010, Respondent filed an Answer, New Matter, and Preliminary Objections.
5. No response was filed to the New Matter or to the Preliminary Objections.

## DISCUSSION

Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994).

The rules regarding preliminary objections are simple and specific:

### § 5.101. Preliminary objections.

- (a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:
- (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.

\* \* \*

52 Pa. Code § 5.101(a).

In deciding preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the Petitioners, recovery or relief is possible. *Dept. of Auditor General, et al v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003), 2003 Pa.

Commw. LEXIS 849; *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996), 1996 Pa. Commw. LEXIS 11. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002), 2002 Pa. Commw. LEXIS 580. All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997) 1997 Pa. Commw. LEXIS 148.

Therefore, it is only the facts in the Complaint which can be presumed to be true in order to determine whether recovery is possible.

The facts are short and simple: Complainant would like to be removed from the Respondent's Smart Meter Plan (Plan), or if that cannot be accomplished, then he would like the charge to be listed as a tax and not a usage fee.

Met Ed responds that the circumstances leading to the imposition of the charge, including the enabling law, regulations, implementation order and Commission-approved tariff do not permit the removal of a customer from the program, nor does it have the ability to exempt a customer from the charge associated with the Plan. The explanation given is quite thorough:

3. On October 15, 2008, Governor Edward G. Rendell signed Act 129 of 2008 (the Act or Act 129) into law, which became effective on November 14, 2008. Among other things, the Act specifically directed that electric distribution companies (EDCs) with at least 100,000 customers file, with the Commission for approval, a smart meter technology procurement and installation plan. 66 Pa. C.S. § 2807(f)(1). Each plan was to describe the smart meter technologies the EDC proposes to install, upon request from a customer at the customer's expense, in new construction, and in accordance with a depreciation schedule not to exceed 15 years. 66 Pa. C.S. §§ 2807(f)(1) and (2).

4. On June 24, 2009, the Commission outlined the standards each smart meter plan must meet and provided guidance on the procedures to be followed for submittal, review and

approval of all aspects of each smart meter plan. *Smart Meter Procurement and Installation, Docket No. M-2009-2092655 (Implementation Order)*.

5. With regard to Act 129, the Commission interpreted the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide within 15 years, i.e. by April 2025, when it included a requirement for smart meter deployment "in accordance with a depreciation schedule not to exceed 15 years." *Implementation Order*.

6. On August 14, 2009, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company filed with the Commission a Joint Petition for Approval of Smart Meter Technology Procurement and Installation plan. To recover the costs associated with the Plan, each Company filed a Smart Meter Technologies Charge Rider proposing, *inter alia*, to recover their smart meter technology costs through a reconcilable adjustment clause called the Smart Meter Technologies.

7. Met Ed's Plan provided, *inter alia*, that the SMT-Charge (or SMT-C) will be expressed as a monthly customer charge, will be billed to all metered customer accounts eligible for the installation of smart meters, and will be non-bypassable.

8. By Opinion and Order entered June 9, 2010, the Commission approved the Smart Meter Technology Procurement and Installation Plan filed by Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company at Docket No. M-2009-2123950, with modifications.

9. On June 25, 2010, Metropolitan Edison Company filed Supplement No. 21 to Met Ed's Tariff Electric Pa. P.U.C. No. 50 in compliance with the Commission's Order at Docket No. M-2009-2123950 to become effective on August 1, 2010.

10. In July of 2010, Met Ed included the following message in its bills to residential customers:  
Act 129 of 2008 – passed by the Pennsylvania General Assembly and signed into law by the Governor – requires the deployment of a smart meter technology system. As mandated by Act 129, the deployment of smart meter technology is to be funded through customer rates. This monthly charge, which will appear on the bill as the Smart Meter Charge line item, will be \$2.64 for residential customers.

11. As explained above, the implementation of Smart Meter Technologies and the approval of the costs associated with the implementation are in accordance with 66 Pa. C.S. § 2807(f). The Company's Smart Meter Plan is not a program in which a customer can participate or enroll, and the SMT-Charge does not represent a tax or "usage fee." Instead, the SMT-Charge is a "customer fee" contained in Met Ed's duly filed and Commission-approved tariff. See Met Ed Tariff, Electric Pa. P.U.C. No. 50 (Supp. 21), Rider P, Original Pages 182-185, Effective August 1, 2010.

12. 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. 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). The Commonwealth Court of Pennsylvania construed Section 1303 of the Code, 66 Pa. C.S. § 1303, and stated that "[t]here can be no lawful rate except the least tariff published as provided by law . . . . Further, it is well established that in the absence of an exception by the Commission, a public utility may not charge any rate for services other than that lawfully tariffed . . . ." *Bell Telephone Co. v. Pennsylvania Public Utility Commission*, 53 Pa. Commonwealth Ct. 241, 244, 41 A.2d 827, 828-29 (1980), citing *Duquesne Light Co. v. Public Service Commission*, 273 Pa. 287, 117 A. 63 (1922); *Leiper v. Baltimore and Philadelphia R.R. Co.*, 262 Pa. 328, 105 A. 551 (1918); *Byer v. Peoples Natural Gas Co.*, 251 Pa. Superior Ct. 75, 380 A.2d 383 (1977). *Blythe Township Municipal Authority v. Pennsylvania Public Utility Commission*, 199 Pa. Superior Ct. 334, 185 A.2d 628 (1962).  
Met Ed Preliminary Objections, 1-4.

Met Ed's references and legal citations are correct. Met Ed and the other EDCs were required by law to submit smart meter plans and to implement them accordingly. Their costs for this deployment are recoverable from the customers. As part of the smart meter plan, Met Ed submitted a proposed tariff with the method for recovery from customers, and this tariff was approved by the Commission. A Commission-approved tariff has the force and effect of law, and the utility must charge its customers using the approved terms. 66 Pa.C.S § 1303. The tariff does not exempt a customer from the smart meter plan nor from paying the charge

associated with it, and therefore, neither the Company nor the Commission may excuse Complainant from participation in the Plan or from the charge used to pay for it.

