**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held October 22, 2015 |
| Commissioners Present:Gladys M. Brown, ChairmanJohn F. Coleman, Jr., Vice ChairmanPamela A. WitmerRobert F. PowelsonAndrew G. Place |  |
| Gregory Kennedy | C-2015-2471718 |
| v. |  |
| PECO Energy Company |  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

 Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions filed by Gregory Kennedy (Complainant or Mr. Kennedy) on April 27, 2015, in response to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Susan D. Colwell issued on April 21, 2015.[[1]](#footnote-1) PECO Energy Company (Respondent or PECO) filed Replies to Exceptions on April 30, 2015. For the reasons stated below, we will grant the Complainant’s Exceptions and adopt the ALJ’s Initial Decision, as modified.

**History of the Proceeding**

 On February 23, 2015, the Complainant filed a Formal Complaint (Complaint) against PECO alleging that the Respondent was threatening to shut off service or had already shut off service. Additionally, Mr. Kennedy averred that PECO was providing unreasonable customer service by refusing to accept any form of payment other than cash, check, or credit cards. According to the Complainant, this is a “violation of UCC 3-603 Tender of Payment, and 31 USC 5118 The Gold Clause and Consent to Sue.” Complaint at 2.

 Mr. Kennedy contended that he attempted to discharge his debt by submitting a negotiable instrument in the form of a promissory note to PECO, but that PECO rejected it as a form of payment for his bill.[[2]](#footnote-2) He alleged that he spoke with PECO representatives via telephone and tried to explain that a promissory note is a negotiable instrument under the Uniform Commercial Code (UCC). However, the PECO representatives still refused to accept his promissory note as payment. Thereafter, Mr. Kennedy stated, he attempted to have his case heard in Municipal Court, but that PECO successfully had the case dismissed on Summary Judgment. For relief, the Complainant requested that the Commission investigate PECO’s alleged unlawful refusal to accept his promissory note as payment for his bill. Complaint at 2-6.

 On March 20, 2015, PECO filed an Answer to the Complaint. The Respondent averred that it accepts cash, certified checks, money orders, valid bank checks, personal checks, and a number of credit cards for payment of utility accounts. PECO also stated that it will not apply as credit to any customer account non-negotiable documents, sight drafts, 1099 Forms, Acceptance for Value, UCC Certified Tender of Payments, Promissory Notes or other UCC documents. Additionally, the Respondent asserted that the same issue in the Complaint has already been decided by the Commission.[[3]](#footnote-3) According to the Respondent, neither PECO’s tariff nor the Commission’s Regulations require PECO to accept all forms of payment. Thus, the Respondent contended that the Complaint should be dismissed for legal insufficiency. Answer at 1-2.

PECO stated that Mr. Kennedy has been submitting the following documents as purported payments toward his account: forms 1099A and 1099C, a bill of exchange and promissory notes.[[4]](#footnote-4) PECO argued that it properly refused these forms as payment. According to PECO, unless the Complainant pays his bill with any of the accepted methods of payment, his account will go into the collections process and his service will be terminated. Moreover, the Respondent alleged that Mr. Kennedy is not entitled to a payment arrangement pursuant to 66 Pa. C.S. § 1405(c) because the outstanding balances are comprised of CAP arrears. *Id.* at 3.

 Also on March 20, 2015, PECO filed Preliminary Objections (POs) to the Complaint. In its POs, PECO asserted that the Respondent is entitled to judgment as a matter of law and sought dismissal of the Complaint on the grounds that it is legally insufficient. PECO cited as controlling authority the Commission’s decisions in *Coppedge 2015* and *Haleema B. Alkhatib v. PECO Energy Company*, Docket No.

C-2011-2242125 (Order entered January 12, 2012) (*Alkhatib*), a decision addressing the Commission’s lack of jurisdiction to interpret the UCC to determine the negotiability of instruments. POs at 2-3.

 On March 30, 2015, the Complainant filed a series of documents without page numbers which we will collectively refer to as an Answer to the POs.[[5]](#footnote-5) Mr. Kennedy also attached a summary to his Answer to the POs titled “In Conclusion of Answer and Facts.” In the summary, Mr. Kennedy stated that PECO received an International Promissory Note from the Complainant dated “December 30, 2015 [sic]” which the Complainant argued is a “negotiable instrument and legal tender to pay/discharge debts.” Answer to POs. According to Mr. Kennedy, PECO dishonored this instrument in direct violation of “Code of Civil Procedure 2074-2077” and is therefore “precluded from any after the fact objections.” Answer to the POs.

