

Legal Department
2301 Market Street / S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699

Direct Dial: 215-841-6863

October 20, 2016

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

**RE: Steven and Diane Van Schoyck v. PECO Energy Company
Docket No. C-2015-2478239**

Dear Ms. Chiavetta:

Enclosed for filing is PECO Energy Company's Objection to Complainant's Petition for Leave to Withdraw Formal Complaint.

Very truly yours,



Ward L. Smith
Counsel for PECO Energy Company

WS/ab
Enclosure

cc: Christopher P. Pell, ALJ
Darlene D. Heep, ALJ
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|--------------------------------------|---|-----------------------|
| Stephen and Diane Van Schoyck | : | |
| | : | |
| v. | : | C-2015-2478239 |
| | : | |
| PECO Energy Company | : | |

**PECO Energy Company’s Objection
to
Complainant’s Petition for Leave to Withdraw Formal Complaint**

I. Introduction

On October 17, 2016, PECO was served with Complainants’ Petition for Leave to Withdraw Formal Complaint. Pursuant to 52 Pa. Code §5.94(a),¹ PECO objects to granting the Petition as stated. In this pleading, however, PECO describes terms that would allow it to withdraw its objection to the Petition; PECO will withdraw its objection if the Petition is granted *with prejudice* so that Complainants may not later re-initiate litigation to interfere with installation of an AMI meter.

The Petition to Withdraw is based upon the assumption that Complainants will successfully install a solar and battery system in their home, and go off-grid, “sometime in November of this year.” Petition, ¶ 21. If the Complainants accomplish that solar/battery installation and disconnection from the grid, they would cease to be PECO’s customers and there would no need for PECO to have any meter – AMI or otherwise – installed at Complainants’

¹ 52 Pa. Code §5.94 (a): “Except as provided in subsection (b), a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties. The petition must set forth the reasons for the withdrawal. A party may object to the petition within 10 days of service. After considering the petition, an objection thereto and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted.”

residence. Complainants' position, therefore, is that their plan to install a solar/battery system and go off-grid negates the need to proceed any further in the instant docket. Petition, ¶¶ 22-24.

PECO agrees that, if Complainants manage to complete installation of the solar/battery system and go off-grid on the proposed schedule, the need for additional litigation in this docket will be obviated. In PECO's view, however, the Petition fails to address a critical contingency question: what procedure should the Commission follow if Complainants do not complete the planned solar/battery installation and off-grid status by "sometime in November"?

If that contingency comes to be – if Complainants are not able to go off-grid by the end of November – they will not have the protection against termination that is afforded by having a complaint proceeding active. In the event of that contingency, therefore, PECO will move forward to install an AMI meter at the Van Schoyck residence and, if the Van Schoycks continue to deny access or otherwise resist installation of the AMI, PECO will initiate termination procedures. If this sequence of events occurs – and the entire sequence is inevitable if Complainants fail to complete their solar/battery installation by the end of November – PECO is concerned that the Van Schoycks logical next step will be to block AMI installation/termination by filing a new complaint at that time. If that happens, then the Van Schoyck litigation will have effectively been pushed into 2017.

PECO does not suggest that the Van Schoycks actively intend to follow the described path. To the contrary, PECO accepts for purposes of this discussion that the Van Schoycks have effectively made the decision to go off-grid and are actively pursuing that goal. But if the Van Schoycks don't accomplish that goal, PECO respectfully submits that they should not be allowed to restart the litigation process at some future time.

This is especially true because, in the approximately eight months since the Commission remanded this case for hearing, the Van Schoycks have done nothing to prosecute their evidentiary hearing. As described in the Argument section of this pleading, the case is clearly ripe for dismissal with prejudice for want of prosecution. The Complainants should not be allowed any greater flexibility as to future litigation options than would be available to them under a dismissal for want of prosecution.

For the reasons set forth below, PECO respectfully submits that, in the event that the Van Schoycks do not successfully install a solar/battery system and go off-grid by the end of November 2016, Complainants should be prohibited from attempting to block AMI installation by filing a new complaint. Instead, if the planned solar/battery installation and off-grid status is not completed by the end of November 2016, Complainants should be required to allow installation of an AMI meter and, if they do not so allow, PECO should be allowed to terminate their electric service. This outcome can be accomplished by an Order from Your Honors granting the Petition with prejudice, with specific Ordering Paragraphs that Complainants may not file a new complaint and that, even if they do file a new complaint, PECO may proceed with termination even in the face of such complaint.

