

Lauren M. Lepkoski, Esq.
(610) 921-6203
(330) 315-9263 (Fax)

September 26, 2019

VIA ELECTRONIC FILING

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

Re: Christopher L. Macey v. West Penn Power Company
Docket No. C-2019-3012705

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

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Enclosures

c: As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CHRISTOPHER L. MACEY

v.

WEST PENN POWER COMPANY

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Docket No. C-2019-3012705

NOTICE TO PLEAD

TO: Christopher L. Macey

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 to counsel for West Penn Power Company, and where applicable, the Administrative Law Judge presiding over the case.

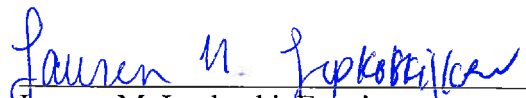
File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Tori L. Giesler
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, Pennsylvania 19612-6001

Dated: September 26, 2019


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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CHRISTOPHER L. MACEY	:	
	:	
v.	:	Docket No. C-2019-3012705
	:	
WEST PENN POWER COMPANY	:	

**PRELIMINARY OBJECTION TO THE FORMAL COMPLAINT OF
CHRISTOPHER L. MACEY**

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, Christopher L. Macey ("Complainant") avers that he is seeking damages relative to the installation of a smart meter at 201 Highland Avenue South, Oakdale, Pennsylvania 15071 ("Service Location"). (Formal Complaint ¶ 5.) The Complainant requests, in part, that West Penn remove the Smart Meter from the Service Location and replace it with an analog meter "until installation is complete to accept smart meter," financially compensate him for damages related to pain and suffering incurred by him and his spouse due to the installation of a smart meter at the Service Location, and direct that employees of the Company be reprimanded. (Formal Complaint ¶ 5.)

2. As explained below, the Commission does not have the power and legal authority to award monetary damages. As a result, the Company requests that this Preliminary Objection be granted and that the Commission: (i) grant its Preliminary Objections and strike the

Complainant's request for smart meter removal, monetary damages and employee reprimand; (ii) expressly prohibit the Complainant from introducing any testimony or exhibits at any evidentiary hearing regarding alleged damages; (iii) dismiss the Formal Complaint in its entirety with prejudice; and (iv) grant the Company such other relief as may be just and reasonable under the circumstances.

II. Background

3. West Penn is an electric distribution company certificated as a public utility permitted to operate within the Commonwealth in Pennsylvania.

4. The Complainant filed a Formal Complaint with the Commission against West Penn at the above-captioned docket requesting: (1) to remove Smart Meter from home, replace smart meter with analog meter until installation is complete to accept smart meter; (2) pay appropriate fines/sanctions for their unilateral actions and virtually no advance notice; (3) damages of \$10,000.00 per day for pain and suffering on complainant and complainant's spouse, beginning August 16, 2019; (4) a reprimand for manager who wrote work order for installation of smart meter on 8/16/2019; and (5) a reprimand for employee/agent who installed smart meter on my property that gave no notice of his action. (Formal Complaint ¶ 5.)

5. On or about September 6, 2019, the Formal Complaint was electronically served on West Penn.

6. West Penn is timely filing its Answer and New Matter contemporaneously with this Preliminary Objection.

III. Argument

7. 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.

8. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice.¹

9. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt.² The Commission has adopted this standard.³

10. 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.⁴

11. In his Formal Complaint, the Complainant states the following as his requests for relief:

¹ *Equitable Small Transportation Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994).

² *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).

³ *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

⁴ See 52 Pa. Code § 5.101(a)(2).

1. Remove Smart Meter from home, replace smart meter with analog meter until installation is complete to accept smart meter.
2. Pay appropriate fines/sanctions for their unilateral actions and virtually no advance notice.
3. Damages of \$10,000.00 per day for pain and suffering on complainant and complainant's spouse, beginning August 16, 2019.
4. Reprimand for manager who wrote work order for installation of smart meter on 8/16/2019.
5. Reprimand for employee/agent who installed smart meter on my property that gave no notice of his action.

(Formal Complaint ¶ 5.)

12. As to the Complainant's first request for relief, the meter has already been relocated to the customer-owned pole as of August 26, 2019. Therefore, the Complainant's request that the Company "remove Smart Meter from home, replace smart meter with analog meter until installation is complete to accept smart meter" is moot.