The SMT-charge is used to fund an initiative required by law, but the charge itself pays for the initiative and is not passed directly to a taxing authority. Therefore, it would not be proper to label it a "tax," even though it is required.

Complainant makes the point that he does not plan to take advantage of the benefits of a smart meter, and therefore, it is unfair to require him to foot the bill for it. He is not alone in this situation, as there are many electric customers state-wide who will not or cannot take advantage of it as intended in conjunction with time of use rates or by closely watching consumption. However, underlying the legislation is the policy that the customer base itself is better served through the upgrade of the existing meters, and all customers are charged for its development and implementation.

The result is that the Complainant has failed to state a claim upon which relief can be granted, and therefore the Preliminary Objections are granted. The Complaint is dismissed.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this case.
2. Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994).
3. When considering the preliminary objection, the Commission must determine "whether the law says with certainty, based on well-pleaded factual averments . . . that no recovery or relief is possible. *P. J. S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

4. Legal insufficiency of a pleading is a proper basis for a preliminary objection. 52 Pa. Code § 5.101(a)(4).

5. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002), 2002 Pa. Commw. LEXIS 580.

6. All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridgs v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997) 1997 Pa. Commw. LEXIS 148.

7. On October 15, 2008, Governor Edward G. Rendell signed Act 129 of 2008 (the Act or Act 129) into law, which became effective on November 14, 2008. Among other things, the Act specifically directed that electric distribution companies (EDCs) with at least 100,000 customers file, with the Commission for approval, a smart meter technology procurement and installation plan. 66 Pa. C.S. § 2807(f)(1). Each plan was to describe the smart meter technologies the EDC proposes to install, upon request from a customer at the customer's expense, in new construction, and in accordance with a depreciation schedule not to exceed 15 years. 66 Pa. C.S. §§ 2807(f)(1) and (2).

8. On June 24, 2009, the Commission outlined the standards each smart meter plan must meet and provided guidance on the procedures to be followed for submittal, review and approval of all aspects of each smart meter plan. *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (*Implementation Order*).

9. With regard to Act 129, the Commission interpreted the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide within 15 years, i.e. by April 2025, when it included a requirement for smart meter deployment "in accordance with a depreciation schedule not to exceed 15 years." *Implementation Order*.

10. On August 14, 2009, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company filed with the Commission a Joint Petition for Approval of Smart Meter Technology Procurement and Installation plan. To recover the costs associated with the Plan, each Company filed a Smart Meter Technologies Charge Rider propose, *inter alia*, to recover their smart meter technology costs through a reconcilable adjustment clause called the Smart Meter Technologies.

11. Met Ed's Plan provided, *inter alia*, that the SMT-Charge (or SMT-C) will be expressed as a monthly customer charge, will be billed to all metered customer accounts eligible for the installation of smart meters, and will be non-bypassable.

12. By Opinion and Order entered June 9, 2010, the Commission approved the Smart Meter Technology Procurement and Installation Plan filed by Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company at Docket No. M-2009-2123950, with modifications.

13. On June 25, 2010, Metropolitan Edison Company filed Supplement No. 21 to Met Ed's Tariff Electric Pa. P.U.C. No. 50 in compliance with the Commission's Order at Docket No. M-2009-2123950 to become effective on August 1, 2010.

14. The SMT-Charge is a customer fee contained in Met Ed's duly filed and Commission-approved tariff. See Met Ed Tariff, Electric Pa. P.U.C. No. 50 (Supp. 21), Rider P, Original Pages 182-185, Effective August 1, 2010.

15. 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. 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). The Commonwealth Court of Pennsylvania construed Section 1303 of the Code, 66 Pa. C.S. § 1303, and stated that "[t]here can be no lawful rate *except* the last tariff published as provided by law . .

. . . Further, it is well established that in the absence of an exception by the Commission, a public utility may not charge any rate for services other than that lawfully tariffed . . . ." *Bell Telephone Co. v. Pennsylvania Public Utility Commission*, 53 Pa. Commonwealth Ct. 241, 244, 41 A.2d 827, 828-29 (1980), citing *Duquesne Light Co. v. Public Service Commission*, 273 Pa. 287, 117 A. 63 (1922); *Leiper v. Baltimore and Philadelphia R.R. Co.*, 262 Pa. 328, 105 A. 551 (1918); *Byer v. Peoples Natural Gas Co.*, 251 Pa. Superior Ct. 75, 380 A.2d 383 (1977). *Blythe Township Municipal Authority v. Pennsylvania Public Utility Commission*, 199 Pa. Superior Ct. 334, 185 A.2d 628 (1962).

16. Complainant has failed to state a claim upon which relief can be granted.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by Metropolitan Edison Company in the case captioned *Richard Negley v. Metropolitan Edison Company* at Docket No. C-2010-2205305 are granted.
2. That the Complaint filed in the case captioned *Richard Negley v. Metropolitan Edison Company* at Docket No. C-2010-2205305 is dismissed.
3. That the Secretary mark this docket closed.

Dated: December 15, 2010

\_\_\_\_\_  
Susan D. Colwell  
Administrative Law Judge

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265

Dennis Lutherschmidt :  
 :  
 v. : C-2010-2200353  
 :  
 Metropolitan Edison Company :

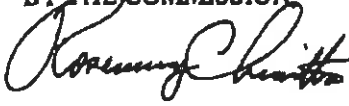
**FINAL ORDER**

In accordance with the provisions of Section 332(h) of the Public Utility Code, 66 Pa. C.S. §332(h), the decision of Administrative Law Judge Wayne L. Weismandel dated January 19, 2011, has become final without further Commission action;

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by Metropolitan Edison Company in the case captioned Dennis Lutherschmidt v. Metropolitan Edison Company at Docket No. C-2010-2200353 are granted.
2. That the Complaint filed in the case captioned Dennis Lutherschmidt v. Metropolitan Edison Company at Docket No. C-2010-2200353 is dismissed.
3. That the Secretary mark this docket closed.