II. History of the Proceeding

In the Petition (¶¶ 1-13), the Van Schoycks provide a partial History of the Proceeding. PECO provides the following additional history, focusing on events since the Commission's remand, in support of its argument that the Van Schoycks have not meaningfully prosecuted their evidentiary case since the remand.

- February 25, 2016 – Commission remands the matter for evidentiary hearings

- April 1, 2016 -- Mr. Lanza enters his appearance
- April 6, 2016 – a Hearing Notice is served, setting the evidentiary hearings for July 26-27
- April 19, 2016 – By email to Your Honors, the parties jointly propose a schedule to exchange written testimony, beginning with June 9 filing of direct by the Van Schoycks
- May 11, 2016 – PECO serves its Set I interrogatories
- June 9, 2016 – the Van Schoycks miss their deadline for filing direct testimony
- June 16, 2016 – Mr. Harvey enters his appearance
- June 22, 2016 -- a Hearing Cancellation/Reschedule Notice is issued (setting new hearings dates for October 24-28)
- August 5, 2016 – PECO files its Motion to Compel answers to discovery and its Motion to Establish a Procedural Schedule
- August 10, 2016 – Mr. Harvey informs PECO that the Van Schoycks intend to file a Petition to Withdraw. PECO informally agrees to stand down on discovery, etc., for three weeks
- August 12, 2016 – Prehearing Order #2 is issued. The Order establishes a new schedule for the exchange of expert reports and hearing exhibits
- August 16, 2016 – the parties file a Joint Motion for an Omnibus Schedule Revision. Footnote 1 states that: “The Van Schoycks are currently evaluating whether to continue to prosecute their claim, but pending the results of that evaluation join the present motion.”

- September 6, 2016 – the deadline for the Van Schoycks to provide expert reports passes
- September 15, 2016 – during evidentiary hearings, Mr. Harvey confirms that Dr. Marino has not prepared testimony regarding the Van Schoycks because they intend to go off-grid and withdraw their complaint. September 15 Transcript 579-80, 667-670
- October 10, 2016 – the deadline to provide hearing exhibits passes
- October 17, 2016 – the Petition to Withdraw is filed

III. Argument – The Petition to Withdraw Should Be Granted *With Prejudice* So That Complainants May Not Re-Initiate Litigation in the Future if They Are Not Successful in Going Off-Grid by November 30, 2016

PECO believes that the Petition to Withdraw must be evaluated against the full procedural posture of this case. Critically, there is no doubt whatsoever that, since the Van Schoycks have effectively stated that they will not appear for their scheduled October 24-27 hearing dates, this matter is now ripe to be dismissed for want of prosecution.

PECO is aware that the Complainants Petition (¶¶ 14-16) claims that the Van Schoycks have “spent considerable time and resources” and “spent countless hours and significant sums of money” on this matter. Moreover, PECO recognizes that this complaint has been pending since April 2015 and that, between April 2015 and February 2016, the Complainants did work hard to convince the Commission to grant them an evidentiary hearing. But since the evidentiary hearing was granted in the February 2016 remand order, the Complainants have done virtually nothing to prosecute that evidentiary hearing. As demonstrated in the History of the Proceeding section of this objection, the Van Schoycks have not answered discovery; they missed every

filing deadline; their initial hearing date had to be rescheduled because they were not ready to litigate in July; they did not retain expert witnesses along with the other represented complainants; and they have now effectively stated that they do not intend to appear for their scheduled October hearing dates.²

Complainants have been amply warned that failure to appear at the scheduled October hearings would result in dismissal of their complaint for failure to prosecute. Prehearing Order #2, issued on August 12, 2016, clearly states (¶ 10) (capitalization and bold in original):

THE COMPLAINT WILL BE DISMISSED IF THE CUSTOMER FAILS TO PARTICIPATE IN THE HEARING AND PRESENT EVIDENCE IN SUPPORT OF THE COMPLAINT.

Moreover, when this issue was discussed at the September 15 evidentiary hearings, Administrative Law Judge Heep reiterated that rule: “[Y]ou’re correct that if the date comes up and they’re not here, they can be dismissed for failure to prosecute.” September 15 Transcript, p. 670.

