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August 2, 2017

VIA UNITED PARCEL SERVICE

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

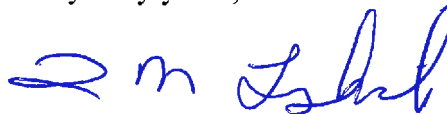
Re: James Wolfgang v. Pennsylvania Electric Company
Docket No. C-2017-2613989

Dear Secretary Chiavetta:

Attached please find the Preliminary Objections of Pennsylvania Electric Company in the above-referenced matter. This document has been served on the Complainant as shown in the Certificate of Service.

Please contact me if you have any questions.

Very truly yours,



Lauren M. Lepkoski

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Enclosures

c: As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JAMES WOLFGANG

v.

PENNSYLVANIA ELECTRIC COMPANY

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Docket No. C-2017-2613989

NOTICE TO PLEAD

TO: James Wolfgang

Pursuant to 52 Pa. Code § 5.101 you are hereby notified that if you do not file a reply to the enclosed Preliminary Objections of Pennsylvania Electric Company within ten (10) days from service of this notice, the facts set forth by Pennsylvania Electric Company in the Preliminary Objections may be deemed to be admitted, thereby requiring no other proof. All pleadings, such as a Reply to Objection, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy service to counsel for Pennsylvania Electric Company, and where applicable, the Administrative Law Judge presiding over the case.

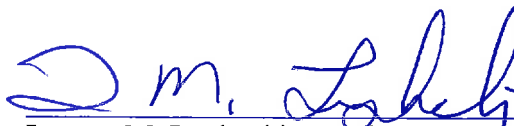
File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Lauren M. Lepkoski
Tori L. Giesler
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, Pennsylvania 19612-6001

Date: August 2, 2017



Lauren M. Lepkoski, Esquire
Tori L. Giesler, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JAMES WOLFGANG	:	
	:	
v.	:	Docket No. C-2017-2613989
	:	
PENNSYLVANIA ELECTRIC COMPANY	:	

**PRELIMINARY OBJECTION TO THE FORMAL COMPLAINT OF
JAMES WOLFGANG**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, Pennsylvania Electric Company ("Penelec" or the "Company"), by and through its counsel, Lauren M. Lepkoski and Tori L. Giesler, files this Preliminary Objection pursuant to Section 5.101(a) of Pennsylvania Public Utility Commission ("Commission") regulations, 52 Pa. Code § 5.101(a)(1), and in support thereof, avers as follows:

I. Introduction

1. In his recently filed Formal Complaint, James Wolfgang ("Complainant"), who resides at 10208 Dunn Avenue, Lake, Pennsylvania 16423 ("Service Location") alleges, in part, that he does not consent or want to have a smart meter installed at the Service Location. (Formal Complaint ¶ 5.) The Complainant states as requested relief, in part, "An opt out option." (Formal Complaint ¶ 5.)

2. The Company is in the process of deploying smart meters in its service territory in accordance with Act 129 of 2008 ("Act 129").¹

3. On March 22, 2016, the Company sent correspondence to the Complainant regarding the installation of a smart meter at the Service Location. No response was received and

¹ 66 Pa.C.S. § 2806.1 *et seq.* Among other things, Act 129 specifically directed that electric distribution companies with at least 100,000 customers file a smart meter technology procurement and installation plan with the Commission for approval. 66 Pa.C.S. § 2807(f)(1) and (2).

on April 27, 2016, a contractor for the Company attempted to install a smart meter at the Service Location. The customer refused the installation of a smart meter. Therefore, the smart meter was not installed and the Company noted the Complainant's account. On April 29, 2016, the Company attempted to discuss the installation of the smart meter with the Complainant, but the Complainant did not respond. On March 19, 2017, a pre-disconnection warning letter was sent to the Complainant pursuant to 52 Pa. Code §56.81 and Rules 9 and 20 of the Company's Commission-approved Tariff.² No response was received. On March 30, 2017, a ten-day service termination notice was issued and the Company received no response. On April 3, 2017, the Complainant contacted the Company and was referred to the Commission. On that same day, the Complainant filed an Informal Complaint with the Bureau of Consumer Services ("BCS"). On June 15, 2017, BCS dismissed the Informal Complaint. On June 28, 2017, a service termination notice was issued due to the Complainant owing \$309.32. On July 11, 2017, the Complainant entered into a payment arrangement with the Company.

4. As explained in greater detail below, even if all of the facts in the Formal Complaint are accepted as true, they do not constitute a violation of any law which the Commission has jurisdiction to administer, or of any regulation or order of the Commission. *See* 66 Pa.C.S. § 701.