BY THE COMMISSION  
  
Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ENTERED: March 25, 2011

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Dennis Lutherschmidt	:	
	:	
v.	:	C-2010-2200353
	:	
Metropolitan Edison Company	:	

**INITIAL DECISION**

Before  
Wayne L. Weismandel  
Administrative Law Judge

**HISTORY OF THE PROCEEDING**

On September 20, 2010, Dennis Lutherschmidt (Complainant) filed a formal Complaint against Metropolitan Edison Company (Met Ed or Respondent) which requested the Commission "to do the right thing" and remove the Respondent's Smart Meter charge from his monthly electric utility bill. ¶ 5. On an attached sheet to his formal Complaint, Complainant described this charge as "...an attempt at another rate hike, without calling it a rate hike." He stated that because he is not currently receiving this service (to date, no smart meter has been installed at his residence) he should not have to pay for the service.

On or about October 15, 2010, Met Ed filed its Answer with New Matter (Answer) and Preliminary Objections endorsed with a Notice to Plead. The Answer denies that the Smart Meter Plan is a program in which a customer can participate and enroll. Rather, all customers on Rate Schedule RS are charged an extra charge on the monthly bill beginning August 2010, and the tariff does not provide for exceptions. The Answer describes the charge as a fixed monthly customer charge to recover the cost of the implementation of Met Ed's Smart Meter Plan. In New Matter, Respondent states that the charge is imposed pursuant to legislative

mandate and according to the guidelines set forth by the Commission. Met Ed states that its actions are consistent with applicable regulations, statutes, and tariffs. The Preliminary Objections ask for dismissal of the case because it is legally insufficient, pursuant to 52 PA. Code § 5.101(a)(4), in that it does not claim that Respondent has committed or omitted an act in violation of Commission statutes, regulations, order, or Met Ed's own tariff. The Complaint has failed to state a claim upon which relief can be granted, and therefore, it should be dismissed in its entirety.

On October 20, 2010, Complainant filed a response to the New Matter or the Preliminary Objections. In his response, Complainant stated that he has not requested a smart meter and that he does not "believe the General Assembly intended for the smart meter to be deployed to existing customers, without their request."

On January 6, 2011, a Motion Judge Assignment was issued which assigned this matter to Chief Administrative Law Charles E. Rainey, Jr.

On January 26, 2011, by Judge Change Notice the case was reassigned to me.

The Preliminary Objections are ready for decision.

#### FINDINGS OF FACT

1. Complainant is Dennis Lutherschmidt, who receives service at 1477 Greene Hill Ct., Kutztown, PA 19530. (Service Address)
2. Respondent is Metropolitan Edison Company, a jurisdictional public utility providing residential electric service in the Commonwealth of Pennsylvania.
3. On September 20, 2010, Complainant filed his formal Complaint with the Commission against Respondent.

4. On October 15, 2010, Respondent filed an Answer, New Matter, and Preliminary Objections.

5. On October 20, 2010, Complainant filed a response to the New Matter or to the Preliminary Objections.

### DISCUSSION

Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994).

The rules regarding preliminary objections are simple and specific:

#### **§ 5.101. Preliminary objections.**

- (a) **Grounds.** Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:
- (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.

\* \* \*

52 Pa. Code § 5.101(a).

In deciding preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the Petitioners, recovery or relief is possible. *Dept. of Auditor General, et al v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003), 2003 Pa. Commw. LEXIS 849; *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996), 1996 Pa. Commw. LEXIS 11. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002), 2002 Pa. Commw. LEXIS 580. All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997) 1997 Pa. Commw. LEXIS 148.

Therefore, it is only the facts in the Complaint which can be presumed to be true in order to determine whether recovery is possible.

The facts are short and simple: Complainant would like to have the charges identified with the smart meter removed from his monthly electric utility bill. Since a smart meter has not been installed at the Service Address, and because Complainant has not received any service or benefit from it, he believes that he should not be charged a fee associated with it.

Met Ed responds that the circumstances leading to the imposition of the charge, including the enabling law, regulations, implementation order and Commission-approved tariff do not permit the removal of a customer from the program, nor does it have the ability to exempt a customer from the charge associated with the Plan. The explanation given is quite thorough:

3. On October 15, 2008, Governor Edward G. Rendell signed Act 129 of 2008 (the Act or Act 129) into law, which became effective on November 14, 2008. Among other things, the Act specifically directed that electric distribution companies (EDCs) with at least 100,000 customers file, with the Commission for approval, a smart meter technology procurement and installation plan. 66 Pa. C.S. § 2807(f)(1). Each plan was to describe the smart meter technologies the EDC proposes to install, upon request from a customer at the customer's expense, in new construction, and in accordance with a depreciation schedule not to exceed 15 years. 66 Pa. C.S. §§ 2807(g)(1) and (2).

4. On June 24, 2009, the Commission outlined the standards each smart meter plan must meet and provided guidance on the procedures to be followed for submittal, review and approval of all aspects of each smart meter plan. *Smart Meter Procurement and Installation, Docket No. M-2009-2092655 (Implementation Order)*.

5. With regard to Act 129, the Commission interpreted the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide within 15 years, i.e. by April 2025, when it included a requirement for smart meter deployment "in accordance with a depreciation schedule not to exceed 15 years." *Implementation Order*.

6. On August 14, 2009, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company filed with the Commission a Joint Petition for Approval of Smart Meter Technology Procurement and Installation plan. To recover the costs associated with the Plan, each Company filed a Smart Meter Technologies Charge Rider proposing, *inter alia*, to recover their smart meter technology costs through a reconcilable adjustment clause called the Smart Meter Technologies.

7. Met Ed's Plan provided, *inter alia*, that the SMT-Charge (or SMT-C) will be expressed as a monthly customer charge, will be billed to all metered customer accounts eligible for the installation of smart meters, and will be non-bypassable.

