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November 27, 2018

VIA E-FILING

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

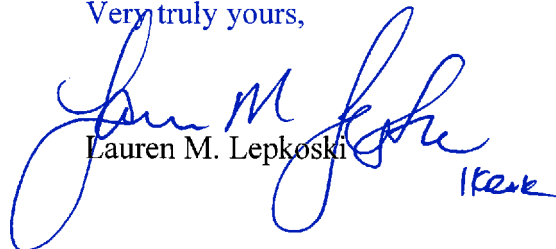
Re: J. Lawrence Hajduk, Esquire v. West Penn Power Company
Docket No. C-2018-3005831

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 Complainant as shown in the Certificate of Service.

Please contact me if you have any questions.

Very truly yours,


Lauren M. Lepkoski

krak
Enclosures

c: As per Certificate of Service

12. On behalf of a class of similarly situated individuals it is requested that West Penn Power be ordered to send letters to all persons threatened with shut off regarding the Smart Meter health issues advising them of PUC complaint procedures and a right to file a Civil Rights complaint with OCR and/or PHRC.

13. It is further requested that West Penn be ordered to have a human being who can directly answer questions on the 1-855-344-3400 telephone number provided in their mailings.

14. I further request the reasonable value of my time in attorney's fees at the rate of \$250.00 per hour.

Attachment to Formal Complaint ¶¶ 11-14.

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 August 21, 2018, the Company sent correspondence to the Complainant regarding the installation of a smart meter at the Service Location. On October 15, 2018, the Company received notification from Wellington Energy, a contractor for the Company, that on October 15, 2018, the Complainant refused installation of the smart meter. On October 18, 2018, the Company attempted to contact the Complainant to discuss the installation of the smart meter but reached a fast busy signal and was unable to leave a message seeking a return telephone call. On October 19, 2018, the Company sent correspondence to the Complainant in an attempt to schedule installation of a smart meter at the Service Location. On October 29, 2018, a pre-disconnection warning letter was issued 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 November 1, 2018, the Complainant contacted the Company stating that he was an attorney and would be filing a class action lawsuit against the Company for threatening to shut off his power for not

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 66 Pa.C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3); *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 52, pp. 40, 55, issued May 1, 2015, effective May 3, 2015.

accepting a smart meter. The Complainant went on to state that he is a heart patient and does not want a transmitting device at the Service Location. He requested the name of someone in the legal department that he could copy on his complaint/lawsuit. The Company representative offered to transfer the Complainant to a representative with the smart meter team but the Complainant disconnected the call before a transfer could be completed. On November 5, 2018, the Complainant filed the instant Formal Complaint. On November 7, 2018, the Company was electronically served with the 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 jurisdiction to administer, or of any regulation or order of the Commission, such that relief can be granted.³

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

7. On August 21, 2018, the Company sent correspondence to the Complainant regarding the installation of a smart meter at the Service Location. On October 15, 2018, the Company received notification from Wellington Energy, a contractor for the Company, that on October 15, 2018, the Complainant refused installation of the smart meter. On October 18, 2018,

³ See 66 Pa.C.S. § 701.

the Company attempted to contact the Complainant to discuss the installation of the smart meter but reached a fast busy signal and was unable to leave a message seeking a return telephone call. On October 19, 2018, the Company sent correspondence to the Complainant in an attempt to schedule installation of a smart meter at the Service Location. On October 29, 2018, a pre-disconnection warning letter was issued 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.⁴ On November 1, 2018, the Complainant contacted the Company stating that he was an attorney and would be filing a class action lawsuit against the Company for threatening to shut off his power for not accepting a smart meter. The Complainant went on to state that he is a heart patient and does not want a transmitting device at the Service Location. He requested the name of someone in the legal department that he could copy on his complaint/lawsuit. The Company representative offered to transfer the Complainant to a representative with the smart meter team but the Complainant disconnected the call before a transfer could be completed.