5. As a result, the Company requests that this Preliminary Objection be granted and the Commission dismiss the Formal Complaint with prejudice. As a result, the Company requests that this Preliminary Objection be granted and that the Commission: (1) grant its Preliminary Objections and strike the Complainant's request for an exemption from the installation of a smart meter; (2) dismiss the Formal Complaint in its entirety with prejudice; and (3) grant the Company such other relief as may be just and reasonable under the circumstances.

² *Pennsylvania Electric Company Retail Electric Service Tariff*, Electric Pa. PUC No. 81 (Supp. 22), pp. 45, 60, issued May 1, 2015, effective May 3, 2015.

II. Background

6. Penelec is an electric distribution company that is certificated as a public utility in Pennsylvania.

7. On March 22, 2016, the Company sent correspondence to the Complainant regarding the installation of a smart meter at the Service Location. No response was received and on April 27, 2016, a contractor for the Company attempted to install a smart meter at the Service Location. The customer refused the installation of a smart meter. Therefore, the smart meter was not installed and the Company noted the Complainant's account. On April 29, 2016, the Company attempted to discuss the installation of the smart meter with the Complainant, but the Complainant did not respond. On March 19, 2017, a pre-disconnection warning letter was sent to the Complainant pursuant to 52 Pa. Code §56.81 and Rules 9 and 20 of the Company's Commission-approved Tariff.³ No response was received. On March 30, 2017, a ten-day service termination notice was issued and the Company received no response. On April 3, 2017, the Complainant contacted the Company and was referred to the Commission. On that same day, the Complainant filed an Informal Complaint with the Bureau of Consumer Services ("BCS"). On June 15, 2017, BCS dismissed the Informal Complaint. On June 28, 2017, a service termination notice was issued due to the Complainant owing \$309.32. On July 11, 2017, the Complainant entered into a payment arrangement with the Company.

8. On or about July 6, 2017, the Complainant filed a Formal Complaint with the Commission against Penelec at the above-captioned docket. The Company was electronically served with the Formal Complaint on July 13, 2017.

³ *Pennsylvania Electric Company Retail Electric Service Tariff*, Electric Pa. PUC No. 81 (Supp. 22), pp. 45, 60, issued May 1, 2015, effective May 3, 2015.

8. Penelec is timely filing its Answer and New Matter contemporaneously with this Preliminary Objection, which Answer and New Matter is incorporated into this Preliminary Objection as if fully set forth herein.

III. Argument

9. 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.

10 The 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. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveler Services, Inc. v. Pa. Dept. of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission has adopted this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

12. The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985). Therefore, in ruling on a preliminary objection, the Commission must assume, for decisional purposes only, that the factual allegations of the Formal Complaint are true. *Id.*

13. Penelec's smart meter deployment plan was approved by the Commission at Docket No. M-2013-2341993 by Order entered June 5, 2014. In accordance with the June 5 Order, the Company filed its final Smart Meter Deployment Plan ("SMP") on June 16, 2014. The SMP was approved by the Commission on June 20, 2014. The Complainant challenges no aspect of the Company's provision of electric service other than the installation of a smart meter at the Service Location, as required by Act 129 and the Company's smart meter implementation plan.

14. Commission precedent is uniform that it cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to opt out.⁴

15. Assuming the facts pleaded in the Formal Complaint are true, as the Commission must for the purposes of a preliminary objection, the Complainant has failed to allege that Penelec

⁴ *Negley v. Pennsylvania Electric Company*, Docket No. C-2010-2205305 (Initial Decision dated January 3, 2011 became final without Commission action closed March 3, 2011); *Lutherschmidt v. Pennsylvania Electric Company*, Docket No. C-2010-2200353 (Final Order entered March 25, 2011). The Commission has continued to uphold installation of smart meters and imposition of smart meter charges on customers' bills by dismissing complaints opposing installation of smart meters and imposition of smart meter charges on the basis of legal insufficiency. *Corbett v. Pennsylvania Power Company*, Docket No. C-2011-2219898 (Final Order entered May 27, 2011); *Jones v. Pennsylvania Electric Company*, Docket No. C-2011-2224380 (Final Order entered June 28, 2011); *Griffin v. Pennsylvania Electric Company*, Docket No. C-2012-2300172 (Final Order entered August 2, 2012); *Brake v. West Penelec Company*, Docket No. C-2013-2367308 (Final Order entered November 14, 2013); *Drake v. Pennsylvania Electric Company*, Docket No. C-2014-2413771 (Final Order entered June 12, 2014); *Efaw v. West Penelec Company*, Docket No. C-2014-2413744 (Final Order entered June 12, 2014). See also, the Initial Decision of ALJ Susan D. Colwell in *Dennis McElwain v. Pennsylvania Power Company*, Docket No. C-2014-2451478 issued December 3, 2015.

has committed or omitted an act in violation of a Commission statute, regulation, order, or Penelec's tariff. *County of Allegheny*, supra. (Compl. ¶ 4).