8. By Opinion and Order entered June 9, 2010, the Commission approved the Smart Meter Technology Procurement and Installation Plan filed by Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company at Docket No. M-2009-2123950, with modifications.

9. On June 25, 2010, Metropolitan Edison Company filed Supplement No. 21 to Met Ed's Tariff Electric Pa. P.U.C. No. 50 in compliance with the Commission's Order at Docket No. M-2009-2123950 to become effective on August 1, 2010.

10. In July of 2010, Met Ed included the following message in its bills to residential customers:

Act 129 of 2008 – passed by the Pennsylvania General Assembly and signed into law by the Governor – requires the deployment of a smart meter technology system. As mandated by Act 129, the deployment of smart meter technology is to be funded through customer rates. This monthly charge, which will appear on the bill as the Smart Meter Charge line item, will be \$2.64 for residential customers.

11. As explained above, the implementation of Smart Meter Technologies and the approval of the costs associated with the implementation are in accordance with 66 Pa. C.S. § 2807(f). The Company's Smart Meter Plan is not a program in which a customer can participate or enroll, and the SMT-Charge does not represent a tax or "usage fee." Instead, the SMT-Charge is a "customer fee" contained in Met Ed's duly filed and Commission-approved tariff. See Met Ed Tariff, Electric Pa. P.U.C. No. 50 (Supp. 21), Rider P, Original Pages 182-185, Effective August 1, 2010.

12. 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. 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). The Commonwealth Court of Pennsylvania construed Section 1303 of the Code, 66 Pa. C.S. § 1303, and stated that "[t]here can be no lawful rate *except* the last tariff published as provided by law . . . . Further, it is well established that in the absence of an exception by the Commission, a public utility may not charge any rate for services other than that lawfully tariffed . . . ." *Bell Telephone Co. v. Pennsylvania Public Utility Commission*, 53 Pa. Commonwealth Ct. 241, 244, 41 A.2d 827, 828-29 (1980), citing *Duquesne Light Co. v. Public Service Commission*, 273 Pa. 287, 117 A. 63 (1922); *Leiper v. Baltimore and Philadelphia R.R. Co.*, 262 Pa. 328, 105 A. 551 (1918); *Byer v. Peoples Natural Gas Co.*, 251 Pa. Superior Ct. 75, 380 A.2d 383 (1977). *Blythe Township Municipal*

*Authority v. Pennsylvania Public Utility Commission*, 199 Pa. Superior Ct. 334, 185 A.2d 628 (1962).

Met Ed Preliminary Objections, 3-11.

Met Ed's references and legal citations are correct. Met Ed and the other EDCs were required by law to submit smart meter plans and to implement them accordingly. Their costs for this deployment are recoverable from the customers. As part of the smart meter plan, Met Ed submitted a proposed tariff with the method for recovery from customers, and this tariff was approved by the Commission. A Commission-approved tariff has the force and effect of law, and the utility must charge its customers using the approved terms. 66 Pa.C.S § 1303. The tariff does not exempt a customer from the smart meter plan nor from paying the charge associated with it, and therefore, neither the Company nor the Commission may excuse Complainant from participation in the Plan or from the charge used to pay for it.

The SMT-charge is used to fund an initiative required by law, but the charge itself pays for the initiative.

Complainant makes the point that he does not currently benefit from the use of a smart meter, and therefore, it is unfair to require him to foot the bill for it. He is not alone in this situation, as there are many electric customers state-wide who will not or cannot take advantage of it as intended in conjunction with time of use rates or by closely watching consumption. However, underlying the legislation is the policy that the customer base itself is better served through the upgrade of the existing meters, and all customers are charged for its development and implementation.

The result is that the Complainant has failed to state a claim upon which relief can be granted, and therefore the Preliminary Objections are granted. The Complaint is dismissed.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of this case.

2. Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994).

3. When considering the preliminary objection, the Commission must determine "whether the law says with certainty, based on well-pleaded factual averments . . . that no recovery or relief is possible. *P. J. S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

4. Legal insufficiency of a pleading is a proper basis for a preliminary objection. 52 Pa. Code § 5.101(a)(4).

5. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002), 2002 Pa. Commw. LEXIS 580.

6. All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997) 1997 Pa. Commw. LEXIS 148.

7. On October 15, 2008, Governor Edward G. Rendell signed Act 129 of 2008 (the Act or Act 129) into law, which became effective on November 14, 2008. Among other things, the Act specifically directed that electric distribution companies (EDCs) with at least 100,000 customers file, with the Commission for approval, a smart meter technology procurement and installation plan. 66 Pa. C.S. § 2807(f)(1). Each plan was to describe the smart meter technologies the EDC proposes to install, upon request from a customer at the customer's expense, in new construction, and in accordance with a depreciation schedule not to exceed 15 years. 66 Pa. C.S. §§ 2807(f)(1) and (2).

8. On June 24, 2009, the Commission outlined the standards each smart meter plan must meet and provided guidance on the procedures to be followed for submittal, review and approval of all aspects of each smart meter plan. *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (*Implementation Order*).

9. With regard to Act 129, the Commission interpreted the intent of the General Assembly to require all covered EDCs to deploy smart meters system-wide within 15 years, i.e. by April 2025, when it included a requirement for smart meter deployment "in accordance with a depreciation schedule not to exceed 15 years." *Implementation Order*.

10. On August 14, 2009, Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company filed with the Commission a Joint Petition for Approval of Smart Meter Technology Procurement and Installation plan. To recover the costs associated with the Plan, each Company filed a Smart Meter Technologies Charge Rider proposal, *inter alia*, to recover their smart meter technology costs through a reconcilable adjustment clause called the Smart Meter Technologies.

11. Met Ed's Plan provided, *inter alia*, that the SMT-Charge (or SMT-C) will be expressed as a monthly customer charge, will be billed to all metered customer accounts eligible for the installation of smart meters, and will be non-bypassable.

