

February 22, 2017

**Via Electronic Filing**

Rosemary Chiavetta, Esquire  
Secretary  
PA Public Utility Commission  
Commonwealth Keystone Building, 2 North  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Docket No. C-2017-2586926  
Ed Himmelwright v. West Penn Power Company  
Preliminary Objection of West Penn Power**

Dear Secretary Chiavetta:

Attached for filing is the Preliminary Objection of Respondent, West Penn Power Company (West Penn), to the Formal Complaint of Ed Himmelwright (Complainant).

A copy of the Preliminary Objection has been forwarded to the Complainants in the manner indicated on the attached Certificate of Service.

If there are any questions, please contact me.

Very truly yours,

Reger Rizzo & Darnall LLP



Margaret A. Morris

MAM/jmm  
Attachment

cc: John L. Munsch, Esquire, FirstEnergy Service Company [w/enc.]  
Ed Himmelwright [w/enc.]

**Re: Docket No. C-2017-2586926  
Ed Himmelwright v. West Penn Power Company  
Preliminary Objection of West Penn Power**

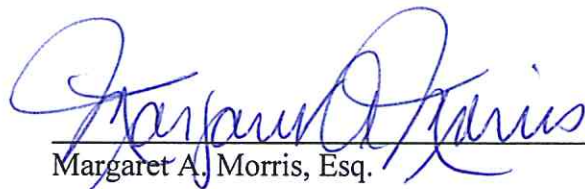
**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served upon the person(s) on this service list, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

**Via First Class Mail**

Ed Himmelwright  
1166 Fishing Creek Road  
Mill Hall, PA 17751

Dated: February 22, 2017

  
Margaret A. Morris, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ED HIMMELWRIGHT

v.

WEST PENN POWER COMPANY

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:  
:  
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Docket No. C-2017-2586926

**NOTICE TO PLEAD**

Pursuant to 52 Pa. Code § 5.101 you are hereby notified that if you do not file a written response answering the enclosed Preliminary Objections of West Penn Power Company within ten (10) days from service of this Notice, the facts set forth by West Penn Power Company in the Preliminary Objections may be deemed to be true, whereby requiring no other proof. All pleadings, such as a Reply to the Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy to counsel for West Penn Power Company, Margaret A. Morris, Esq., and where applicable, the Administrative Law Judge presiding over the issue.

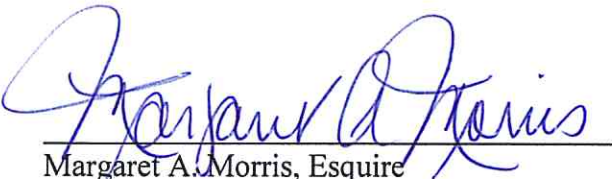
**File with:**

Rosemary Chiavetta, Esquire  
Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building, 2 North  
P.O. Box 3265  
Harrisburg, PA 17105

With a copy to:

Margaret A. Morris, Esquire  
Reger Rizzo & Darnall LLP  
Cira Centre, 13<sup>th</sup> Floor  
2929 Arch Street  
Philadelphia, PA 19104

Date: February 22, 2017



Margaret A. Morris, Esquire  
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Counsel for West Penn Power Company

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ED HIMMELWRIGHT	:	
	:	
v.	:	Docket No. C-2017-2586926
	:	
WEST PENN POWER COMPANY	:	

**PRELIMINARY OBJECTIONS TO THE FORMAL COMPLAINT  
OF ED HIMMELWRIGHT**

West Penn Power Company (West Penn or Company), by and through its attorneys, Reger Rizzo & Darnall LLP, pursuant to 52 Pa. Code § 5.101, hereby files its Preliminary Objection to the Formal Complaint of Ed Himmelwright (Complainant) filed in the above-captioned proceeding.