8. On November 5, 2018, the Complainant filed a Formal Complaint with the Commission against West Penn at the above-captioned docket. The Company was electronically served with the Formal Complaint on November 7, 2018 and termination efforts ceased.

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.

⁴ 66 Pa.C.S. § 1406(a)(4); 52 Pa. Code § 56.81(3); *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 52, pp. 40, 55, issued May 1, 2015, effective May 3, 2015.

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.⁵

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.⁶ The Commission has adopted this standard.⁷

A. Preliminary Objection Regarding Lack of Standing Pursuant to 52 Pa. Code § 5.101(a)(1).

13. The Commission's procedural regulations allow a party to object to pleadings that are filed by complainants who lack the capacity to sue as well as complainants who lack standing to participate in a proceeding. *See* 52 Pa. Code § 5.102(a)(7).

⁵ *Equitable Small Transportation Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Opinion and Order entered August 158, 1994).

⁶ *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).

⁷ *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

14. The Complainant states that he filed the instant complaint both “individually and as representative of a class of similarly situated individuals.”⁸

15. Further, the Complainant states as part of his requested relief that the resolution he is seeking is on behalf of “a class of similarly situated individuals.”⁹

16. The Complainant lacks standing and capacity to file or to prosecute a complaint related to other ratepayers.

17. The Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding.¹⁰

18. Requiring a person or entity to have a direct, immediate and substantial interest in the subject matter of a proceeding helps avoid frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility ratepayers.¹¹

B. Preliminary Objection Regarding Inclusion of Scandalous or Impertinent Pursuant to 52 Pa. Code § 5.101(a)(2).

19. 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.¹²

20. In his Formal Complaint, the Complainant states the following as part of his request for relief:

⁸ Formal Complaint ¶ 1; Attachment to Formal Complaint.

⁹ Attachment to Formal Complaint.

¹⁰ *Joint Application of Pennsylvania-American Water Co. and Evansburg Water Co. for Approval of the transfer, by sale, of the water works property and rights of Evansburg Water Co. to Pennsylvania-American Water Co.*, A-212285F0046/47 and A-210870F01 (Ordered entered July 9, 1998); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975); *Landlord Service Bureau, Inc. v. Equitable Gas Co.*, 79 Pa. P.U.C. 342 (1993); *Re Equitable Gas Co.*, 76 Pa. P.U.C. 23 (1992); *Manufacturers’ Association of Erie v. City of Erie - Bureau of Water*, 50 Pa. P.U.C. 43 (1976); *Waddington v. Pennsylvania Public Utility Commission*, 670 A.2d 199 (Pa. Cmwlth. 1995), *alloc. denied*, 678 A.2d 368 (Pa. 1996).

¹¹ *NFG, supra.*

¹² *See* 52 Pa. Code § 5.102(a)(2).

14. I further request the reasonable value of my time in attorney's fees at the rate of \$250.00 per hour.

(Attachment to Formal Complaint ¶ 14.)

21. Clearly, the Complainant is seeking relief through the Formal Complaint of an award of monetary damages from the Company.

22. It is well-established under Pennsylvania law that the enforcement powers of the Commission do not include the power to award money damages.¹³

23. 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.

24. 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.¹⁴

25. 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.

¹³ *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).

¹⁴ *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)).

C. Preliminary Objection Regarding Legal Insufficiency Pursuant to 52 Pa. Code § 5.101(a)(4).

26. In accordance with Section 701 of the Code¹⁵ 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.¹⁶ In fact, the Company’s actions have been in compliance with Act 129 and the June 5 Order.

27. 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.¹⁷ 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.¹⁸

28. 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 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 Company’s efforts to install a smart meter at the Service Location, as required by Act 129 and the Company’s SMP.

¹⁵ 66 Pa.C.S. § 701.

¹⁶ *Id.*

¹⁷ *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985).