12. By Opinion and Order entered June 9, 2010, the Commission approved the Smart Meter Technology Procurement and Installation Plan filed by Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company at Docket No. M-2009-2123950, with modifications.

13. On June 25, 2010, Metropolitan Edison Company filed Supplement No. 21 to Met Ed's Tariff Electric Pa. P.U.C. No. 50 in compliance with the Commission's Order at Docket No. M-2009-2123950 to become effective on August 1, 2010.

14. The SMT-Charge is a customer fee contained in Mad Ed's duly filed and Commission-approved tariff. See Met Ed Tariff, Electric Pa. P.U.C. No. 50 (Supp. 21), Rider P, Original Pages 182-185, Effective August 1, 2010.

15. 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. 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). The Commonwealth Court of Pennsylvania construed Section 1303 of the Code, 66 Pa. C.S. § 1303, and stated that "[t]here can be no lawful rate *except* the last tariff published as provided by law . . . Further, it is well established that in the absence of an exception by the Commission, a public utility may not charge any rate for services other than that lawfully tariffed . . ." *Bell Telephone Co. v. Pennsylvania Public Utility Commission*, 53 Pa. Commonwealth Ct. 241, 244, 41 A.2d 827, 828-29 (1980), citing *Duquesne Light Co. v. Public Service Commission*, 273 Pa. 287, 117 A. 63 (1922); *Leiper v. Baltimore and Philadelphia R.R. Co.*, 262 Pa. 328, 105 A. 551 (1918); *Byer v. Peoples Natural Gas Co.*, 251 Pa. Superior Ct. 75, 380 A.2d 383 (1977). *Blythe Township Municipal Authority v. Pennsylvania Public Utility Commission*, 199 Pa. Superior Ct. 334, 185 A.2d 628 (1962).

16. Complainant has failed to state a claim upon which relief can be granted.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by Metropolitan Edison Company in the case captioned *Dennis Lutherschmidt v. Metropolitan Edison Company* at Docket No. C-2010-2200353 are granted.

2. That the Complaint filed in the case captioned *Dennis Lutherschmidt v. Metropolitan Edison Company* at Docket No. C-2010-2200353 is dismissed.

3. That the Secretary mark this docket closed.

Dated: January 19, 2011

---

Wayne L. Weismandel  
Administrative Law Judge

# **EXHIBIT C**

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265

Gloria Corbett  
v.  
Pennsylvania Power Company

:  
:  
:  
:  
:

C-2011-2219898

**FINAL ORDER**

In accordance with the provisions of Section 332(h) of the Public Utility Code, 66 Pa. C.S. §332(h), the decision of Administrative Law Judge David A. Salapa dated February 23, 2011, has become final without further Commission action;

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by Pennsylvania Power Company at Docket No. C-2011-2219898 is sustained.
2. That the complaint of Gloria Corbett at Docket No. C-2011-2219898 against Pennsylvania Power Company is dismissed.
3. That the record at Docket No. C-2011-2219898 is marked closed.

BY THE COMMISSION,



Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ENTERED: May 27, 2011

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Gloria Corbett	:	
	:	
v.	:	C-2011-2219898
	:	
Pennsylvania Power Company	:	

**INITIAL DECISION SUSTAINING PRELIMINARY OBJECTION AND DISMISSING  
COMPLAINT**

Before  
David A. Salapa  
Administrative Law Judge

**HISTORY OF THE PROCEEDING**

On January 8, 2011, Gloria Corbett (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against Pennsylvania Power Company (Respondent). The complaint alleges that the Complainant owns two properties located in Mercer County. The complaint objects to the installation of smart meters at both properties.

The complaint contends that smart meters are an invasion of the Complainant's privacy, an illegal search and seizure and will lead to identity theft. Attached to the complaint are articles from various publications regarding smart meters and their potential affect on an individual's privacy.

The complaint requests that "all customers should be considered to have 'opted out' of info. gathering". The complaint also requests that the Commission direct utilities to update the security protections on smart meters on an ongoing basis.

The Respondent filed an answer with new matter and preliminary objections on January 31, 2011. The answer admits that the Respondent provides electric service to the Complainant at both locations in Mercer County. The answer states that it has not installed smart meters at either property location. The answer states that the Respondent is currently assessing different types of smart meters that will be deployed to customers.

The new matter states that Act 129 of 2008 directed the Respondent and other electric distribution companies (EDCs) to file a smart meter procurement and installation plan with the Commission. The Respondent filed a smart meter procurement and installation plan with the Commission. By order dated June 9, 2010, at M-2009-2123950 the Commission approved the Respondent's smart meter procurement and installation plan. On June 25, 2010, the Respondent filed a tariff supplement in compliance with the Commission's June 9, 2010 order.

The new matter contends that the Respondent must install smart meters throughout its service territory and charge its customers a monthly charge for that installation pursuant to Commission order and its tariff. The Respondent's tariff is binding on the Respondent, its customers and the public. While the Complainant is concerned about the effect smart meters will have on her privacy, the new matter asserts that the Respondent has not installed a smart meter at either of her properties. The answer and new matter request that the Commission dismiss the complaint with prejudice.

The preliminary objections contend that the complaint is legally insufficient pursuant to 52 Pa. Code §5.101(4). The preliminary objections reiterate the assertions in the new matter regarding Act 129 of 2008, the steps that the Respondent has taken to comply with Act 129 of 2008 and the Commission order approving the Respondent's smart meter procurement and installation plan. The preliminary objections contend that the complaint fails to state a claim that the Respondent has violated a provision of the Public Utility Code, Commission regulation, Commission order or any provision in its tariff. Therefore, the complaint has failed to state a claim upon which relief can be granted. The preliminary objections request that the Commission dismiss the complaint.

