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November 27, 2017

VIA ELECTRONIC FILING

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

Re: Linda Biconik v. Pennsylvania Electric Company
Docket No. C-2017-2632380

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**

LINDA BICONIK	:	
	:	
v.	:	Docket No. C-2017-2632380
	:	
PENNSYLVANIA ELECTRIC COMPANY	:	

NOTICE TO PLEAD

TO: Linda Biconik

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: November 27, 2017


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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

LINDA BICONIK :
 :
 : **Docket No. C-2017-2632380**
 :
 v. :
 :
 PENNSYLVANIA ELECTRIC COMPANY :

**PRELIMINARY OBJECTION TO THE FORMAL COMPLAINT OF
LINDA BICONIK**

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 her recently filed Formal Complaint, Linda Biconik ("Complainant"), who resides at 73 Cherry Lane, Homer City, Pennsylvania 15748 ("Service Location") alleges that she does not want a smart meter installed at the Service Location. (Formal Complaint ¶¶ 4, 5.) The Complainant states as requested relief:

As a customer of Penelec we have fulfilled our responsibilities so we have a right to a fair hearing, to be able to present evidence from our complaint and any other new matter and evidence found that applies.

In keeping with the states complaints filed, we request that the PUC acts on our behalf and mandates compliance by the utility company to retract the insistence of installing a smart meter on our property/premise. We also request the utility company changes the method and content of their communication with all their customer in regard to the above mentioned complaints. To the end result being that any customer of this utility may retain or obtain without penalty any kind including but not limited to financial penalty, the meter of their choice as long as they are in compliance with all customer responsibilities and not in violation of any billing agreement.

(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 September 19, 2017, the Company sent correspondence to the Customer regarding the installation of a smart meter at the Service Location. On October 5, 2017, the Company received notification from Wellington Energy, a contractor for the Company, that on October 2, 2017, the Customer was refusing installation of the smart meter. On October 6, 2017, the Company attempted to contact the Customer, but the telephone number listed on the Account had been disconnected. On October 8, 2017, a pre-disconnection warning letter was sent to the Complainant pursuant to 66 Pa.C.S. § 1406, 52 Pa. Code § 56.81 and Rules 9 and 20 of the Company’s Commission-approved Tariff.² On October 12, 2017, the Complainant contacted the Company to refuse the smart meter installation. On October 19, 2017, a service termination notice was issued. On October 24, 2017, the Company received a letter from the Customer and Complainant stating that they did not want a smart meter installed at the Service Location. On October 19, 2017, a second service termination notice was issued. On October 27, 2017, the Complainant contacted the Company continuing to refuse the smart meter installation. On October 29, 2017, a service termination notice was issued. On November 6, 2017, the Company was electronically served with the instant Formal Complaint and termination efforts ceased.

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

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).

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

jurisdiction to administer, or of any regulation or order of the Commission, such that relief can be granted. *See* 66 Pa.C.S. § 701.

5. As a result, the Company requests that this Preliminary Objection be granted and that the Commission: (1) 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.

II. Background

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

7. On September 19, 2017, the Company sent correspondence to the Customer regarding the installation of a smart meter at the Service Location. On October 5, 2017, the Company received notification from Wellington Energy, a contractor for the Company, that on October 2, 2017, the Customer was refusing installation of the smart meter. On October 6, 2017, the Company attempted to contact the Customer, but the telephone number listed on the Account had been disconnected. On October 8, 2017, a pre-disconnection warning letter was sent to the Complainant pursuant to 66 Pa.C.S. § 1406, 52 Pa. Code § 56.81 and Rules 9 and 20 of the Company's Commission-approved Tariff.³ On October 12, 2017, the Complainant contacted the Company to refuse the smart meter installation. On October 19, 2017, a service termination notice was issued. On October 24, 2017, the Company received a letter from the Customer and Complainant stating that they did not want a smart meter installed at the Service Location. On October 19, 2017, a second service termination notice was issued. On October 27, 2017, the Complainant contacted the Company continuing to refuse the smart meter installation. On October

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

29, 2017, a service termination notice was issued. On November 6, 2017, the Company was electronically served with the instant Formal Complaint and termination efforts ceased.

8. 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 November 6, 2017.

9. 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

10. 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.

11 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).

12. 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).

