

June 14, 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-2017-2606028
Wilda M. Schooley v. West Penn Power Company
Preliminary Objection of West Penn Power**

Dear Secretary Chiavetta:

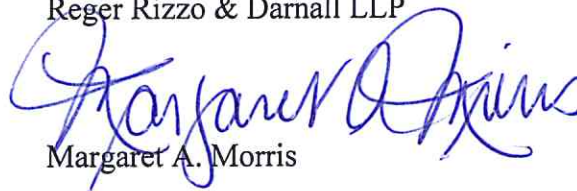
Attached for filing is the Preliminary Objection of Respondent, West Penn Power Company (West Penn), to the Formal Complaint of Wilda M. Schooley (Complainant).

A copy of the Preliminary Objection has been forwarded to the Complainant 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.]
Wilda M. Schooley [w/enc.]

**Re: Docket No. C-2017-2606028
Wilda M. Schooley 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) listed below, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Via First Class Mail

Wilda M. Schooley
125 Flickerville Road
Warfordsburg, PA 17267

Dated: June 14, 2017


Margaret A. Morris, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

WILDA M. SCHOOLEY

v.

WEST PENN POWER COMPANY

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:
:
:

Docket No. C-2017-2606028

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.

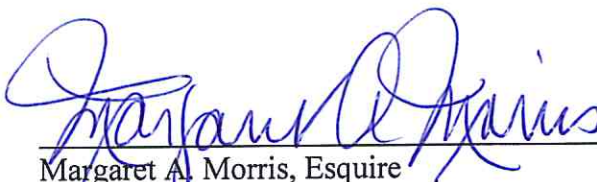
File with:

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, 13th Floor
2929 Arch Street
Philadelphia, PA 19104

Date: June 14, 2017



Margaret A. Morris, Esquire
Attorney ID No. 75048
Reger Rizzo & Darnall LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 tel.
(215) 495-6600 fax
mmorris@regerlaw.com

Counsel for West Penn Power Company

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

WILDA SCHOOLEY	:	
	:	
v.	:	Docket No. C-2017-2606028
	:	
WEST PENN POWER COMPANY	:	

**PRELIMINARY OBJECTIONS OF WEST PENN POWER COMPANY
TO THE FORMAL COMPLAINT OF WILDA SCHOOLEY**

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 Wilda Schooley (Complainant) filed in the above-captioned proceeding. West Penn avers the subject of the Formal Complaint is beyond the subject matter jurisdiction of the Pennsylvania Public Utility Commission (Commission) which is without authorization to grant the Complainant’s request to “opt out” of the mandatory installation of a smart meter. The Formal Complaint includes impertinent matter in its requested relief. Therefore, West Penn moves to have the Formal Complaint dismissed in its entirety or in the alternative to strike the Complainant’s request to “exchange her smart meter for one that didn’t cause problems.”

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 service to the Complainant under Account No. 100102007687.

2. The Complainant is a residential customer for service at 125 Flickerville Road, Warfordsburg, Pennsylvania (Service Location). She filed a Formal Complaint alleging she is experiencing side effects from the installed smart meter.

3. In its Answer and New Matter being served contemporaneously with this Preliminary Objection, West Penn denied the material allegations in the Formal Complaint and averred that the installation of a smart meter at the Service Location is mandated by Act 129 of 2008 which amended Section 2807 of the Code (Act 129), the Commission's *Smart Meter Procurement and Installation Order (Smart Meter Order)*,¹ and West Penn's *Smart Meter Plan Order (Plan Order)*.²

4. Act 129 does not permit the Complainant to "opt out" of the installation of a smart meter at the Service Location. 66 Pa. C.S. § 2807(f).

5. The *Smart Meter Order* does not have a provision for customers to "opt out" of smart meter installation.

6. The *Plan Order* does not provide an "opt out" provision.

7. Pursuant to 52. Pa. Code § 5.101, West Penn objects to the Formal Complaint on the grounds that the Commission lacks jurisdiction to grant the requested relief, i.e., permit the Complainant to "opt out" of the mandatory requirement of Act 129 that West Penn install a smart meter at the Service Location. The Complainant is not entitled to the relief under the law.

¹ The Commission's *Smart Meter Procurement and Installation Order* established the standards each EDC's plan must meet and to provide guidance on the procedures to be followed for submittal, review and approval of all aspects of each smart meter plan. See, Docket No. M-2009-2092655, Opinion and Order entered June 24, 2009.

² Docket No. M-2013-2341994, Opinion and Order entered March 6, 2014.

II. Argument

8. 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.

9. 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).

10. 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).

11. 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).

12. In the instant Formal Complaint, the Complainant requests that the Company exchange the smart meter for “one that didn’t cause problems.” Complaint at ¶ 5.

13. Clearly, the only relief sought through the Formal Complaint is to “opt out” of the requirements of Act 129 and remove the currently installed smart meter at the Service Location.

A. Impertinent Matter

14. 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).

15. In her Complaint, the Complainant provides a history of various symptoms/illnesses³ she began experiencing that her cardiologist and family doctor were unable to explain since 2011. She alleges that she now is experiencing side effects⁴ since the smart meter was installed in January 2017 and requests her smart meter be exchanged for a meter that does not “cause problems.”

16. Accepting the facts as alleged as true for the purpose of disposing of preliminary objections, the requested relief to “opt out” of the installation of the smart meter, mandated by Act 129, is 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

³ Complainant states she became ill in 2011 due to “water bacteria”; had a pacemaker installed in 2011 and “turned off” in March 2015 due to “severe weakness” and other unexplained side effects from the pacemaker; and suffered a stroke in 2016.

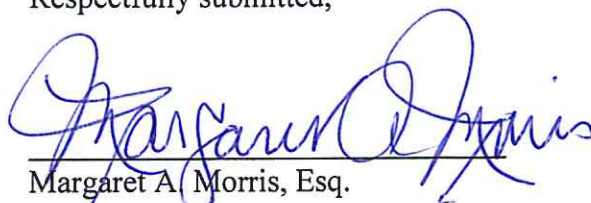
⁴ The alleged side effects from the installed smart meter included “itching, rash, weak, light headed, short of breath, unstable walking, whole body achiness.”

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)).

17. The Commission does not have the power to order the Company to remove the smart meter at the Service Location and the Complainant's request to exchange the meter 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 requested relief to allow for the "opt out" of the installation of a smart meter by removing the installed smart meter be stricken and the Formal Complaint filed by Wilda Schooley be dismissed with prejudice or denied in its entirety.

Respectfully submitted,



Margaret A. Morris, Esq.
Attorney ID No. 75048
Reger Rizzo & Darnall LLP
Cira Centre, 13th Floor
2929 Arch Street
Philadelphia, PA 19104
(215) 495-6524 tel.
(215) 495-6600 fax
mmorris@regerlaw.com

Counsel for West Penn Power Company

Date: June 14, 2017