On February 12, 2011 the Complainant filed answers to the Respondent's new matter and preliminary objections. The answer to new matter reiterates the assertions in the complaint that smart meters are an invasion of the Complainant's privacy, an illegal search and seizure and will lead to identity theft. The answer to new matter also contends that the General Assembly and Governor did not recognize the potential intrusiveness of smart meters when Act 129 of 2008 was signed into law. The answer to new matter asserts that the Complainant never received notice of the Respondent's Act 129 of 2008 filings with the Commission regarding smart meters.

The answer to the preliminary objection contends that the Complainant was not notified about the installation of smart meters by either the Respondent or the Commission. The Complainant argues that since she was not notified about the installation of smart meters, the Commission's proceedings were "fraudulent". The Complainant requests that the Commission direct the Respondent to ensure that information it obtains from the smart meters cannot be used to identify individual customers.

By notice dated February 15, 2011, the Commission notified the parties that it had assigned the case to me as motion judge. The preliminary objection is ready for decision. For the reasons set forth below, I will sustain the preliminary objection and dismiss the complaint.

#### FINDINGS OF FACT

1. The Complainant in this case is Gloria Corbett.
2. The Respondent in this case is Pennsylvania Power Company.
3. On January 8, 2011, the Complainant filed a complaint with the Commission against the Respondent.
4. The Respondent filed an answer with new matter on January 31, 2011.

5. On January 31, 2011, the Respondent filed a preliminary objection.

6. On February 12, 2011, the Complainant filed answers to the new matter and preliminary objection.

### DISCUSSION

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.

Here the Respondent's preliminary objection asserts that the complaint is legally insufficient pursuant to 52 Pa. Code §5.101(4) in that the complaint fails to allege that the Respondent violated the Public Utility Code, Commission regulations or orders or its tariff provisions. I agree.

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenor v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) Preliminary objections in civil practice requesting dismissal of a pleading will be granted only

where the right to relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environment 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 follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988)

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A. 2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988) The Commission must view the complaint in this case in the light most favorable to the Complainant and should dismiss the complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994)

The Commission regulation at 52 Pa. Code §5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa. Code §5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa. Code §5.101(a)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa. Code §5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. §703(a); Lehigh Valley Power Committee v. Pennsylvania Pub. Util. Comm'n., 563 A.2d 557 (Pa. Cmwlth. 1989); Lehigh Valley Power Committee v. Pennsylvania Pub. Util. Comm'n., 563 A.2d 548 (Pa. Cmwlth. 1989); S.M.E. Bessemer Cement, Inc. v. Pennsylvania Pub. Util. Comm'n., 540 A.2d 1006 (Pa. Cmwlth. 1988); White Oak Borough Authority v. Pennsylvania Pub. Util. Comm'n., 103 A.2d 502 (Pa. Super. 1954)

Viewing the complaint in this case in the light most favorable to the Complainant, the complaint objects to the installation of smart meters at her properties. The complaint contends that smart meters are an invasion of the Complainant's privacy, an illegal search and seizure and will lead to identity theft. The complaint requests that the Commission direct utilities to update smart meters to newer security standards when they become available.

Accepting the facts alleged in the complaint as true for purposes of disposing of its preliminary objection, the Respondent contends that the complaint fails to allege that the Respondent has violated the Public Utility Code, Commission regulations or orders. The Respondent concludes that the complaint is legally insufficient. I agree.

In order to be legally sufficient, a complaint must set forth "an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission." 52 Pa. Code §5.22(a)(4) Here, the Respondent has not violated any statute, regulation or order which the Commission has jurisdiction to administer by initiating a smart meter program but rather is complying with relevant statutes, regulations and orders.

As set forth in great detail in the Respondent's answer and new matter, Act 129 of 2008 directed the Respondent and other EDCs to file a smart meter procurement and installation plan with the Commission. The Respondent filed a smart meter procurement and installation plan with the Commission. By order dated June 9, 2010, at M-2009-2123950 the Commission approved the Respondent's smart meter procurement and installation plan. The Respondent is complying with the Commission's order by developing a plan to install smart meters in the Complainant's properties.

In her Initial Decision in Richard Negley v. Metropolitan Edison Company, Docket No. C-2010-2205305 (Initial Decision issued January 3, 2011), ALJ Susan D. Colwell dismissed a complaint opposing installation of smart meters for legal insufficiency. ALJ Colwell concluded that Act 129 of 2008 authorized the installation of smart meters by EDCs.

ALJ Colwell held that the Commission's orders approving the EDC's smart meter plans did not exempt any customers from the smart meter plans or from paying the charges associated with the smart meter plans. In Dennis Lutherschmidt v. Metropolitan Edison Company, Docket No. C-2010-2200353 (Initial Decision issued January 31, 2011), ALJ Weismandel dismissed a complaint opposing installation of smart meters for legal insufficiency, adopting ALJ Colwell's reasoning. I find the reasoning in these cases to be persuasive and adopt that reasoning.

Because Act 129 of 2008 and the Commission's order authorize the Respondent to develop and implement a smart meter procurement and installation plan, leading to the installation of smart meters in the Complainant's properties, the Complainant has not set forth in her complaint any act done by the Respondent that violates a Commission regulation, statute or order. The Respondent is authorized to develop and implement a smart meter procurement and installation plan that will lead to the installation of smart meters in the Complainant's properties. Since the Complainant's complaint does not set forth any violation of a Commission regulation, statute or order, it is legally insufficient. I will sustain the Respondent's preliminary objection and enter the following order.

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this dispute. 66 Pa. C.S.A. §701
2. The Complainant's complaint fails to state a claim upon which relief can be granted.
3. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2011-2219898 be dismissed.

**ORDER**

**THEREFORE,**

**IT IS ORDERED:**

1. That the preliminary objection filed by Pennsylvania Power Company at Docket No. C-2011-2219898 is sustained.
2. That the complaint of Gloria Corbett at Docket No. C-2011-2219898 against Pennsylvania Power Company is dismissed.
3. That the record at Docket No. C-2011-2219898 is marked closed.

