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July 31, 2018

VIA E-FILING

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

Re: Gaylynn Downes and Samuel R. Downes v. West Penn Power Company
Docket No. C-2018-3003298

Dear Secretary Chiavetta:

Attached please find the Preliminary Objections of West Penn Power Company in the above-referenced matter. This document has been served on the Complainants 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**

**GAYLYNN DOWNES AND
SAMUEL R. DOWNES**

v.

WEST PENN POWER COMPANY

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Docket No. C-2018-3003298

NOTICE TO PLEAD

TO: Gaylynn Downes and Samuel R. Downes

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 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 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 West Penn Power 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: July 31, 2018


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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GAYLYNN DOWNES AND	:	
SAMUEL R. DOWNES	:	
	:	Docket No. C-2018-3003298
v.	:	
	:	
WEST PENN POWER COMPANY	:	

**PRELIMINARY OBJECTION TO THE FORMAL COMPLAINT OF
GAYLYNN DOWNES AND SAMUEL R. DOWNES**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, West Penn Power Company ("West Penn" 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 their recently filed Formal Complaint, Gaylynn Downes and Samuel R. Downes ("Complainants"), who reside at 60 Woodland Road, Daisytown, Pennsylvania 15427 ("Service Location") and receive service under Residential Account No. 100090332790 ("Residential Account") and under Commercial Account No. 100090333111 ("Commercial Account"), alleges, in part, that they object to the smart meter which has been installed at the Residential Account at the Service Location and do not want a smart meter installed at the Commercial Account. (Formal Complaint ¶¶ 4, 5.) The Complainants state as requested relief:

I have been planning a new bussiness at our place of residence for several years that was to occur after our last childs college graduation, which was this past month. This was to be a retreat enter to offer relief and wellness tops to those that are sensitive to todays fast growing technology/radiation concerns. Being that we are in a very rural area we did not have any concerns or knowledge of electric companies placements of the smart meters and had a good place to begin my bussiness until the smart meter

was installed without my knowledge making it impossible to advertise a “smart meter free” zone to sensitive people, causing and creating delays in my new bussiness.

(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 January 30, 2018, the Company sent correspondence to the Complainant regarding the installation of a smart meter at the Commercial Account at the Service Location. On February 12, 2018, Mrs. Downes contacted the Company regarding the correspondence stating that she did not wish to have a smart meter installed. The Company representative advised that a smart meter had already been installed at the Residential Account, but there was no discussion regarding the Commercial Account which does not currently have a smart meter installed. On or about February 20, 2018, the Complainants filed a Formal Complaint with the Commission against West Penn at the above-captioned docket which was then electronically served on the Company on March 6, 2018.

4. As explained in greater detail below, even if all of the facts in the Formal Complaint related to the smart meter 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, such that relief can be granted.²

5. As a result, the Company requests that this Preliminary Objection be granted and that the Commission: (i) grant its Preliminary Objection and dismiss the Formal Complaint because the Complainants already have a prior complaint pending before the Commission on

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 See 66 Pa.C.S. § 701.

identical allegations; and (ii) grant the Company such other relief as may be just and reasonable under the circumstances.

II. Background

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

7. On January 30, 2018, the Company sent correspondence to the Complainant regarding the installation of a smart meter at the Commercial Account at the Service Location. On February 12, 2018, Mrs. Downes contacted the Company regarding the correspondence stating that she did not wish to have a smart meter installed. The Company representative advised that a smart meter had already been installed at the Residential Account, but there was no discussion regarding the Commercial Account which does not currently have a smart meter installed.

8. On or about July 5, 2018, the Complainants filed a Formal Complaint with the Commission against West Penn at the above-captioned docket which was then electronically served on the Company on July 11, 2018.

9. West Penn 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.³

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.⁴ The Commission has adopted this standard.⁵

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.⁶ 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.⁷ Therefore, in ruling on a preliminary objection, the Commission must assume, for decisional purposes only, that the factual

³ *Equitable Small Transportation Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994).

⁴ *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).

⁵ *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

⁶ 66 Pa.C.S. § 701.

⁷ *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985).

allegations of the Formal Complaint are true.⁸ Further, the Complainants have not stated a claim within the Commission's jurisdiction to adjudicate because, as a matter of law, the acts complained of are identical to a prior proceeding which is currently pending before the Commission.

A. Preliminary Objection Regarding Standing of a Party Pursuant to 52 Pa. Code § 5.101(a)(4) –Legal Insufficiency of a Pleading.

15. West Penn's smart meter deployment plan was approved by the Commission at Docket No. M-2013-2341991 by Order entered June 5, 2014. In accordance with the June 5 Order, the Company filed its final SMP on June 16, 2014. The SMP was approved by the Commission on June 20, 2014. The Complainants challenge the installation of a smart meter at the Service Location, as required by Act 129 and the Company's SMP.

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.⁹

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 Complainants have failed to allege that West Penn has committed or omitted an act in violation of a Commission statute, regulation, order, or West Penn's tariff, with regard to the installation of the smart meter at the Residential

⁸ *Id.*

⁹ *Negley v. Metropolitan Edison Company*, Docket No. C-2010-2205305 (Final Order entered March 3, 2011); *Lutherschmidt v. Metropolitan Edison 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. Metropolitan Edison Company*, Docket No. C-2011-2224380 (Final Order entered June 28, 2011); *Griffin v. Metropolitan Edison Company*, Docket No. C-2012-2300172 (Final Order entered July 31, 2012); *Brake v. West Penn Power Company*, Docket No. C-2013-2367308 (Opinion and Order entered November 14, 2013); *Drake v. Pennsylvania Electric Company*, Docket No. C-2014-2413771 (Final Order entered June 12, 2014); *Efaw v West Penn Power 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 16, 2015.

