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April 3, 2017

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

RE: Antonio Romeo v. PECO Energy Company
Docket No. C-2015-2479260

Dear Ms. Chiavetta:

Enclosed for filing is the Preliminary Objection of Respondent, PECO Energy Company.

Very truly yours,



Ward L. Smith
Counsel for PECO Energy Company

WS/ab
Enclosure

cc: Antonio Romeo

PENNSYLVANIA PUBLIC UTILITY COMMISSION

ANTONIO ROMEO :
Complainant :
v. : **DOCKET NO. C-2015-2479260**
: :
PECO ENERGY COMPANY :
Respondent :
:

NOTICE TO PLEAD

Pursuant to 52 Pa. Code §§ 5.101 and 5.62(c), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objection of PECO Energy Company within 20 days from service of this notice, a decision may be rendered against you. All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for PECO Energy Company, Shawane L. Lee, and where applicable, the Administrative Law Judge presiding over the issue.

File with:
Rosemarie Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

With a copy to:
Ward L. Smith, Esq.
PECO Energy Company
2301 Market Street, S-23-1
Philadelphia, PA 19103

Dated at Philadelphia, PA, April 4, 2017



Ward L. Smith
Counsel for PECO Energy Company
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Ward.smith@exeloncorp.com

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**PRELIMINARY OBJECTION OF RESPONDENT,
PECO ENERGY COMPANY**

Respondent, PECO Energy Company (“PECO Energy”), pursuant to 52 Pa. Code § 5.101(a)(4) respectfully petitions this Honorable Commission to dismiss portions of the instant Complaint as legally insufficient because the Commonwealth Court has already ruled against Complainant on the noted issues.

1. On April 28, 2015, PECO Energy was served with a formal complaint filed by Antonio Romeo. (hereafter “Complainant”).
2. This matter was subsequently appealed to the Commonwealth Court. *Romeo v Pennsylvania Public Utility Commission*, No. 498 C.D. 2016 (Cmwlth Ct. Feb. 8, 2017 Opinion remanding for further proceedings).
3. On March 3, 2017, the Commission directed PECO, by Secretarial Letter, “to file an Answer within 30 days of the date of this Secretarial Letter.”
4. Pursuant to 52 Pa. Code § 5.101, preliminary objections may be filed within the same timeframe provided for the filing of answers. A preliminary objection may allege that a complaint should be dismissed for legal insufficiency. 52 Pa. Code § 5.101(a)(4).

5. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil procedure. Equitable Small Transportation Intervenors. v. Equitable Gas Co., 1994 Pa.PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

6. In deciding preliminary objections, the Public Utility Commission must determine, based on the factual pleadings of the petitioner, if relief or recovery is possible. Roc v. Flaherty, 527 A.2d 211 (Pa. Cmwlth 1985).

7. A complaint must be able to recover under the law to survive a preliminary objection. Milliner v. Enck, 709 A.2d 417, 418 (Pa. Super. Ct. 1998) (“preliminary objection should be sustained only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover”).

8. All of the non-moving party’s averments must be taken as true for the sake of deciding the preliminary objection. County of Allegheny v. Commw. of Pa., 490 A.2d 402 (Pa. 1985).

9. The court does not, however, need to accept, “unwarranted inferences from facts, argumentative allegations, or expressions of opinions.” Feingold v. McNulty, 2009 Phila. Ct. Com. Pl LEXIS 167, *3.

10. 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 to the public interest.

11. A hearing is required only when there is a disputed question of fact, and is not required to resolve questions of law. Dee-Dee Cab, Inc. v. Pa.Pub. Util. Comm’n, 817 A.2nd 593 (Pa. Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003).