 Additionally, Mr. Kennedy contended that PECO’s 2015 tariff does not exclude promissory notes. The Complainant argued that PECO is attempting to use the Gold Clause statute by requesting payments in a particular currency from its customers which is a direct violation of Public Law 73-10[[6]](#footnote-6) and 31 U.S.C. § 5118. Finally, Mr. Kennedy claimed that the Respondent, as a public company, is prohibited from requiring payment of a particular kind. Answer to the POs.

 In her Initial Decision issued on April 21, 2015, ALJ Colwell found that the Commission does not have jurisdiction over the interpretation of negotiable instruments under the UCC. Additionally, the ALJ explained that the Commission previously ruled that PECO’s accepted methods of payment policy is not unreasonable and, therefore, is not a violation of Section 1501 of the Public Utility Code (Code), 66 Pa. C.S. § 1501. Accordingly, the ALJ granted the POs and dismissed the Complaint.[[7]](#footnote-7) I.D. at 1. As previously indicated, the Complainant filed Exceptions to the Initial Decision on April 27, 2015, and PECO filed Replies to Exceptions on April 30, 2015.

**Discussion**

Initially, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. It is well-settled that the Commission is not required to consider expressly or at length each contention or argument raised by the parties. [Consolidated Rail Corp. v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

 In her Initial Decision, ALJ Colwell made six Findings of Fact and reached twelve Conclusions of Law. I.D. at 3-4, 8-9. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

**Legal Standards**

Section 5.101 of our Regulations, 52 Pa. Code § 5.101, sets forth the grounds for granting preliminary objections. That section provides as follows:

**§ 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.

(7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. 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. Dep’t of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979). 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. Commonwealth* *of Pa.*, 507 Pa. 360, 490 A.2d 402 (1985). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep’t of Auditor General, et al. v. State Employees’ Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

**ALJ’s Initial Decision**

 The ALJ explained that the Commission’s Regulations do not address the forms of payment which a utility is required to accept from a customer as payment for services rendered. Specifically, the ALJ noted that the Regulation relating to termination provides that a customer may avoid termination if “payment in full is tendered in *any reasonable manner*” and that payment “in any reasonable manner includes payment by personal check.” I.D. at 6 (quoting 52 Pa. Code § 56.94 (emphasis added)). Furthermore, the ALJ acknowledged that PECO’s tariff does not appear to directly define its view of payment in “any reasonable manner” except to note that customers who are deemed not to be “creditworthy” are required to make payment “by means of a certified, cashier’s, teller’s or bank check, or by wire transfer, or in cash or other immediately available funds.” I.D. at 6 (quoting PECO Tariff Rule 17.3).

In addressing the Complainant’s contention that PECO should accept the promissory note as payment for electricity service, the ALJ explained that the Commission must act within and cannot exceed its jurisdiction. Moreover, the ALJ noted that jurisdiction may not be conferred by the parties where none exists. I.D. at 7. Additionally, the ALJ referenced our prior decisions in *Alkhatib* and *Coppedge v. PECO Energy Company,* Docket No. F-2009-2135893 (Order entered August 3, 2010) (*Coppedge 2010*), in which we determined that the Commission lacks jurisdiction to interpret the UCC to determine the negotiability of instruments.

 Next, the ALJ cited to the more recent *Coppedge 2015* decision in which we held that PECO’s policy regarding acceptable methods of payment is not unreasonable. I.D. at 7. The ALJ concluded that PECO's action herein in refusing to accept the Complainant’s promissory note as payment for his bill does not violate the Code or the Commission’s Regulations or Orders. *Id.*

As such, the ALJ determined that the Commission lacks jurisdiction to grant the remedy sought. Finding no issue of material fact, the ALJ granted the Respondent’s POs. Because the Commission lacked subject matter jurisdiction to determine the negotiability of Mr. Kennedy’s alleged tender of payments, the ALJ concluded that a hearing would be unnecessary and not in the public interest. *Id.* at 7-8 (citing 66 Pa. C.S. § 703(b) and 52 Pa. Code § 5.21(d)).

**Exceptions and Replies**

 In his Exceptions, the Complainant simply asserts that the Initial Decision contains an incorrect statement that Mr. Kennedy did not file an Answer to the POs.[[8]](#footnote-8) The Complainant requests that the Commission research his file, review the Answer to the POs and the relevant exhibits, and amend the findings to reflect the timely filed documents. Exc. at 1.