Account and the attempt to install a smart meter at the Commercial Account, a finding of which must be made in order to sustain a formal complaint.¹⁰

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 in part. 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 followed the law as it has done here in relation to the smart meter installations.

19. Therefore, the portion of the Formal Complaint requesting an exemption from the smart meter installation is legally insufficient because it fails to state a claim upon which the Commission can grant relief.¹¹

20. The Commission may dismiss a complaint, or a portion thereof, without hearing if a hearing is not necessary in the public interest.¹²

21. Recently, the Commission set for hearing two cases in which the complainant was opposed to the installation of a smart meter at their premises.¹³ 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

¹⁰ See 66 Pa.C.S. § 701; *County of Allegheny*, supra. (Compl. ¶ 4).

¹¹ See 52 Pa. Code § 5.101(a)(4).

¹² 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21 (d).

¹³ *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).

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.¹⁴ In contrast, in the instant case, the Complainants have made no specific factual averments regarding any effects experienced which began *after* a smart meter was installed. Furthermore, the Complainants states that they do not want a smart meter installed at the Commercial Account at the Service Location so that they can open a new business and advertise as a “smart meter free” zone. The Commission has not recognized a customer’s lack of consent to install a smart meter as sufficient to overcome Preliminary Objections.¹⁵

22. In *Charles F. Jackson v. Pennsylvania Electric Company*, Docket No. C-2017-2600495 (Order Entered August 31, 2017), the Commission approved the Initial Decision of ALJ David A. Salapa, dated June 26, 2017, which granted the Preliminary Objections of Pennsylvania Electric Company and dismissed the formal complaint of Mr. Jackson (who was disputing the installation of a smart meter) finding that formal complaint was legally insufficient, pursuant to 52 Pa. Code § 5.101(a)(4), in that the complaint fails to allege that the utility violated the Public Utility Code, Commission regulations or orders or its tariff provisions. The respondent was found to be authorized to install smart meters and impose a charge on its customers to develop and implement a smart meter procurement and installation plan that will lead to the installation of smart meters throughout its service territory. ALJ Salapa further found that the respondent was authorized to terminate the Mr. Jackson’s service if he refused to provide the respondent with access to its meter and equipment to install the smart meter.

¹⁴ *Id.*

¹⁵ *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).

This Commission decision was entered after *Kreider*. The instant formal complaint is similar to the alleged averments in the formal complaint at Docket No. C-2017-2600495, in that the Complainant has only alleged that the installation of a smart meter would violate his privacy rights and does not want a smart meter at the Service Location. The Complainant has not set forth in his complaint that any act done by the Company violates a Commission regulation, statute or order.

23. 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.

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

25. Rule 9 of the Company's Commission- approved Tariff¹⁶, allows the Company to have access to its customers' premises for any and all purposes relating to the supply of electric energy which includes the exchange of meters. The Complainants refusal to allow the Company access to its own meter is a violation of Rules 9 and 20 of the Company's Commission-approved

¹⁶ *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 52, p. 40 issued May 1, 2015, effective May 3, 2015.

Tariff¹⁷ and is grounds for termination of service. 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.¹⁸

26. Because Act 129 of 2008 and the Commission's orders authorize the Company to develop and implement a smart meter procurement and installation plan, the Complainants have not set forth in her complaint any act done by the Company that violates a Commission regulation, statute or order.

B. Preliminary Objection Regarding Standing of a Party Pursuant to 52 Pa. Code § 5.101(a)(6) – Pendency of a Prior Proceeding.

27. On or about February 20, 2018, the Complainants filed the February 2018 Complaint with the Commission at Docket No. C-2018-3000262, alleging that the Complainants did not want a smart meter installed at the Service Location and that the Company improperly terminated service (February 2018 Complaint at ¶¶ 1, 4, 5).

28. On March 6, 2018, the February 2018 Complaint was served on Met-Ed.

29. On or about March 26, 2018, the Company filed an Answer and New Matter as well as Preliminary Objections to the February 2018 Complaint.

30. To date, the Preliminary Objections have not yet been assigned to an Administrative Law Judge.

31. The February 2018 Complaint is still pending before the Commission.

32. The February 2018 Complaint contains the same allegations as the instant Formal Complaint.

¹⁷ *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 52, pp. 40, 55, issued May 1, 2015, effective May 3, 2015.

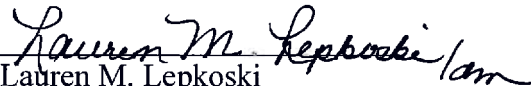
¹⁸ *Art Larson v. PECO Energy Company*; Docket No. C-2014-2451754 (Opinion and Order entered June 11, 2015). See also, *Catherine J. Frompovitch v. PECO Energy Company*; Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018).

IV. Conclusion

WHEREFORE, West Penn Power Company hereby requests that the Commission: (i) grant its Preliminary Objection and dismiss the Formal Complaint because the Complainants already have a prior complaint pending before the Commission on identical allegations; and (ii) grant the Company such other relief as may be just and reasonable under the circumstances. Alternatively, Metropolitan Edison Company respectfully requests that the Commission consolidates the instant Formal Complaint with the formal complaint filed under Docket No. C-2018-3000262.

Respectfully submitted,

Dated: July 31, 2018


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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

GAYLYNN DOWNES AND SAMUEL R. DOWNES :
 :
 : **Docket No. C-2018-3003298**
 v. :
 :
WEST PENN POWER COMPANY :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Preliminary Objections of West Penn Power Company to the Formal Complaint of Gaylynn Downes and Samuel R. Downes 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:

Gaylynn Downes and Samuel R Downes
60 Woodland Road
Daisytown, PA 15427

Dated: July 31, 2018


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