13. Further, a portion of the relief sought through the Formal Complaint is an award of monetary damages from the Company in the amount of "\$10,000.00 per day for pain and suffering on complainant and complainant's spouse, beginning August 16, 2019."

14. It is well-established under Pennsylvania law that the enforcement powers of the Commission do not include the power to award money damages.⁵ Further, the Commission can't even issue civil penalties for that amount per day per event.

15. 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.

⁵ *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).

16. 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.⁶

17. Absent express legislative authority, the Commission does not have the power to interfere with the general management decisions of public utility companies.⁷ The Public Utility Code does not expressly grant the Commission general authority over management decisions such as employee reprimands.

18. Therefore, in accordance with Pennsylvania law, this Commission does not have the power to award monetary damages or require the Company to reprimand employees, and the Complainant’s requests for money damages and employee reprimands are impertinent matters that must be stricken.

19. In accordance with Section 701 of the Code⁸ 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.⁹ 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.¹⁰

⁶ *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)).

⁷ *Pennsylvania Public Utility Com. v. Philadelphia Electric Co.*, 501 Pa. 153, 460 A.2d 734 (Pa. Super. 1983).

⁸ 66 Pa.C.S. § 701.

⁹ *Id.*

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

20. 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.¹¹ 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.¹²

21. 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.

22. Commission precedent is uniform that it cannot grant exceptions to the statutory directive that smart meters be installed by allowing customers to opt out.¹³

23. 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,

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

¹² *Id.*

¹³ *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.

order, or West Penn's tariff, a finding of which must be made in order to sustain a formal complaint.¹⁴

24. 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.

25. Therefore, the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief.¹⁵

26. The Commission may dismiss a complaint without hearing if a hearing is not necessary in the public interest.¹⁶

27. Recently, the Commission set for hearing two cases in which the complainant was opposed to the installation of a smart meter at their premises.¹⁷ 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

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

¹⁵ See 52 Pa. Code § 5.101(a)(4).

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

¹⁷ *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).

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.¹⁸ 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 at its new location on the newly installed pole. The Commission has not recognized a customer's lack of consent to install a smart meter as sufficient to overcome preliminary objections.¹⁹ 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.²⁰ 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.

28. 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

¹⁸ *Id.*

¹⁹ *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).

²⁰ *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).

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 she 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 violates a Commission regulation, statute or order.

29. 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.

30. 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.

31. Rule 9 of the Company's Commission-approved tariff²¹ 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 tariff²² 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.²³

32. 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 smart meter removal, monetary damages and employee reprimand; (2) expressly

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

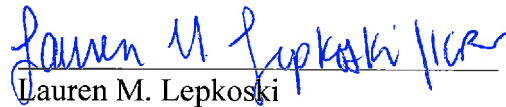
²² *West Penn Power Company Retail Electric Service Tariff*, Electric Pa. PUC No. 40, pp. 46, 61, issued May 1, 2015, effective May 3, 2015.

²³ *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).

prohibit the Complainant from introducing any testimony or exhibits at any evidentiary hearing regarding alleged damages; (3) dismiss the Complaint in its entirety with prejudice; and (4) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: September 26, 2019



Lauren M. Lepkoski

Attorney No. 94800

Tori L. Giesler

Attorney No. 207742

FirstEnergy Service Company

2800 Pottsville Pike

P.O. Box 16001

Reading, Pennsylvania 19612-6001

(610) 921-6203

(610) 921-6658

llepkoski@firstenergycorp.com

tgiesler@firstenergycorp.com

Counsel for West Penn Power Company

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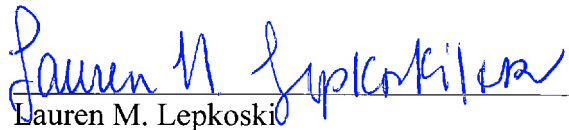
CERTIFICATE OF SERVICE

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 Christopher L. Macey 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:

Christopher L. Macey
201 Highland Avenue South
Oakdale, PA 15071

Dated: September 26, 2019



Lauren M. Lepkoski
Tori L. Giesler
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, Pennsylvania 19612-6001
(610) 921-6203
(610) 921-6658
llepkoski@firstenergycorp.com
tgiesler@firstenergycorp.com