

August 8, 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-2017-2614954
Henry Berdine v. West Penn Power Company
Preliminary Objection of West Penn Power**

Dear Secretary Chiavetta:

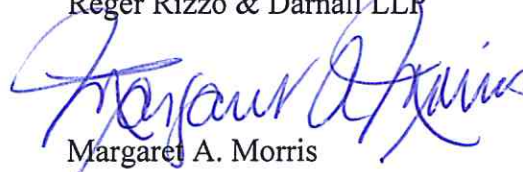
Attached for filing is the Answer and New Matter of Respondent, West Penn Power Company (West Penn), to the Formal Complaint of Henry Berdine (Complainant).

A copy of the Answer and New Matter 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
Henry Berdine

**Re: Docket No. C-2017-2614954
Henry Berdine 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

Henry Berdine
559 Zediker Station Road
Washington, PA 15301

Dated: August 8, 2017



Margaret A. Morris, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

HENRY BERDINE

v.

WEST PENN POWER COMPANY

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:
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Docket No. C-2017-2614954

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.

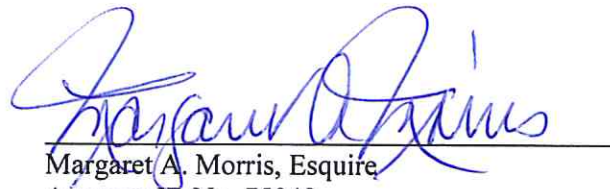
File with:

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: August 8, 2017



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

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

HENRY BERDINE	:	
	:	
v.	:	Docket No. C-2017-2614954
	:	
WEST PENN POWER COMPANY	:	

**PRELIMINARY OBJECTION OF WEST PENN POWER COMPANY
TO THE COMPLAINT OF HENRY BERDINE**

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 Henry Berdine (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 request for damages; and (2) 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 service to the Complainant under Account No. 100097227423.

2. The Complainant, the owner of real property located at 559 Zediker Station Road, Washington, Pennsylvania (Service Location), filed a Formal Complaint seeking reimbursement for his property allegedly damaged by West Penn.

3. In its Answer and New Matter being served contemporaneously with this Preliminary Objection, West Penn denied the material allegations in the Formal Complaint.

4. Pursuant to 52 Pa. Code § 5.101, West Penn objects to that portion of the Formal Complaint on the grounds that the Commission lacks jurisdiction to award damages. The Complainant seeks to have West Penn “pay for my UP station that cost \$2389.38.” (Compl. ¶ 5.)

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 states the following as his request for relief "pay for my UP station that cost \$2389.38." (Compl. ¶ 5.)

8. Clearly, this 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). Therefore, the statutory authority of the Commission does not include the power to award monetary damages.

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 Henry Berdine be dismissed with prejudice or denied in its entirety for lack of subject matter jurisdiction.

Respectfully submitted,



Date: August 8, 2017

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