

August 13, 2018

*Via Electronic Filing*

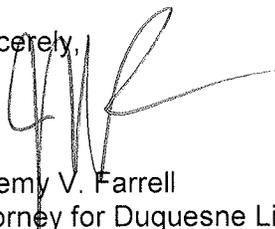
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Keystone Bldg. 2nd Floor W  
400 N. Street  
Harrisburg, PA 17120

**RE: Mark Sanders v. Duquesne Light Company**  
Docket No. C-2018-3003564

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Preliminary Objections filed by Mark Sanders. A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,



Jeremy V. Farrell  
Attorney for Duquesne Light Company

Paul Shane Miller  
Attorney for Duquesne Light Company

Enclosure

cc: Mark Sanders (w/ enclosure)

TADMS:1004141-1 014657-158498

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MARK C. SANDERS

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2018-3003564

**PRELIMINARY OBJECTIONS**

Filed on behalf of Respondent  
Duquesne Light Company

Counsel of Record for this Party:  
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**NOTICE TO PLEAD**

**TO COMPLAINANT:**

**YOU ARE NOTIFIED TO FILE A WRITTEN RESPONSE TO THESE PRELIMINARY OBJECTIONS WITHIN TEN DAYS OF SERVICE OR A JUDGMENT MAY BE ENTERED AGAINST YOU.**

TUCKER ARENSBERG, P.C.

\_\_\_\_\_  
Jeremy V. Farrell, Esquire  
Paul Shane Miller, Esquire  
Counsel for Duquesne Light Company

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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**PRELIMINARY OBJECTIONS**

Pursuant to 52 Pa. Code. § 5.101, Duquesne Light files its Preliminary Objections to the Formal Complaint filed by Complainant Mark Sanders:

**I. Introduction**

1. The narrow issue raised by these preliminary objections is whether the Commonwealth Court's Romeo decision either created an opt-out provision in Act 129 or conferred new jurisdiction on the Commission in smart meter cases to adjudicate alleged violations of laws other than the Public Utility Code or its associated regulations. It did neither, so Duquesne Light files these targeted objections seeking to dismiss only the *portions* of the formal complaint that (1) seek relief that does not exist under the law (a smart meter opt-out), or (2) raise alleged violations of law that fall outside the Commission's jurisdiction (e.g. alleged violations of state and federal constitutions). These *portions* of the complaint fail as a matter of law and dismissing them now will foster a more orderly, efficient, and informed proceeding.<sup>1</sup>

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<sup>1</sup> Duquesne Light is aware that ALJ Watson issued an Interim Order Denying Respondent's Preliminary Objections issued in Corinne Green v. Duquesne Light Co., Docket No. C-2018-3002223, on August 7, 2018. That decision does not affect these preliminary objections for two reasons. First, in Green, Duquesne Light sought to dismiss the complaint in its entirety; conversely, here, Duquesne Light only seeks to dismiss certain portions of the complaint. Second, in Green, unlike here, the complainant did not seek to completely opt out of Duquesne Light's smart meter program. Rather, she requested that Duquesne Light simply delay the installation of a smart meter until 2023. Accordingly, ALJ Watson's decision in Green is not dispositive in evaluating these preliminary objections.

## II. Relevant Allegations

2. Complainant is a Duquesne Light customer at the service address located at 1607 Aurelius Street, Pittsburgh, Pennsylvania 15218 (the "Property"). Complaint at ¶ 1.

3. Duquesne Light plans to install a smart meter at the Property. Complaint at ¶ 5.

4. Complainant has refused Duquesne Light's attempt to install a smart meter and asks that the Commission permit him to opt out of receiving a smart meter. Complaint at ¶ 5.