PECO respectfully submits that, given all the circumstances of this case, if PECO sought dismissal for want of prosecution it would and should be granted *with prejudice* – that is, that such dismissal would act as a bar to these Complainants later filing another complaint against installation of an AMI meter. The Van Schoycks have had ample opportunity to prepare their case – approximately eight months have passed since the Commission issued its remand order. They are represented by two different law firms, and have been so represented for months. They

² PECO recognizes that the Petition is couched as a request to suspend the procedural schedule pending resolution of the Petition to Withdraw. *See* Petition, Conclusion. However, by Commission regulation, PECO has ten days to object to the Petition. By filing the Petition less than one week before the scheduled hearing, Complainants virtually guaranteed that their Petition would still be pending on the scheduled hearing dates. Since Complainants have known since at least August that they intended to file a Petition to Withdraw, their choice to wait until the last minute to file that Petition should be viewed as a choice by Complainants not to proceed with and prosecute their evidentiary hearing.

had the opportunity to join with the other represented Complainants to jointly present expert testimony, and chose not to pursue that option. They have illegally removed their meter and replaced it with an analog meter purchased on the internet. The Commission, PECO, and the other represented Complainants mobilized resources to litigate this group of cases together in 2016 so that all parties costs and disruption could be minimized.

Moreover, if the Van Schoycks were to be allowed to file a new complaint, thus pushing their hearings into 2017, this would cause additional delay in final resolution of this body of AMI cases, and thus delay the resolution of the important policy issues that are part of these cases, which would be prejudicial to PECO. PECO has materially completed the installation of AMI meters for its full customer base (with only a few hundred meters still to install), and PECO is thus operating both a modified version of its old AMR backbone and its full AMI support system. Operating both systems, even with the AMR system in a modified form, is quite expensive, and also requires the redundant dispatch of key personnel whose skills should be utilized to run the new AMI system. PECO anticipates moving to the single AMI system as soon as possible, but delays in the final resolution of these cases make it more difficult to finalize that transition. Consequently, since Complainants have had ample opportunity to prosecute their case and further delay will be detrimental to PECO, PECO respectfully submits that this case is ripe for dismissal *with prejudice* for want of prosecution.

The Petition to Withdraw implicates those same procedural and policy issues. If Complainants are allowed to withdraw without prejudice, they could file a new complaint months from now to stop installation of an AMI. The Commission and PECO would need to remobilize. The same procedural delays would occur, even though the Van Schoycks had every opportunity to prosecute their case in 2016. In that situation, the Van Schoycks would

essentially have granted themselves another multi-month continuance. PECO therefore submits that the Petition should only be granted if that relief is made *with prejudice*.

IV. Conclusion

PECO respectfully requests that the Petition be granted *with prejudice*. Moreover, in order to avoid the sequence of events set forth above, PECO requests that Your Honors include the following Ordering Paragraphs:

1. The Petition to Withdraw is granted, *with prejudice*.
2. To allow Complainants the opportunity to complete their planned solar/battery installation, PECO has agreed not to seek to install an AMI meter at the Van Schoyck residence or to seek to terminate service related to AMI installation prior to November 30, 2016.
3. Beginning on December 1, 2016, PECO may proceed with installation of an AMI meter at the Van Schoyck residence, including initiating procedures to terminate service.
4. Complainants may not file any additional complaint that seeks or requests that PECO be prohibited or delayed from installing an AMI meter at the Van Schoyck residence.
5. If Complainants file a complaint in violation of the above paragraph, PECO may proceed with AMI installation/termination notwithstanding the existence of such complaint. PECO is not required to make any additional filing with the Commission seeking permission to proceed with installation/termination notwithstanding the existence of such complaint.

Respectfully submitted,



Ward Smith
Assistant General Counsel
PECO Energy Company
215-841-6863
ward.smith@exeloncorp.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

STEPHEN AND DIANE VAN SCHOYK

v.

PECO ENERGY COMPANY

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Docket No. C-2015-2478239

CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a copy of PECO'S Energy Company's Objection to Complainant's Petition for Leave to Withdraw Formal Complaint in the above matter upon all interested parties via e-mail and postage prepaid to:

Via Electronic Mail

Ed Lanza, Esquire
The Lanza Firm, LLC
P.O. Box 61336
Harrisburg, PA 17106

Via Electronic Mail

Stephen G. Harvey
1880 JFK Boulevard
Suite 1715
Philadelphia, PA 19103

Dated at Philadelphia, Pennsylvania, October 20, 2016



Ward L. Smith
Counsel for PECO Energy Company
2301 Market Street, S23-1
Philadelphia, PA 19101-8699
(215) 841-6863
Fax: 215.568.3389
Ward.Smith@exeloncorp.com