

July 10, 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-2017-2610125
Joanne M. Fiorito v. Pennsylvania Electric Company
Preliminary Objection of Penelec**

Dear Secretary Chiavetta:

Attached for filing is the Preliminary Objection of Respondent, Pennsylvania Electric Company (Penelec), to the Formal Complaint of Joanne M. Fiorito (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: Teresa K. Harrold, Esquire, FirstEnergy Service Company w/enc.]
Joanne M. Fiorito [w/enc.]

**Re: Docket No. C-2017-2610125
Joanne M. Fiorito v. Pennsylvania Electric Company
Preliminary Objection of Penelec**

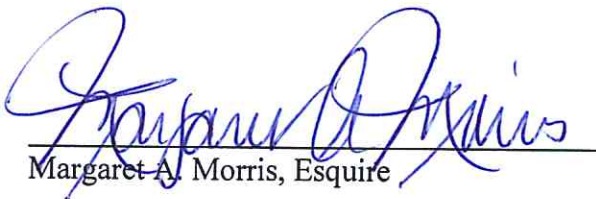
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon the following person(s), 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

Joanne M. Fiorito
173 Brookside Road
Tunkhannock, PA 19657

Dated: July 10, 2017


Margaret A. Morris, Esquire

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JOANNE M. FIORITO :
 :
 v. : Docket No. C-2017-2610125
 :
 PENNSYLVANIA ELECTRIC COMPANY :

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.101, you are hereby notified that if you do not file a written response to the enclosed Preliminary Objection of Pennsylvania Electric Company, within **ten (10) days** from service of this Notice, the facts set forth by Pennsylvania Electric Company in the Preliminary Objection may be granted. All pleadings, such as a Reply to the Preliminary Objection, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Pennsylvania Electric Company and the Administrative Law Judge, where applicable.

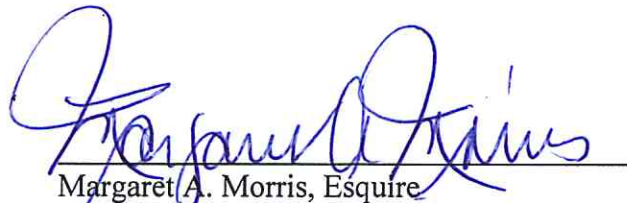
File with:

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

With a copy to:

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

Date: July 10, 2017



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Counsel for Pennsylvania Electric Company

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

| | | |
|-------------------------------|---|---------------------------|
| JOANNE M. FIORITO | : | |
| | : | |
| v. | : | Docket No. C-2017-2610125 |
| | : | |
| PENNSYLVANIA ELECTRIC COMPANY | : | |

**PRELIMINARY OBJECTIONS OF PENNSYLVANIA ELECTRIC COMPANY
TO THE FORMAL COMPLAINT OF KERRI ELLEN WILDER**

Pennsylvania Electric Company (Penelec 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 Joanne M. Fiorito (Complainant) filed in the above-captioned proceeding. Penelec 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, Penelec moves to have the Formal Complaint dismissed in its entirety or in the alternative to strike the Complainant’s request to “opt out” and retain her analog meter.

In support of its preliminary objections, Penelec states as follows:

I. Procedural Background

1. Penelec 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. 100009227362.

2. The Complainant is a residential customer for service at 173 Brookside Road, Tunkhannock, Pennsylvania (Service Location). She filed a Formal Complaint objecting in general terms to the installation of a smart meter because of general health and safety concerns and refuses the Company access to install the smart meter. She also disputes the threatened termination of service for failure to give the Company access to its meter.

3. In its Answer and New Matter being served contemporaneously with this Preliminary Objection, Penelec denied the material allegations in the Formal Complaint and averred that the installation of a smart meter at the Service Location, as a condition of continued service, 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 Penelec'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, Penelec objects to the Formal Complaint on the grounds that the Commission lacks jurisdiction to grant the requested relief, i.e., permit the Complainant to maintain her analog meter and "opt out" of the mandatory requirement of Act 129 that Penelec 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 Commission order the Company to stop “threatening” her service for her refusal to permit the installation of a smart meter. Complaint at ¶ 5.

13. Clearly, the only relief sought through the Formal Complaint is to “opt out” of the requirements of Act 129 and to retain the analog meter currently installed 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. The Complainant has not alleged or identified any specific safety or health issue with the smart meter to be installed at the Service Location. The Commission has ruled that a complaint alleging health effects related to the smart meter must contain specific allegations by the complainant of material facts relating to a potential violation of Section 1501 of the Code³ for unsafe and/or unreasonable service about which the complaint could personally testify and provide documentary evidence. *See, Kreider v. PECO Energy Company*, Docket No. P-2015-2495064 (Opinion and Order entered September 3, 2015.)

16. The Complainant simply does not want a smart meter and objects, in very general terms, to the smart meter mandate. None of those arguments challenges the key question herein, which is whether Act 129, the *Smart Meter Order* and *Plan Order* permit the Complainant to opt out of the smart meter installation.

³ 66 Pa.C.S. § 1501.

17. Accepting the facts as alleged as true for the purpose of disposing of preliminary objections, the Complaint fails to allege that Respondent has violated the Code, Commission regulations or orders, or its Commission-approved tariff, that can be the basis of any finding against the Company.

18. A prayer for 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 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)).

19. Section 703 of the Code,⁴ provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. See also, 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and is not required to resolve questions of law, policy or discretion. *Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm’n*, 817 A.2d 593 (Pa. Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003).

20. The public interest does not require a hearing in this case. The Respondent’s right to prevail at hearing is so clear that having a hearing would be a fruitless exercise. The Commission cannot grant the relief requested, i.e., “opt out” of the installation of a smart meter at the Service Location. *Povacz v. PECO Energy Company*, Docket No. C-2012-2317176 (Opinion and Order entered January 24, 2013); *Theresa Gavin v PECO Energy Company*, Docket No. C-2012-2325258 (Opinion and Order entered January 24, 2013).

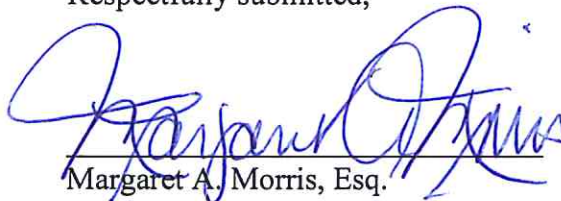
⁴ 66 Pa.C.S. § 703(b).

21. The Commission does not have the power to order the Company not to install a smart meter at the Service Location and the Complainant's request to maintain her analog 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).

22. The Complaint fails to allege that Respondent has violated the Code, Commission regulations or orders that can be the basis of any finding against the Company. Therefore, in accordance with Pennsylvania law, the Complaint should be dismissed as legally insufficient under 52 Pa. Code § 5.101(a)(4).

WHEREFORE, Respondent, Pennsylvania Electric Company, requests that the requested relief to allow for the "opt out" of the installation of a smart meter be stricken and the Formal Complaint filed by Joanne M. Fiorito that fails to allege any specific violation of the Code, Commission regulations/ orders or its Commission-approved tariff be dismissed with prejudice or denied in its entirety.

Respectfully submitted,



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Date: July 10, 2017

Counsel for Pennsylvania Electric Company