West Penn avers the subject of the Formal Complaint is beyond the jurisdiction of the Pennsylvania Public Utility Commission (Commission) who is without authorization to grant the Complainant's request for damages. The Formal Complaint includes impertinent matter in its requested relief. Therefore, West Penn requests that this Preliminary Objection be granted and that the Commission: (1) grant its Preliminary Objections and strike the Complainant's requests for monetary damages; (2) expressly prohibit the Complainant from introducing any testimony or exhibits at any evidentiary hearing regarding exemption alleged damages; (3) dismiss the Formal Complaint in part with prejudice; and (4) grant the Company such other relief as may be just and reasonable under the circumstances.

In support of its preliminary objections, West Penn states as follows:

**I. Procedural Background**

1. West Penn is an electric distribution company certificated as a public utility permitted to operate within the Commonwealth in Pennsylvania and provides residential electric service to the Customer under Account No. 100092354784.

2. The Complainant is the owner of the real property located at 1166 Fishing Creek Road, Mill Hall, Pennsylvania (Service Location). He filed a Formal Complaint alleging, that a contractor for the Company entered the Service Location without notice, damaged a fence, cut down the wrong tree and left cut brush on his property. He seeks compensatory damages for the costs and labor to replace two white pine trees and a four foot wood fence as well as the labor costs to clear cut up trees and brush at the Service Location.

3. In its Answer and New Matter being served contemporaneously with this Preliminary Objection, West Penn has denied the material allegations in the Formal Complaint. The Company avers notice was provided in writing and the fence was rotting and in a dilapidated condition prior to their arrival. The Company further avers that the contractor returned to the Service Location with the intent to complete removal and disposal of the debris but was denied entry by the Complainant.

4. Pursuant to 52. Pa. Code § 5.101, West Penn objects to the Formal Complaint on the grounds that the Commission lacks jurisdiction to award monetary damages. The Complainant seeks to have West Penn pay for the alleged damages to his property.

## II. Argument

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

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

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

7. In the instant Formal Complaint, the Complainant seeks \$1,0045.00 [sic] for the alleged damages. (Compl. ¶ 5.)

8. Clearly, the relief sought through the Formal Complaint is an award of monetary damages from the Company.

### A. Impertinent Matter

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

10. It is well-established under Pennsylvania law that the enforcement powers of the Commission do not include the power to award money damages. *Elkin v. Bell Tel. Co. of PA.*,

420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978); see *Nagy v. Bell Tel. Co. of PA.*, 436 A.2d 701 (Pa. Super. 1981).

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

. . . the statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility. Nor can we find an express grant of power from which the power to award such damages can be fairly implied. Thus, it can be concluded that the Legislature did not intend for the PUC to have such a power.

*Feingold*, 383 A.2d at 794.

12. The Court of Common Pleas retains original jurisdiction over suits for monetary damages. *Behrend, supra*.

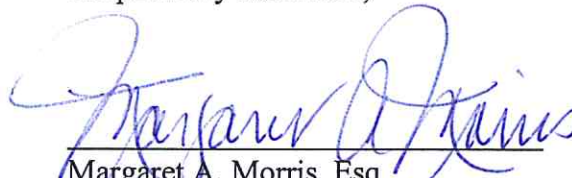
13. A prayer for damages, which are not legally recoverable in the cause of action, is “impertinent matter” in the sense that it is irrelevant to that cause of action, and is correctly challenged through a motion to strike the requested relief as impertinent matter. *Third Avenue Realty Limited Partners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

14. The Complainant’s requested relief of damages is irrelevant to the instant cause of action and therefore an “impertinent matter.”

15. Therefore, in accordance with Pennsylvania law, this Commission does not have the power to award monetary damages, and the Complainant’s request for money damages is an impertinent matter that must be stricken within the use and meaning of Commission regulation at 52 Pa. Code § 5.101(a)(2).

**WHEREFORE**, Respondent, West Penn Power Company, requests that the relief for damages in the Formal Complaint filed by Ed Himmelwright be dismissed with prejudice or denied in its entirety for lack of subject matter jurisdiction. The Respondent also requests, to the extent relevant, that no testimony or exhibits at any evidentiary hearing regarding alleged damages be permitted.

Respectfully submitted,



Date: February 22, 2017

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