5. There is no allegation in the Complaint that Duquesne Light has installed a smart meter at the Property.

## III. Law and Argument

### **A. To the extent that Complainant seeks to opt out of receiving a smart meter, that portion of his claim is legally insufficient and must be dismissed.**

9. Preliminary objections may be filed for "legal insufficiency of a pleading." 52 Pa. Code § 5.101(a)(4). "In order to be legally sufficient, a complaint must set forth an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission." Drake v. Pa. Elec. Co., Docket No. C-2014-2413771, 2014 WL 2003281, at \*1 (Pa. P.U.C. May 7, 2014) (Salapa, ALJ).

10. Section 703(b) of the Public Utility Code ("Code") allows the Commission to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessarily in the public interest. 66 Pa. C.S. § 703(b); See also Campisi v. PECO Energy Co., Docket No. 2014-2434501, 2014 WL 4644282, at \*1 (Pa. P.U.C. Sept. 3, 2014) (Salapa, ALJ) ("The provision at 52 Pa. Code § 5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists.").

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11. Act 129 of 2008 (“Act 129”) requires electric distribution companies with more than 100,000 customers, including Duquesne Light, to deploy smart meters throughout their service territories. 66 Pa. C.S. § 2807.

12. Act 129 also requires electric distribution companies with more than 100,000 customers, including Duquesne Light, to file a smart meter technology procurement and installation plan with the Commission for approval. 66 Pa. C.S. § 2807(f)(1).

13. Duquesne Light filed a smart meter technology procurement and installation plan, which the Commission approved on May 6, 2013. See Docket No. M-2009-2123948.

14. The Commission approved, in relevant part, Duquesne Light’s amended smart meter technology procurement and installation plan (“Smart Meter Plan”) on April 7, 2017. See Docket No. P-2015-2497267, Opinion and Order at 9, 51.

15. The Smart Meter Plan requires Duquesne Light to finish installing residential smart meters, including at the Property, by the end of 2018.

16. By attempting to install a smart meter at the Property in accordance with the Smart Meter Plan, Duquesne Light is, therefore, complying with the law.

17. Duquesne Light’s installation of smart meters is consistent with, and not a violation of, the Code and Commission regulations and orders.

18. Act 129 does not permit a customer to “opt out” of receiving a smart meter. To the extent that Complainant is requesting Duquesne Light to provide her with an opt out of its smart meter program, Complainant asks Duquesne Light to break the law.

19. The Commission has ruled that “[t]he use of the word ‘shall’ in the statutes indicates the General Assembly’s direction that all customers will receive a smart meter.” Evans v. PECO Energy Co., Docket No. C-2013-2368477, 2013 WL 7019103, at \*3 (Pa. P.U.C. Dec. 19, 2013) (Hoyer, ALJ) (emphasis added).

20. Likewise, the Commission Implementation Order relating to the installation of smart meters provides: “The Commission believes that it was the intent of the General Assembly **to require all covered EDCs to deploy smart meters system-wide when it included a requirement for smart meter deployment ‘in accordance with a depreciation schedule not to exceed 15 years.’**” Id. (quoting Smart Meter Procurement and Installation Implementation Order, Docket No. M-2009-2092655 (entered June 24, 2009)) (emphasis added).

21. Simply put, “there is no provision in the statute that allows customers to ‘opt out’ of smart meter installation, as Complainants desire.” Evans, 2013 WL 7019103 at \*3; see also, Francis v. PECO Energy Co., Docket No. C-2014-2451351, 2015 WL 5011620, at \*7 (Pa. P.U.C. August 20, 2015) (noting that “there is no provision in the Code, the Commission’s Regulations, or Commission Orders that permits a customer to opt out of having a smart meter installed on his or her premises.”). In fact, Complainant seemingly acknowledges as much in paragraph 5 of the Complaint, and only argues that a bill was proposed that would permit an opt-out if it were passed.