¹⁸ *Id.*

29. Commission precedent is uniform that it cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to opt out.¹⁹

30. 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 West Penn has committed or omitted an act in violation of a Commission statute, regulation, order, or West Penn's tariff, a finding of which must be made in order to sustain a formal complaint.²⁰

31. 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 Formal 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.

32. Therefore, the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief.²¹

¹⁹ *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.

²⁰ See 66 Pa.C.S. § 701; *County of Allegheny, supra*.

²¹ See 52 Pa. Code § 5.101(a)(4).

33. The Commission may dismiss a complaint without hearing if a hearing is not necessary in the public interest.²²

34. Recently, the Commission set for hearing two cases in which the complainant was opposed to the installation of a smart meter at their premises.²³ 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.²⁴ In contrast, in the instant case, the Complainant has made no specific factual averments regarding any health effects experienced *after* a smart meter has been installed. Specifically, the Complainant states that he does not want a smart meter installed at the Service Location as he has a medical device installed into his chest and that the smart meter will interfere with the device.²⁵ The Commission has not recognized a customer's lack of consent to install a smart meter as sufficient to overcome preliminary objections.²⁶ Therefore, the Company respectfully submits that the matters plead in the subject Formal

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

²³ *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).

²⁴ *Id.*

²⁵ Formal Complaint ¶¶ 4, 5.

²⁶ *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).

Complaint do not meet the standards set in the *Kreider* and *Van Schoyck* cases such that this matter can survive dismissal on preliminary objections.

35. 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 the formal complaint was legally insufficient, pursuant to 52 Pa. Code § 5.101(a)(4), in that the complaint failed to allege that the utility violated the Public Utility Code, Commission regulations or orders or the utility's 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.

This Commission decision was entered after *Kreider*. The 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 he does not want a smart meter installed at the Service Location. The Complainant has not set forth in his complaint that any act done by the Company that violates a Commission regulation, statute or order.

36. Therefore, the Company respectfully submits that the matters plead in the 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.

37. 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 EDCs 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.

38. Rule 9 of the Company's Commission-approved tariff,²⁷ 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 Complainant's refusal to allow the Company access to its own meter is a violation of Rules 9 and 20 of the Company's Commission-approved tariff²⁸ 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.²⁹

39. 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 Complainant has not set forth in his complaint any act done by the Company that violates a Commission regulation, statute or order.

²⁷ *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 52, p. 40 issued May 1, 2015, effective May 3, 2015.

²⁸ *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 52, pp. 40, 55, issued May 1, 2015, effective May 3, 2015.

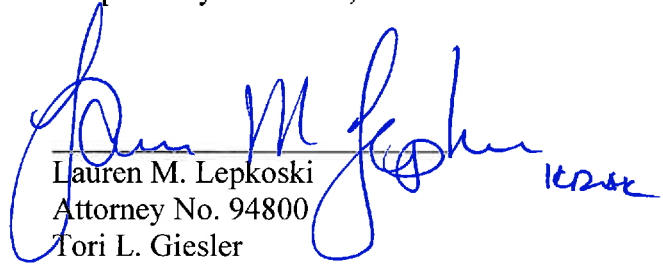
²⁹ *Art Larson v. PECO Energy Company*, Docket No. C-2014-2451754 (Opinion and Order entered June 11, 2015). See also, *Catherine J. Frompovitch v. PECO Energy Company*, Docket No. C-2015-2474602 (Opinion and Order entered May 3, 2018).

IV. Conclusion

WHEREFORE, for the foregoing reasons, West Penn Power 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, 2018



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Counsel for West Penn Power Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

J. LAWRENCE HAJDUK, ESQUIRE

:

:

v.

:

Docket No. C-2018-3005831

:

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 J. Lawrence Hajduk, Esquire 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:

J. Lawrence Hajduk, Esquire
186 New Beaver Creek Road
Markleysburg, PA 15459

Dated: November 27, 2018



Lauren M. Lepkoski
Tori L. Giesler

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