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April 29, 2019

VIA E-FILING

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

Re: Jacob and Stephanie Binando v. West Penn Power Company
Docket No. C-2019-3009012

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,



Tori L. Giesler

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Enclosures

c: As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JACOB AND STEPHANIE BINANDO	:	
	:	
v.	:	Docket No. C-2019-3009012
	:	
WEST PENN POWER COMPANY	:	

NOTICE TO PLEAD

TO: Jacob and Stephanie Binando

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: April 29, 2019



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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JACOB AND STEPHANIE BINANDO	:	
	:	
v.	:	Docket No. C-2019-3009012
	:	
WEST PENN POWER COMPANY	:	

**PRELIMINARY OBJECTION TO THE FORMAL COMPLAINT OF
JACOB AND STEPHANIE BINANDO**

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, Jacob and Stephanie Binando (“Complainants”) alleges that they do not want a smart meter installed at 100 Maryland Avenue, Vandergrift, Pennsylvania 15690 (“Service Location”). (Formal Complaint ¶ 4; Attachment to the Formal Complaint.) The Complainants state as requested relief:

I was referred to write to you by West Penn Power when I called to speak to someone regarding my concerns about smart meter installation. I have multiple concerns about the smart meter including privacy, but my number one concern and the reason I am writing to you is health and safety of my child. Our power meter is located on the wall immediately outside of his bedroom, sharing a wall with his crib. He is one and a half and I truly do not wish to expose him to any chronic and long-term radiation, no matter what level. I have read evidence from both sides (smart meter is safe vs. dangerous) and I have a doctorate in health sciences and despite what the research says I still have serious concerns regarding the placement of this meter. Our home is a 2-bedroom home and there is not another room for me to move my son to. I have read evidence that compares the smart meters radiation to a cell phone, and even if that is the case, I would not feel safe with prolonged exposure of

my child to any amount of radiation even a cell phone. I have also read research regarding the spikes in radiation when the meter is sending a reading and its affects on the electromagnetic signals in cardiac tissue. The American Cancer Society states “RF radiation is classified by the International Agency for Research on Cancer (IARC), as “possibly carcinogenic to RF radiation is classified by the International Agency for Research on Cancer (IARC), as “possibly carcinogenic to humans.” This is based on the finding of a possible link in at least one study between cell phone use and a specific type of brain tumor. Because RF radiation is a possible carcinogen, and smart meters give off RF radiation, it is possible that smart meters could increase cancer risk. Still, it isn't clear what risk, if any there might be from living in a home with a smart meter.

I have serious concerns regarding the lack of long-term evidence in the safety of smart meters. I absolutely do not want a “possible carcinogen” next to my sleeping child every night and during day-time naps, for years. I currently try to decrease his exposure to carcinogens in every manner I can and feel strongly about a possible carcinogen being placed outside of his room.

While I realize legislation requires smart meter to be installed by 2023, I am asking if installation can be delayed in my home to delay exposure to my son and in the hopes that the legislation is overturned before that time.

I thank you very much for your time and consideration.

(Attachment to Formal Complaint.)

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 November 27, 2018, the Company sent correspondence to Mr. Binando, the customer of record at the Service Location (“Customer”), regarding the installation of a smart meter at the Service Location. On February 6, 2019, the Company received notification from Wellington Energy that the Complainants refused installation of the smart meter on February 4, 2019. That same day, the Company attempted to contact the Complainants to discuss the smart meter installation and a voicemail message was left seeking a return telephone call. No return

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).

telephone call was received. On February 7, 2019, the Company issued a letter to the Customer stating that he should contact the Company to facilitate installation of a smart meter at the Service Location. On February 12, 2019, Mrs. Binando contacted the Company to refuse installation of a smart meter at the Service Location or to delay installation until 2023. The Company representative attempted to address Mrs. Binando's concerns and advised that continued refusal could result in termination of service. Mrs. Binando was provided with her dispute rights. On March 5, 2019, Mrs. Binando again contacted the Company to reiterate her refusal of the smart meter installation at the Service Location or to seek a delay of installation until 2023. Mrs. Binando was also advised that relocation of the meter was an option. Mrs. Binando expressed an interest in relocation and was advised that a field investigation would occur and the Company would provide a quote. Later that day, a Company representative contacted Mrs. Binando to discuss the potential meter relocation. Mrs. Binando was advised that the meter socket and service entrance cable were her equipment and she would therefore need to have an electrician complete the work. She was provided with contact information for a Company representative so that once the work was completed, the Company would reconnect service to the new location. On April 4, 2019, the Complainants filed a Formal Complaint with the Commission and the Company was electronically served with the Formal Complaint on April 8, 2019.