22. Despite that acknowledgement, Complainant seeks to opt out of receiving a smart meter, Complaint at ¶ 5, but his request is legally insufficient and should be dismissed. See Campisi, supra (granting preliminary objections for legal insufficiency where the complainant sought to opt out of PECO’s smart meter program) (citing additional cases); Jackson v. PECO, Docket No. C-2017-2600495 (June 26, 2017) (Salapa, ALJ) (sustaining preliminary objections and dismissing a formal complaint that opposed the installation of a smart meter).

23. Finally, it bears noting that the Commonwealth Court’s decision in Romeo v. Pa. Public Util. Comm’n, 154 A.3d 422 (Pa. Commw. Ct. 2017) does not undermine Duquesne Light’s Preliminary Objection, which seeks dismissal of the portion of the Formal Complaint in which Complainant requests to opt out of Duquesne Light’s smart meter program. Romeo did

not create an opt-out provision in Act 129. Installation of smart meters is still mandatory as a condition of receiving electric service from Duquesne Light, so the portion of the Formal Complaint requesting an opt-out is legally insufficient.

**B. Complainant's claim that Duquesne Light has violated the Pennsylvania and United States Constitutions must be dismissed because the Commission lacks jurisdiction to resolve such issues.**

24. A party may file preliminary objections on the grounds that the Commission lacks jurisdiction. 52 Pa. Code §5.101(a).

25. The Commission is a creature of statute and may exercise only those powers that are expressly conferred upon it by the legislature. Feingold v. Bell of Pennsylvania, 383 A.2d 791, 794 (Pa. 1978).

26. The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n., 43 A.2d 348, 348 (Pa. Super. 1945).

27. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390, 393 (Pa. Cmwlth. 1992).

28. Section 701 of the Code, 66 Pa. C.S. § 701, authorizes the Commission to hear complaints regarding the Code, Commission Regulations, or a Commission order. Haleema B. Alkhatib v. PECO Energy Co., C-2011-2242125, 2012 WL 641672, at \*5 (Pa. P.U.C. Jan. 12, 2012).

29. The Commission does not have jurisdiction over claims arising under the Pennsylvania or United States Constitutions or other federal or state laws other than the Code, associated regulations, or Commission orders. See Alice Ann Belmonte-Gates v. PECO Energy Co., F-2012-2332583, 2013 WL 596066, at \*7 (Jan. 24, 2013) (Commission does not have jurisdiction over matters involving federal civil rights) (Cheskis, ALJ); James Coppedge v. PECO Energy Co., F-2009-2135893, 2010 WL 3183815, at \*5-6 (July 29, 2010) (Commission does not have jurisdiction over issues arising under the United States Constitution).

30. Here, Complainant claims that Duquesne Light has violated his rights under the Pennsylvania and United States Constitutions by attempting to install a smart meter at the Property. Complaint at ¶ 5.

31. The Commission does not have jurisdiction to rule on these claims.

32. Complainant also references the Energy Policy Act of 2005 and some other federal law from 2007. Complaint at ¶ 5. To the extent that Complainant contends that Duquesne Light violated those statutes, the Commission also lacks jurisdiction over such claim.

33. Accordingly, this portion of the formal complaint must also be dismissed.

WHEREFORE, Respondent Duquesne Light Company respectfully requests that the Commission sustain its Preliminary Objections and dismiss the portion of the Formal Complaint that seeks an opt out of Duquesne Light Company's smart meter program and that alleges violations of Pennsylvania and United States Constitutions.

Respectfully submitted,

TUCKER ARENSBERG, P.C.

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**BEFORE THE  
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Complainant,

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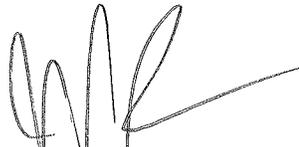
No: C-2018-3003564

**CERTIFICATE OF SERVICE**

I certify that I have this day served a true copy of Respondent's Preliminary Objections upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

Mark C. Sanders  
1607 Aurelius Street  
Pittsburgh, PA 15218

Dated this 13th day of August 2018.



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