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May 13, 2019

**VIA E-FILING**

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

**Re: Stephen Barclay v. West Penn Power Company**  
**Docket No. C-2019-3009312**

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

krak  
Enclosures

c: As per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**STEPHEN BARCLAY**

v.

**WEST PENN POWER COMPANY**

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**Docket No. C-2019-3009312**

**NOTICE TO PLEAD**

TO: Stephen Barclay

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: May 13, 2019



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

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>STEPHEN BARCLAY</b>	:	
	:	
<b>v.</b>	:	<b>Docket No. C-2019-3009312</b>
	:	
<b>WEST PENN POWER COMPANY</b>	:	

**PRELIMINARY OBJECTION TO THE FORMAL COMPLAINT OF  
STEPHEN BARCLAY**

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 his recently filed Formal Complaint, Stephen Barclay (“Complainant”) alleges that he does not want a smart meter installed at 1000 Dale Road, Finleyville, Pennsylvania 15332 (“Service Location”). (Formal Complaint ¶ 5.) The Complainant states as requested relief:

We are requesting delay of installation of “smart meter” because we have just had an invisible dog fence installed for our German Shepherd as we live next to a heavily travelled road. Smart meters can interfere with the frequency of the electric fence. If West Penn is willing to sign a waiver stating that they are responsible for any + all damages incurred in the event that there is failure of the invisible fence, we would be in agreement to have it installed at the present time. According to the current law in PA, we have until 2023 to comply.

(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”).<sup>1</sup>

3. On August 21, 2018, the Company sent correspondence to the Complainant regarding the installation of a smart meter at the Service Location. On November 13, 2018, the Complainant refused to allow Wellington Energy, a contractor for the Company, access to the Company’s meter in order to install a smart meter at the Service Location. On November 16, 2018, the Company attempted to contact the Complainant in an attempt to address the Complainant’s concerns regarding the smart meter and left a message seeking a return call. On November 21, 2018, the Company sent correspondence to the Complainant in an attempt to schedule installation of a smart meter at the Service Location. On April 1, 2019, the Company sent a second correspondence to the Complainant in an attempt to schedule installation of a smart meter at the Service Location. On April 16, 2019, 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.<sup>2</sup> On April 18, 2019, the Complainant’s spouse contacted the Company to refuse installation of the smart meter at the Service Location stating that she wants to be one of the last ones installed in 2023. Mrs. Barclay was advised that the Company could not guarantee service if she continued to refuse installation of a smart meter at the Service Location. On April 19, 2019, the Complainant filed the Formal Complaint with the Commission. On April 22, 2019, the Formal Complaint was electronically served on the Company.

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<sup>1</sup> 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).

<sup>2</sup> *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, pp. 46, 61, issued May 1, 2015, effective May 3, 2015.

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.<sup>3</sup>

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 November 13, 2018, the Complainant refused to allow Wellington Energy, a contractor for the Company, access to the Company's meter in order to install a smart meter at the Service Location. On November 16, 2018, the Company attempted to contact the Complainant in an attempt to address the Complainant's concerns regarding the smart meter and left a message seeking a return call. On November 21, 2018, the Company sent correspondence to the Complainant in an attempt to schedule installation of a smart meter at the Service Location. On April 1, 2019, the Company sent a second correspondence to the Complainant in an attempt to schedule installation of a smart meter at the Service Location. On April 16, 2019, 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

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<sup>3</sup> See 66 Pa.C.S. § 701.

Company's Commission-approved Tariff.<sup>4</sup> On April 18, 2019, the Complainant's spouse contacted the Company to refuse installation of the smart meter at the Service Location stating that she wants to be one of the last ones installed in 2023. Mrs. Barclay was advised that the Company could not guarantee service if she continued to refuse installation of a smart meter at the Service Location.

8. On April 19, 2019, the Complainant filed a Formal Complaint with the Commission against the Company at the above-captioned docket. On April 22, 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.

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<sup>4</sup> *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, pp. 46, 61, issued May 1, 2015, effective May 3, 2015.

11. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice.<sup>5</sup>

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.<sup>6</sup> The Commission has adopted this standard.<sup>7</sup>

13. In accordance with Section 701 of the Code<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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<sup>5</sup> *Equitable Small Transportation Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Opinion and Order entered August 15, 1994).

<sup>6</sup> *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).

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

<sup>8</sup> 66 Pa.C.S. § 701.

<sup>9</sup> *Id.*

<sup>10</sup> *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, p. 41, issued January 25, 2017, effective January 27, 2017.

<sup>11</sup> *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985).

<sup>12</sup> *Id.*

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 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.

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.<sup>13</sup>

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 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.<sup>14</sup>

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

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<sup>13</sup> *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.

<sup>14</sup> See 66 Pa.C.S. § 701; *County of Allegheny, supra*.

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.<sup>15</sup>

20. The Commission may dismiss a complaint without hearing if a hearing is not necessary in the public interest.<sup>16</sup>

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.<sup>17</sup> 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.<sup>18</sup> 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 is refusing smart meter installation at the Service Location due to possible interference with invisible dog fence.<sup>19</sup> The Commission has not recognized a customer's lack of consent to install a smart meter as sufficient to overcome

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<sup>15</sup> See 52 Pa. Code § 5.101(a)(4).

<sup>16</sup> 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21 (d).

<sup>17</sup> *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).

<sup>18</sup> *Id.*

<sup>19</sup> Formal Complaint ¶ 5.

preliminary objections.<sup>20</sup> Further, the Commission has upheld decisions finding that a utility has the ability to terminate the service of a customer who refuses installation of a smart meter.<sup>21</sup> 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 Complainant has only alleged that he does not want a smart meter installed at the Service Location.

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<sup>20</sup> *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).

<sup>21</sup> *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).

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 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 tariff<sup>22</sup> 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 tariff<sup>23</sup> 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.<sup>24</sup>

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<sup>22</sup> *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, pp. 46, issued May 1, 2015, effective May 3, 2015.

<sup>23</sup> *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, pp. 46, 61, issued May 1, 2015, effective May 3, 2015.

<sup>24</sup> *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).

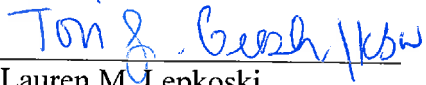
26. Because Act 129 of 2008 and the Commission's orders authorize the Company to develop and implement a smart meter procurement and installation plan, the Complainant has not set forth in his complaint any act done by the Company that violates a Commission regulation, statute or order.

**IV. Conclusion**

WHEREFORE, for the foregoing reasons, West Penn Power Company respectfully requests that the Commission: (1) grant its Preliminary Objections and strike the 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: May 13, 2019

  
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Counsel for West Penn Power Company

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**STEPHEN BARCLAY**

**v.**

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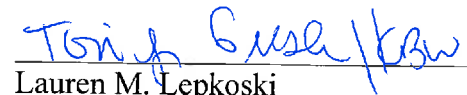
**CERTIFICATE OF SERVICE**

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 Stephen Barclay upon the individual 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:

Stephen Barclay  
1000 Dale Road  
Finleyville, PA 15332

Dated: May 13, 2019



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