In its Replies to Exceptions, PECO argues that the Complainant’s Answers to the POs are not material to the ALJ’s decision that the Commission lacks jurisdiction to determine the negotiability of Mr. Kennedy’s promissory note. According to PECO, the fact that the Complainant’s Answer to the POs was not included in the Initial Decision does not change any material issue of law or fact in this case and presents no grounds for overturning the ALJ’s decision. PECO opines that the ALJ properly relied on prior Commission decisions to determine that the Respondent’s actions in refusing to accept a promissory note as payment for Mr. Kennedy’s bill did not violate any statute or Regulation or Order of the Commission. R. Exc. at 2-3.

Further, the Respondent contends that the ALJ correctly applied the standard for resolving preliminary objections and that none of the facts asserted in the Complaint stated a case against PECO as a matter of law. As such, PECO asserts, it was proper for the ALJ to dismiss the Complaint without holding a hearing. *Id.* at 3-4.

**Disposition**

 Preliminarily, we shall address the Complainant’s request to acknowledge the filing of his Answer to the POs and the accompanying exhibits. As discussed above, the Initial Decision incorrectly stated that the Commission did not receive the Complainant’s responsive filing. To this extent, we shall grant the Exceptions.

Next, in light of the arguments set forth in the Answer to the POs, we shall evaluate the ALJ’s decision to grant PECO’s POs and to dismiss the Complaint. With his Answer to the POs, the Complainant filed a compendium of exhibits containing excerpts of purported federal and state authorities and other materials. Mr. Kennedy submitted this information as support for his argument that PECO willfully violated the law by refusing to accept a promissory note as a negotiable instrument in payment for his outstanding electric service. However, none of the arguments or information contained in the Answer to the POs alter the conclusion that the Commission lacks the jurisdiction to determine if a promissory note is an acceptable negotiable instrument under the UCC. *See, Coppedge 2010* and *Alkhatib, supra*.

In *Alkhatib*, the complainant attempted to satisfy her electric service balance by presenting various documents such as Internal Revenue Service forms which she claimed were negotiable instruments. We found that the Commission lacked the subject matter jurisdiction to determine the negotiability of the instruments tendered to PECO as payment for service.

The Commission, as an administrative agency, possesses only those powers expressly conferred on it by statute or those powers which are necessarily implied from its express powers. *Norfolk Southern Ry. Co. v. Pa. Public Utility Commission,* 875 A.2d 1243 (Pa. Cmwlth. 2005). In order to determine if the Complainant’s instruments are a reasonable manner of payment, the Commission would be required to determine the instruments’ negotiability which is a question of law governed by application of the UCC, and in particular 13 Pa. C.S. § 3104. Section 701 of the [Code], 66 Pa. C.S.

§ 701, authorizes the Commission to hear complaints regarding the Code, Commission Regulations or a Commission order. Section 1501 of the Code, 66 Pa. C.S. §1501, provides the basis for the Commission’s subject matter jurisdiction. The Commission is responsible for ensuring the adequacy, efficiency, safety and reasonableness of public utility services. *Id.*; *Schriner v. Pa. Power & Light Co*., 348 Pa. Superior Ct., 177, 501 A.2d 1128 (Pa. Superior 1985). Because an instrument’s negotiability does not fall within that realm, we concur with the ALJ’s findings that the Commission lacks subject matter jurisdiction to entertain the Complaint.

*Alkhatib* at 8-9.

Here, as in *Alkhatib*, the negotiability of the proposed instrument of payment, a promissory note, does not fall within the Commission’s jurisdiction. The information set forth in the Answer to the POs does nothing to modify this limit upon our jurisdiction. Furthermore, the ALJ correctly concluded that the Commission previously determined that PECO’s policy regarding acceptable methods of payment (*i.e.*, cash, certified checks, money orders, valid bank checks, personal checks, and a number of credit cards) was not unreasonable. *See, Coppedge 2015* at 12. We find no reason to deviate from our recent determination on this issue. Thus, we find no error in the ALJ’s conclusion that PECO’s action in refusing to accept the Complainant’s promissory note as payment for his bill did not violate the Code, Commission Regulations or a Commission Order.

We recognize that the Complainant is appearing *pro se* and as such may not be well-versed in the proper presentation of legal pleadings, including the proper design and filing of complaints, preliminary motions or answers, nor may he understand rules regarding the sufficiency or admissibility of evidence to support a complaint. For this reason, we are generally more accommodating to legal insufficiencies in *pro se* complaints and would not dismiss a *pro se* complaint without first providing a hearing during which the *pro se* complainant could further explain his or her position and the factual basis for the complaint. *See*, *e.g.*, *Carlock v. The United Telephone Company of Pennsylvania*, Docket No. F-00163617 (Order entered July 14, 1993) (*Carlock*). Our concern is that *pro se* complainants may find it difficult to navigate through pre-hearing motions and, therefore, should be given the chance to testify to their issue with supporting facts.