Date: February 23, 2011

---

David A. Salapa  
Administrative Law Judge

# **EXHIBIT D**

*Richard Secrest v. WPPCo., C-2013-2356669*



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

June 20, 2013

C-2013-2356669

Richard Secret  
v.  
West Penn Power Company

TO ALL PARTIES:

Enclosed is a copy of the Initial Decision Granting Preliminary Objection of the Office of Administrative Law Judge.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Your signed Exceptions to the decision, if any, must be: 1) filed with the Secretary of the Commission, and 2) mailed or hand-delivered to each party of record, within twenty (20) days of the date of this letter.

To file Exceptions with the Secretary of the Commission, you must mail or hand-deliver them as follows:

If using U.S. Postal Service:

Secretary  
Pa. Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

If using Overnight or Hand Delivery Service:

Secretary  
Pa. Public Utility Commission  
400 North Street  
Commonwealth Keystone Building, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

Or, instead of mailing or hand-delivering your Exceptions, you may electronically file them with the Secretary of the Commission. To do so, you need to establish an account on the Commission's eFiling system, which may be accessed at <http://www.puc.state.pa.us/efiling/default.aspx>. Please note that Exceptions sent to the Commission by fax or e-mail will not be accepted for filing.

In addition to filing your Exceptions with the Secretary of the Commission, a courtesy copy of your Exceptions should be e-mailed to the Commission's Office of Special Assistants (OSA) at [ra-OSA@pa.gov](mailto:ra-OSA@pa.gov). If the document is too large to e-mail, please mail or hand-deliver a copy on CD-ROM or DVD (or other data storage media), in Microsoft Word 2010 format or other compatible format to either address noted above.

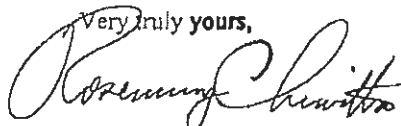
Replies to Exceptions, if any, must be filed with the Secretary of the Commission and served on each party of record and the Commission's OSA, in the manner described above. They are due within ten (10) days of the date when Exceptions are due.

It is your responsibility to serve all the parties with your Exceptions and Replies to Exceptions. Failure to do so may render your filing unacceptable. A certificate of service (see format in 52 Pa. Code §1.58) shall be attached to the filed Exceptions or Replies to Exceptions.

Exceptions and Replies to Exceptions shall follow 52 Pa. Code §§5.533 and 5.535 particularly the 40-page limit for Exceptions and the 25-page limit for Replies to Exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)". Any reference to specific sections of the Administrative Law Judge's Initial Decision shall include the page number(s) of the cited section of the decision.

If no Exceptions are received, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

JF  
Enclosures  
Certified Mail  
Receipt Requested

Very truly yours,  
  
Rosemary Chiavetta  
Secretary

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Richard Secrest	:	
	:	
v.	:	C-2013-2356669
	:	
West Penn Power Company	:	

**INITIAL DECISION GRANTING PRELIMINARY OBJECTIONS**

Before  
Elizabeth H. Barnes  
Administrative Law Judge

**HISTORY OF THE PROCEEDING**

On March 25, 2013, Richard Secrest (Mr. Secrest or complainant) filed a formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against West Penn Power Company (West Penn or respondent), requesting the Commission forbid the installation of a smart meter on his house. Attached to his complaint is a form signed by complainant entitled "Notice of No Consent to Trespass and Surveillance, Notice of Liability."

On April 9, 2013, the Complaint was served on respondent. On April 19, 2013, respondent timely filed an Answer and New Matter, denying the material averments of the Complaint. Respondent admits that it provides residential electric service to the complainant at 364 Jake Lane, Scottdale, Pennsylvania. Respondent claims in its New Matter that the complaint is legally insufficient because there is no averment that the Utility Code or Commission order or regulation has been violated pursuant to Section 701 of the Public Utility Code, 66 Pa. C.S. § 701. Rather, because complainant essentially disagrees with the legislative and Commission directives regarding smart meter deployment in accordance with Act 129, 66 Pa. C.S. § 2807(f), this

Complaint would have been more appropriately addressed via a petition to rescind or amend the Commission's prior order pursuant to Section 703 of the Public Utility Code, 66 Pa.C.S. §703(g).

Also on April 19, 2013, respondent filed Preliminary Objections to the Complaint as well as a Motion to Consolidate the case with another similar case, *Richard and Cheryl Deuel v. West Penn Power Company*, Docket No. C-2013-2356667. The Preliminary Objections and Motion to Consolidate are now ripe for a decision.

### FINDINGS OF FACT

1. The complainant in this proceeding is Richard Secrest, who receives residential electric heat service from respondent at 364 Jake Lane, Scottdale, Pennsylvania 15683.
2. The respondent in this proceeding is West Penn Power Company.
3. Complainant requests the Commission forbid West Penn from installing a smart meter on his house.
4. By Opinion and Order entered June 30, 2011, at Docket No. M-2009-2123951, the Commission approved West Penn's Amended Joint Petition for Settlement regarding smart meter deployment.
5. On August 1, 2012, as amended on August 27, 2012, West Penn submitted its annual rate change to the SMT Surcharge for the period of January 1, 2013, through December 31, 2013, which the Commission accepted on December 14, 2012, and directed West Penn to file a tariff compliance filing for SMT Surcharge rates effective January 1, 2013.
6. As ordered by the Commission, on December 20, 2012, West Penn filed a tariff compliance filing as Supplement No. 223 to Electric – Pa.PUC No. 39, with rates effective January 1, 2013.

## DISCUSSION

Preliminary objections are appropriate under Commission regulations. 52 Pa. Code §5.101. Commission preliminary objection practice is similar to Pennsylvania civil practice respecting the filing of preliminary objections. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994).

Preliminary objections are limited to the following:

### **§ 5.101. Preliminary objections.**

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (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.

\* \* \*

52 Pa. Code § 5.101(a).

When considering the preliminary objection, the Commission must determine “whether the law says with certainty, based on well-pleading factual averments . . . that no recovery or relief is possible.” *P. J. S. v. Pa. State Ethics Commission*, 669 A.2d 1105

(Pa. Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002).” *Dept. of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003).