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.²

² 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 Complainants' 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 November 27, 2018, the Company sent correspondence to the Customer regarding the installation of a smart meter at the Service Location. On February 6, 2019, the Company received notification from Wellington Energy that the Complainants refused installation of the smart meter on February 4, 2019. That same day, the Company attempted to contact the Complainants to discuss the smart meter installation and a voicemail message was left seeking a return telephone call. No return telephone call was received. On February 7, 2019, the Company issued a letter to the Customer stating that he should contact the Company to facilitate installation of a smart meter at the Service Location. On February 12, 2019, Mrs. Binando contacted the Company to refuse installation of a smart meter at the Service Location or to delay installation until 2023. The Company representative attempted to address Mrs. Binando's concerns and advised that continued refusal could result in termination of service. Mrs. Binando was provided with her dispute rights. On March 5, 2019, Mrs. Binando again contacted the Company to reiterate her refusal of the smart meter installation at the Service Location or to seek a delay of installation until 2023. Mrs. Binando was also advised that relocation of the meter was an option. Mrs. Binando expressed an interest in relocation and was advised that a field investigation would occur and the Company would provide a quote. Later that day, a Company representative contacted Mrs.

Binando to discuss the potential meter relocation. Mrs. Binando was advised that the meter socket and service entrance cable were her equipment and she would therefore need to have an electrician complete the work. She was provided with contact information for a Company representative so that once the work was completed, the Company would reconnect service to the new location.

8. On April 4, 2019, the Complainants filed a Formal Complaint with the Commission against the Company at the above-captioned docket. On April 8, 2019, the Company was electronically served with the Formal Complaint.

9. The Company 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

³ *Equitable Small Transportation Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Opinion and Order entered August 158, 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.⁴ The Commission has adopted this standard.⁵

13. In accordance with Section 701 of the Code⁶ 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.⁷ In fact, the Company’s actions have been in compliance with Act 129 and the June 5 Order. Further, the Company may, in its sole and exclusive discretion, install such meters and related equipment it deems reasonable and appropriate to provide service to its customers.⁸

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.⁹ 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.¹⁰

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 Smart Meter Deployment Plan (“SMP”) on June 16, 2014. The SMP

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 *Id.*

⁸ *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, p. 41, issued January 25, 2017, effective January 27, 2017.

⁹ *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985).

¹⁰ *Id.*

was approved by the Commission on June 20, 2014. The Complainants challenge 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.

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.¹¹

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, a finding of which must be made in order to sustain a formal complaint.¹²

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 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.

¹¹ *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.

¹² See 66 Pa.C.S. § 701; *County of Allegheny, supra*.

19. Therefore, the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief.¹³

20. The Commission may dismiss a complaint without hearing if a hearing is not necessary in the public interest.¹⁴

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.¹⁵ 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.¹⁶ In contrast, in the instant case, the Complainants have made no specific factual averments regarding any health effects experienced *after* a smart meter has been installed. Specifically, the Complainants are refusing smart meter installation at the Service Location due to generic health concerns.¹⁷ The Commission has not recognized a customer's lack of consent to install a smart meter as sufficient to overcome preliminary objections.¹⁸ Further, the Commission has upheld decisions finding that a utility has

¹³ See 52 Pa. Code § 5.101(a)(4).

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

¹⁵ *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 26, 2016).

¹⁶ *Id.*

¹⁷ Attachment to Formal Complaint.

¹⁸ *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).

the ability to terminate the service of a customer who refuses installation of a smart meter.¹⁹ 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.

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 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 Complainants have only alleged that they do not want a smart meter installed at the Service Location. The Complainants have not set forth in their complaint any act done by the Company that violates a Commission regulation, statute or order.

¹⁹ *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-2015-2474592 (Opinion and Order entered May 3, 2018).

23. 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.

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 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.

25. Rule 9 of the Company's Commission-approved tariff²⁰ 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 tariff²¹ and is grounds for termination of service in accordance with 66 Pa.C.S. § 1406(a)(4) and 52 Pa. Code § 56.81(3). 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.²²

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

²⁰ *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, p. 46, issued May 1, 2015, effective May 3, 2015.

²¹ *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, pp. 46, 61, issued May 1, 2015, effective May 3, 2015.

²² *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-2015-2474592 (Opinion and Order entered May 3, 2018).

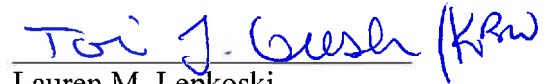
not set forth in their complaint any act done by the Company that violates a Commission regulation, statute or order.

IV. Conclusion

WHEREFORE, for the foregoing reasons, West Penn Power Company respectfully requests that the Commission: (1) grant its Preliminary Objections and strike the Complainants' 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: April 29, 2019



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Counsel for West Penn Power Company

**BEFORE THE
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v.

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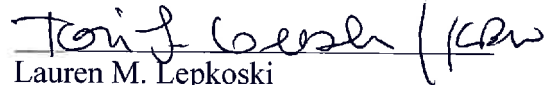
CERTIFICATE OF SERVICE

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 Jacob and Stephanie Binando 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:

Jacob and Stephanie Binando
100 Maryland Avenue
Vandergrift, PA 15690

Dated: April 29, 2019


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