Such accommodation, however, must be within the bounds of due process. *See MacLuckie v. Palmco Energy, LLC*, Docket No. C-2014-2402558 (Order entered December 4, 2014). Further, there are some cases where a hearing would not alter the inevitable conclusion that this Commission cannot provide the Complainant the relief requested. *See Floyd v. Verizon Pennsylvania LLC,* Docket No. C-2012-2333157 (Order entered April 30, 2013). However, unlike *Carlock*, the case now before us does not rest on the ability of the Complainant to describe the factual underpinnings of his Complaint. This case is about subject matter jurisdiction. The relief requested is for a review of, and a ruling on, the negotiability of a promissory note. We have explained the extent to which we concur with the ALJ’s rulings on these issues, *supra*. Against this backdrop, we find that a hearing would not enable Mr. Kennedy to better explain his positions or provide additional facts which would alter the inevitable conclusion that this Commission lacks jurisdiction to entertain the Complaint in the first instance. On that basis, we distinguish *Carlock* from the case now before us*.*

**Conclusion**

In light of the above discussion, we shall: (1) grant the Complainant’s Exceptions; (2) adopt the ALJ’s Initial Decision, as modified; and (3) dismiss the Complaint, all consistent with this Opinion and Order. **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions filed by Gregory Kennedy on April 27, 2015, to the Initial Decision of Administrative Law Judge Susan D. Colwell, are granted.

2. That the Initial Decision of Administrative Law Judge Susan D. Colwell, issued on April 21, 2015, is adopted, as modified.

3. That the Preliminary Objections filed by PECO Energy Company on March 20, 2015, are granted.

 4. That the Formal Complaint filed on February 23, 2015, by Gregory Kennedy against PECO Energy Company is dismissed.

 5. That the proceeding at Docket No. C-2015-2471718 is marked closed.

 **BY THE COMMISSION,**



 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: October 22, 2015

ORDER ENTERED: October 22, 2015

1. On April 29, 2015, the Commission’s Secretary’s Bureau issued a Secretarial Letter to the Parties stating that the Complainant’s Exceptions did not contain a certificate of service or other indication that the Respondent was served with the Exceptions. Thus, the Secretary’s Bureau enclosed a copy of the Exceptions and notified the Respondent that any Replies to Exceptions would be due by May 21, 2015. [↑](#footnote-ref-1)
2. The Complainant submitted that PECO is in violation of “Public law 73-10” by requesting “a particular coin or currency to pay a debt.” Complaint at 2-3. [↑](#footnote-ref-2)
3. *See, James Coppedge v. PECO*, Docket No. F-2014-2406180 (Order entered January 29, 2015) (*Coppedge 2015*). PECO cited to the Initial Decision in *Coppedge 2015*. [↑](#footnote-ref-3)
4. PECO noted that the Complainant is currently enrolled in PECO’s Customer Assistance Program (CAP) and has balances totaling $4,590.80. Answer at 3. [↑](#footnote-ref-4)
5. The Answer to the POs contains a series of exhibits with purported excerpts from various federal and state sources and other references: Exhibit A (31 C.F.R.

§ 103.11 and 13 Pa. C.S. § 3603 (pertaining to tender of payment)); Exhibit B (June 5, 1933 – House Joint Resolution 192); Exhibit C (UCC § 3-310); Exhibit D (31 U.S.C.

§ 5118 (pertaining to Gold Clauses and Consent to Sue)); Exhibit E (1913-1935 Banking Acts); Exhibit F (PECO’s 2015 tariff report); and Exhibit G (“Code of Civil Procedure” §§ 2074-2077). [↑](#footnote-ref-5)
6. Mr. Kennedy did not provide a further cite or excerpt of Public Law

73-10 and, upon review, it is unclear to which law he is referring. [↑](#footnote-ref-6)
7. The Initial Decision incorrectly stated that no responsive pleadings to the POs had been filed. I.D. at 3. [↑](#footnote-ref-7)
8. We acknowledge that the format of the Complainant’s Exceptions does not strictly comply with Section 5.533(b) of our Regulations, 52 Pa. Code § 5.533(b), which requires that exceptions be numbered, identify the finding of fact and conclusion of law to which exception is taken, and cite to the relevant pages of the Initial Decision. Nevertheless, particularly because the Complainant is appearing *pro se*, we will accept the Exceptions as filed pursuant to Section 1.2(a) of our Regulations, 52 Pa. Code

§ 1.2(a), in order to secure a just, speedy, and inexpensive determination. [↑](#footnote-ref-8)