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environment 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 follows this standard. *Montague v. Philadelphia Electric Company*, 66 Pa.PUC 24 (1988).

Viewing the Complaint in the instant case in the light most favorable to the complainant, the complainant seeks a directive from the Commission precluding West Penn from installing a smart meter on his service residence. The Complaint contends that smart meters are an invasion of the complainant’s privacy, an illegal search and seizure and will lead to identity theft. Accepting these facts as alleged as true for the purpose of disposing of preliminary objections, Respondent contends that the Complaint fails to allege that Respondent has violated the Public Utility Code, Commission regulations or orders. The Respondent contends that the complaint is legally insufficient. I agree.

On October 15, 2008, Governor Edward G. Rendell signed Act 129 of 2008 into law, which directed electric distribution companies with at least 100,000 customers to file, with the Commission, a smart meter deployment and installation plan. Thus, there is a statute requiring smart meter deployment by large electric distribution companies operating within the Commonwealth. 66 Pa. C.S. § 2807(f). On August 14, 2009, West Penn filed with the Commission a Petition for Approval of its Smart Meter Technology Procurement and Installation Plan, which was the subject of a publicly litigated proceeding. Many parties with varying interests evaluated and discussed issues raised by the installation and recovery of costs for smart meters, including privacy issues and third party access to data. The Complainant did not participate in these proceedings.

As ordered by the Commission, on December 20, 2012, West Penn filed a tariff compliance filing as Supplement No. 223 to Electric – Pa.PUC No. 39, with rates effective January 1, 2013. There is no enrollment or “opt-out” provision in the tariff. The implementation of West Penn’s Smart Meter Deployment Plan and the approval of the costs associated with its implementation have been found by the Commission to be in accordance with Act 129 of 2008, 66 Pa. C.S. § 2807(f). West Penn is required by statute, Commission Order, and its Commission-approved tariff to implement a Smart Meter program, install Smart Meters throughout its service territory, and to charge a SMT Surcharge to all of its metered customers. Tariffs have the force and effect of law in Pennsylvania and are legally binding upon utilities, their customers, and the public. 66 Pa. C.S. § 1303. *See also Brockway Glass v. Pennsylvania Pub. Util. Comm’n*, 437 A.2d 1067 (Pa. Cmwlth. 1982). Therefore, there can be no basis for sustaining the instant Complaint.

To the extent that Mr. Secrest disagrees with the Commission’s decision to approve West Penn’s Smart Meter Deployment Plan, the appropriate procedure would be to file a petition for recession or amendment pursuant to Section 703 of the Public Utility Code, 66 Pa.C.S.A. § 703(g).<sup>1</sup>

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 in the public interest. *See also*, 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and is not required to resolve questions of law, policy or discretion. *Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm’n*, 817 A.2d 593 (Pa. Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003). The public interest does not require a hearing in this case. As a result, West Penn’s right to prevail at hearing is so clear that having a hearing would be a fruitless exercise. Therefore, respondent’s Preliminary Objections shall be granted. Respondent’s Motion for Consolidation shall be denied as moot.

---

<sup>1</sup> “The Commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.” 66 Pa.C.S.A. § 703(g).

The Commission reached a similar conclusion in the case of *Gloria Corbett v. Pennsylvania Power Company*, Docket No. C-2011-2219898, (Final Order entered May 27, 2011), wherein complainant objected to the installation of smart meters at her two properties in Mercer County. The Commission sustained Penn Power's preliminary objection to the complaint holding that the complaint failed to state a claim upon which relief can be granted. See also *Richard Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305, (Final Order entered March 3, 2011).

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter in this proceeding.
2. Commission regulations provide for the filing of preliminary objections. 52 Pa. Code § 5.101.
3. The Complaint should be dismissed as legally insufficient under 52 Pa. Code § 5.101(a)(4).
4. Public utility tariffs have the force of law and are binding on both the public utility and its customers. *Brockway Glass v. Pennsylvania Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1982).
5. Respondent West Penn's Tariff filed on December 20, 2012, compliance filing as Supplement No. 223 to Electric – Pa.PUC No. 39, with rates effective January 1, 2013, was approved by the Commission.
6. The Commission may dismiss a complaint without a hearing if a hearing in this matter is not necessary or in the public interest.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by West Penn Power Company seeking dismissal of the Complaint filed by Richard Secrest at Docket No. C-2013-2356669 are granted;
2. That the Formal Complaint filed by Richard Secrest at Docket No. C-2013-2356669 is dismissed;
3. That West Penn Power Company's Motion to Consolidate is denied as moot.
4. That the case in this proceeding be marked closed.

Date: June 11, 2013

/s/

\_\_\_\_\_  
Elizabeth H. Barnes  
Administrative Law Judge

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Richard Secrest

v.

West Penn Power Company

:  
:  
:  
:  
:

C-2013-2356669

**FINAL ORDER**

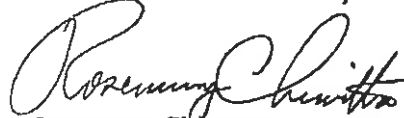
In accordance with the provisions of Section 332(h) of the Public Utility Code, 66 Pa. C.S. §332(h), the decision of Administrative Law Judge Elizabeth H. Barnes dated June 11, 2013, has become final without further Commission action;

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by West Penn Power Company seeking dismissal of the Complaint filed by Richard Secrest at Docket No. C-2013-2356669 are granted;
2. That the Formal Complaint filed by Richard Secrest at Docket No. C-2013-2356669 is dismissed;
3. That West Penn Power Company's Motion to Consolidate is denied as moot.
4. That the case in this proceeding be marked closed.

BY THE COMMISSION,



Rosemary Chavetta  
Secretary

(SEAL)

ORDER ENTERED: July 23, 2013

JUL 26 2013