13. In accordance with Section 701 of the Code, 66 Pa.C.S. § 701, a person may file a complaint which sets forth “any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.” As explained below, the Company has not violated the Public Utility Code or the orders or regulations of the Commission.⁴ In fact, the Company’s action have been in compliance with Act 129 and the June 5 Order.

14. 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.*

15. Penelec’s smart meter deployment plan was approved by the Commission at Docket No. M-2013-2341990 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 SMP.

⁴ 66 Pa.C.S. § 701.

16. Commission precedent is uniform that it cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to opt out.⁵

17. Assuming the facts pleaded in the Formal Complaint are true, as the Commission must for the purposes of ruling on a preliminary objection, the Complainant has failed to allege that Penelec has committed or omitted an act in violation of a Commission statute, regulation, order, or Penelec's tariff, a finding of which must be made in order to sustain a formal complaint. *See* 66 Pa.C.S. § 701; *County of Allegheny*, supra. (Compl. ¶ 4).

18. 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. As such, the Commission cannot find the Company to be in violation for having attempted to follow the law as it has done here.

19. 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).

21. 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).

⁵ *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 Electric 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 November 27, 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 Electric Company*, Docket No. C-2014-2451478 issued December 3, 2015.

22. Recently, the Commission set for hearing two cases in which the complainant was opposed to the installation of a smart meter at their premises.⁶ 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 time the smart meter was installed.⁷ In contrast, in the instant case, the Complainant have made no specific factual averments regarding health or other effects experienced which began *after* a smart meter was installed. In fact, the Complainant only alleges, speculatively, that the smart meters are unsafe and unlawful and as relief she wants the Commission to bar the Company from installing a smart meter. The Commission has not recognized a general assertion of general, potential health concerns as sufficient to overcome Preliminary Objections.⁸ 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.

23. Further, the Commission has upheld decisions granting preliminary objections and dismissing complaints for legal insufficiency opposing smart meter installation. In *Richard Negley*

⁶ *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).

⁷ *Id.*

⁸ *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).

v. Metropolitan Edison Company, Docket No. C-2010-2205305 (Initial Decision issued January 3, 2011), ALJ Susan D. Colwell dismissed a complaint opposing installation of smart meters for legal insufficiency. ALJ Colwell concluded that Act 129 of 2008 authorized the installation of smart meters by EDCs. ALJ Colwell held that the Commission's orders approving the EDC's smart meter plans did not exempt any customers from the smart meter plans. By Commission final order entered March 3, 2011, ALJ Colwell's Initial Decision became final without further Commission action. *Dennis Lutherschmidt v. Metropolitan Edison Company*, Docket No. C-2010-2200353 (Order Issued March 25, 2011); *Gloria Corbett v Pennsylvania Power Company*, Docket No. C-2011-2219898 (Order entered May 27, 2011); *Edward Jones v. Metropolitan Edison Company*, Docket No. C-2011-2224380 (Order entered June 28, 2011); *Gerald Griffin v Metropolitan Edison Company*, Docket No. C-2012-2300172 (Order entered July 31, 2012); *Michael Balogh v. West Penn Power Company*, Docket No. C-2012-2329713 (Order entered January 4, 2013).

24. The Commission has also upheld decisions finding that a utility has the ability to terminate the service of a customer who refuses installation of a smart meter. *Art Larson v. PECO Energy Company*; Docket No. C-2014-2451754 (Opinion and Order entered June 11, 2015)

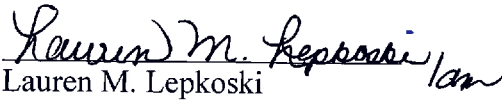
25. Because Act 129 of 2008 and the Commission's orders authorize the Company to develop and implement a smart meter procurement and installation plan, and impose a smart meter charge on its customers to pay for that development, implementation, procurement and installation, the Complainant has not set forth in her complaint any act done by the Company that violates a Commission regulation, statute or order.

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: November 27, 2017


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LINDA BICONIK :
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 v. : **Docket No. C-2017-2632380**
 :
PENNSYLVANIA ELECTRIC COMPANY :


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 Linda Biconik 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:

Linda Biconik
73 Cherry Lane
Homer City, PA 15748

Dated: November 27, 2017


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Tori L. Giesler
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