16. Because Act 129 and the Commission's orders not only authorize but require the Company to develop and implement a smart meter procurement and installation plan, and do not allow a customer to opt out of having a smart meter installed, this Complaint must be dismissed. As a matter of law, the Company is required to install a smart meter at the Service Location. It cannot be a violation for the Company to follow the law as it has done here.

17. Therefore, the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief. *See* 52 Pa. Code § 5.101(a)(4).

18. The Commission may dismiss a complaint without hearing if a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b), 52 Pa. Code § 5.21 (d).

19. Recently, the Commission set for hearing two cases in which the Complainant was opposed to the installation of a smart meter at their premises.⁵ These cases represent a departure from past Commission practice of dismissing such complaints on Preliminary Objections. The Commission stated that where a Complainant has presented specific factual averments regarding the health or other effects that they have experienced **after** a smart meter was installed at their home, the Commission has overruled Preliminary Objections and allowed a case to proceed. Specifically, in *Kreider*, the complainant alleged specific deleterious health effects after installation of a smart meter affecting her specific medical condition. Further, in *Van Schoyck*, the complainants alleged potential health risks due to constant ringing noise in their home and their inability to sleep since the smart meter was installed.⁶ In contrast, in the instant case, the

⁵ *Susan Kreider v. PECO Energy Company*, Docket No. C-2015-2469655 (Order on Reconsideration entered January 28, 2016); *Stephen and Diane Van Schoyck v. PECO Energy Company*, Docket No. C-2015-2478239 (Opinion and Order entered February 25, 2016).

⁶ *Id.*

Complainant has made no specific factual averments regarding health or other effects experienced **after** a smart meter was installed. In fact, the Complainant has not permitted the installation of a smart meter at the Service Location. The Complainant only alleges, speculatively, that the smart meter is not “healthy” or “safe” or “green” and “will contribute to on going health concerns” regarding his family, and as relief he wants to opt out. The Complainant did not provide any details regarding the alleged future health effects of a smart meter being installed. The Commission has not recognized a general assertion of a potential “negative health impact” as sufficient to overcome Preliminary Objections.⁷ Therefore, the Company respectfully submits that the matters plead in the subject Formal Complaint do not meet the standards set in the *Kreider* and *Van Schoyck* cases such that this matter can survive dismissal on preliminary objections. The Complainant’s alleged reasons for non-consent are: (1) generic adverse health effects due to the presence of a smart meter, which are speculative and unsubstantiated; (2) generic allegation of not safe; and (3) not green. (Formal Complaint ¶ 5.)

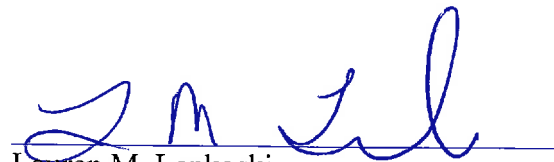
⁷ *Richard and Marie Fugo in care of Fugo Eye Institute v. PECO Energy Company*, Docket Nos. C-2015-2519763 and C-2015-2519770 (Order entered April 6, 2016).

IV. Conclusion

WHEREFORE, for the foregoing reasons, Pennsylvania Electric Company respectfully requests that the Commission: (1) grant its Preliminary Objections and strike the Complainant's request for an exemption from the installation of a smart meter; (2) dismiss the Formal Complaint in its entirety with prejudice; and (3) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: August 2, 2017



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Counsel for Pennsylvania Electric Company

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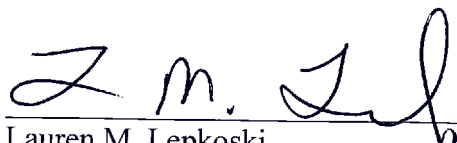
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Preliminary Objections of Pennsylvania Electric Company to the Formal Complaint of James Wolfgang upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, as follows:

James Wolfgang
1028 Dunn Avenue
Lake City, PA 16423

Dated: August 2, 2017



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