12. In his Complaint (Appendix A, numbered subparagraphs 9-10), the Complainant makes the legal argument that Pennsylvania's Act 129 is preempted by the federal Energy Policy Act. The Complaint argues in pertinent part that:

9. PECO's attempts to force the installation of a smart meter on my property are in violation of federal law. Specifically, the Energy Policy Act of 2005 provides that: "Not later than 18 months after the date of enactment of this paragraph, each electric utility shall **offer** each of its customer classes, and provide individual customers **upon customer request**, a time-based rate schedule under which the rate charged by the electric utility varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level. The timebased rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology." 16 U.S.C. § 2621(d)(14)(A) (emphasis added). Congress has chosen to speak on the issue of smart metering and, in doing so, it has declined to make the installation of smart meters mandatory. Rather, federal law requires only that electric utilities, such as PECO, **offer** smart metering technology to its customers **upon request**. Thus, to the extent that PECO is relying on Pennsylvania's Act 129 of 2008 as a justification for forcing the installation of a smart meter on my property, PECO's actions are in violation of the Energy Policy Act of 2005, which pre-empt's Act 129. See U.S. CONST., Art. VI, cl. 2 (Supremacy Clause). Neither PECO nor the PUC can take action in violation of federal law.

10. The Energy Policy Act of 2005 also provides that: "each State regulatory authority shall, not later than 18 months after August 8, 2005, conduct an investigation in accordance with section 2625 (i) of this title and issue a decision whether it is appropriate to implement the standards set out in subparagraphs (A) and (C)." 16 U.S.C. § 2621(d)(14)(F). Upon information and belief, the required investigation has not been conducted by the appropriate authority in Pennsylvania.

13. Complainant presented the same preemption argument to the Commonwealth Court. In its February 8, 2017 Opinion remand this matter for hearing (p. 7), the Court characterized Mr. Romeo's argument to it as follows:

With regard to preemption, Romeo directs our attention to Section 2621(d)(14)(A) of PURPA, 16 U.S.C. § 2621(d)(14)(A), which provides:

Not later than 18 months after August 8, 2005, each electric utility shall *offer* each of its customer classes, and provide individual customers *upon customer request*, a time-based rate schedule under which the rate charged by the electric utility

varies during different time periods and reflects the variance, if any, in the utility's costs of generating and purchasing electricity at the wholesale level. The time-based rate schedule shall enable the electric consumer to manage energy use and cost through advanced metering and communications technology.

(Emphasis added.) Citing to the Supremacy Clause of the United States Constitution, Romeo argues that because Congress has declined to make the installation of smart meters mandatory, Act 129's compulsory installation is contrary to federal law and must be reversed.

14. The Commonwealth Court ruled against Mr. Romeo's preemption argument, stating (pp. 9-10) that:

Because federal standards are a supplement to the state standards, and the state is only required to consider the federal standards, the federal and state standards are not and cannot be in conflict. Moreover, Congress's enactment of multiple provisions under PURP A, all providing that the state is entitled to adopt its own guidelines that are different from those provided under PURPA, is indicative of Congress's lack of intent to occupy the field. Rather, it is indicative of Congress's objective to allow states to regulate how they choose. As such, PURP A and the Energy Policy Act do not preempt the smart meter provisions of the Code or of Act 129.

15. The legal issues raised in the Complaint, Appendix A, subparagraphs 9 and 10, have thus already been resolved by the Commonwealth Court adverse to Complainant's position.

REQUEST FOR RELIEF

WHEREFORE, for the reasons set forth above, PECO Energy Company respectfully requests that your Honorable Commission summarily dismiss the legal arguments made in the Complaint, Appendix A, subparagraphs 9 and 10, and all related issues which were raised in the Complaint.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ward L. Smith", written over a horizontal line.

Ward L. Smith
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VERIFICATION

I, Ward L. Smith, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.

Date: April 3, 2017



Ward L. Smith

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CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a copy of PECO Energy Company's Preliminary Objection in the above matter upon all interested parties by mailing a copy, properly addressed and postage prepaid to:

Antonio Romeo
9517 Alton Street
Philadelphia, PA 19115

April 3, 2017



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